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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZA-
TION OF THE COURT (BAY'S REPORTS) UP TO
AND INCLUDING VOLUME 25 OF THE
SOUTH CAROLINA REPORTS

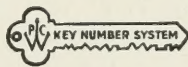
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REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE
COURT OF APPEALS AND IN THE COURT OF
ERRORS OF SOUTH CAROLINA

FROM NOVEMBER AND DECEMBER, 1846, TO NOVEMBER AND
DECEMBER, 1847, BOTH INCLUSIVE

By JAMES A. STROBHART,
STATE REPORTER

VOLUME I

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON
1848

ANNOTATED EDITION
ST. PAUL
WEST PUBLISHING CO.
1917

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LAW

CHANCELLORS OF SOUTH CAROLINA¹

DURING THE PERIOD COMPRISED IN THIS
VOLUME

HON. DAVID JOHNSON, (*Resigned December, 1846.*)

“ WILLIAM HARPER, (*Died October, 1847.*)

“ JOB JOHNSTON,

“ B. F. DUNKIN,

“ J. J. CALDWELL, (*Elected December, 1846.*)

“ G. W. DARGAN, (*Elected December, 1847.*)

¹ The Chancellors sitting together form the Court of Appeals in Equity—
sitting together with the Law Judges, they form the Court of Errors.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—NOVEMBER AND
DECEMBER TERM, 1846.

CHANCELLORS PRESENT.

HON. DAVID JOHNSON,

“ WILLIAM HARPER,

“ JOB JOHNSTON,

“ B. F. DUNKIN.

1 Strob. Eq. *1

*JONATHAN M. HILL and Wife v. HENRY
H. HILL and JOHN BATES, Admin-
istrators.

HENRY H. HILL and JOHN BATES, Admin-
istrators, v. J. M. HILL and Wife and
Others.

(Columbia. Nov. and Dec. Term, 1846.)

[*Husband and Wife* ⚭8.]

If there be a donation of personal property to several persons, with a limitation to survivors, in the event of the death of either without issue, and one die and his portion is distributed among the survivors, and then a second die, the proportion of property of the first, taken by survivorship by the second, does not go over to the remaining survivors, but becomes the absolute property of the survivor to whom it so accrues; and the marital rights of the husband of one of the several persons thus endowed, will attach to the portion or portions of the property originally taken by the donees, which may survive to her, so as to vest the legal title in him absolutely; nor will his having joined her in a suit for its recovery, alter the case.

[Ed. Note.—Cited in *Verdier v. Hyrne*, 4 Strob. 471; *Shaw v. Monefeldt*, 6 Rich. Eq. 247; *McGee v. Hall*, 26 S. C. 183, 184, 1 S. E. 711; *Gordon v. Gordon*, 32 S. C. 568, 11 S. E. 334.

For other cases, see *Husband and Wife*, Cent. Dig. § 19; Dec. Dig. ⚭8.]

*2

[*Husband and Wife* ⚭11.]

*The rule is well known, that if there be a perfect legal title and the present right of possession, this is enough to vest the property in the husband, though there may be no actual, manual possession; and the husband may sue alone for the property, being thus vested with the perfect title.

[Ed. Note.—Cited in *Verdier v. Hyrne*, 4 Strob. 468.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 39, 40, 47-57; Dec. Dig. ⚭11.]

[*Husband and Wife* ⚭12.]

When husband and wife bring suit for a distributive share of an intestate estate, to which they are entitled in right of the wife, while the fund remains under the power of the court, it will, on a proper application in the cause, or where there is an original proceeding by the wife, for the purpose, direct a suitable settlement to be made on her; nor will the alleged agreement with the administrator, to which the wife was no party, that the amount of his purchases at the sales should be discounted, by the husband, against the shares and interests of his wife, invalidate her claim.

[Ed. Note.—Cited in *Verdier v. Hyrne*, 4 Strob. 467, 472.

For other cases, see *Husband and Wife*, Cent. Dig. § 58; Dec. Dig. ⚭12.]

[*Husband and Wife* ⚭12.]

While the proceeds of a married woman's real estate remain in court, they are subject to its disposition, and stand on the same footing as her choses in action.

[Ed. Note.—Cited in *Bouknight v. Epting*, 11 S. C. 77.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 58-67, 396; Dec. Dig. ⚭12.]

[This case is also cited in *Nix v. Harley*, 3 Rich. Eq. 382, on the question of election of remedies.]

Before Johnston, Ch., at Edgefield, June, 1843.

The deed under which have arisen the questions here litigated, is as follows:—

Deed.

Know all men by these presents, that I, John P. Bond, of the State of South Carolina, and district of Lexington, in consideration of the natural love and affection which I have and bear for my children, Felix Pad-don, Lucinda, Moses and Theodore S. Bond, and also for divers other good causes and

considerations. I, the said John P. Bond, have given, granted and confirmed, and by these presents do give, grant and confirm unto the said Felix P. Lucinda, Moses and Theodore S. Bond, all and singular, twelve negroes, designated as follows, viz:

First. I give, grant and devise unto my son Felix Paddon Bond, my negro girl Tener, (who I purchased of Warren Hart,) also Joe and Polly, (children of Thom and Peggy, and Esau and Julia, whom I purchased of Mrs. Burket and Charles O'Neal,) to be his right and title, in whose hands, custody or possession soever they may be, with their future increase from the date of this deed.

Secondly. I give, grant and devise unto my daughter, Lucinda Bond, my negro man Esau and his wife Julia, and their son Frank, to be her right and title, in whose hands, custody or possession soever they may be, with their future increase from the date of this deed.

Thirdly. I give, grant and devise unto my son Moses Bond, my negro girl Hannah, (who I purchased of Warren Hart,) and Thom and

*3

Philip, (sons of Esau and Julia, which *I give to Lucinda Bond,) to be his right and title, in whose hands, custody or possession soever they may be, with their future increase from the date of this deed.

Fourthly. I give, grant and devise unto my son, Theodore Stanmore Bond, my negro girl Judy, (who I purchased of Warren Hart,) and Thom and Prince, (sons of Thom and Peggy, whom I purchased of Mrs. Burket,) to be his right and title, in whose hands, custody or possession soever they may be, with their future increase from the date of this deed.

To have, hold and enjoy, all and singular the said negroes, as above designated, unto the said Felix P. Lucinda, Moses, and Theodore S. Bond, their heirs and assigns forever, to be and remain their right and property. That if either one or more of the said above named children should die without a lawful issue, that the deceased's part or parts shall be equally divided among the survivors nominated in this deed, against me, my heirs, executors, administrators or assigns, and against every other person or persons whomsoever. Given under my hand and seal, this 2nd day of August, in the year of our Lord one thousand eight hundred and twenty-three, and of the forty-seventh year of the American Independence.

Jno. P. Bond, [Seal.]

Thomas R. Bond,
Henry H. Hill,
Nathan Norris.

The main question in this case was decided by his Honor Chancellor Johnston, at Edgefield, June, 1836, and, upon appeal, his decree was affirmed in May, 1837. (The case is reported in Dudley's Eq. Rep. p. 71.) From that time no proceedings whatever appear to

have been taken by either party until June, 1842, when a reference was had under the decree of 1836.

The Chancellor, in that decree, after settling the proper construction of the deed, ordered an account to be taken according to the principles of the decree. John P. Bond, the elder, died in 1823, leaving six children by his first marriage, viz:—Martha, wife of Henry H. Hill, Epsiby, wife of John Bates, John P. Bond, Matilda, now Mrs. Daniel, Felix P. and Lucinda, the complainant, and two children by his second marriage, viz:—Moses and Theodore S. Moses died in 1826, an infant, unmarried and intestate; Henry H. Hill was his guardian. Theodore died in May, 1834, also unmarried and intestate. H. H. Hill and John Bates administered on his estate. Felix P. Bond died in September, 1834, unmarried and intestate. H. H. Hill and John Bates administered on his estate. On the 23d December, 1834, H.

*4

H. Hill and John *Bates, administrators, sold the estates of Theodore S. and Felix P. Bond. At this sale, Jonathan M. Hill was present and bought property. At the sale of the estate, supposed to be Theodore's his purchases amounted to \$2,544.00; at the sale of the estate of Felix P. Bond, his purchases amounted to \$5,812.00; for the first amount, he gave his note to the administrators, with Bryan Deen and Theophilus Hill sureties; and for the second amount, his note, with Theophilus Hill surety. In these purchases are embraced the negroes Tom, Polly, Judy and Philip, included in the deed of John P. Bond, the elder—these negroes sold for \$3,244. The Commissioner, in his report, allowed to the complainants one-third of the value of the negroes given by the deed directly to Moses, one-half of the value of those given to Theodore, and the whole of the value of those given to Felix. And in distributing the estates of Theodore and Felix, adopted the principle that the portions which respectively accrued to them, as the deaths occurred, did not survive under the deed, but were distributable as intestate property. In making up the accounts between the parties, the Commissioner allowed to the defendants, by way of set-off, the amount of the two notes given by the complainant, J. M. Hill, at the sales aforesaid, except \$945.21, which Theophilus Hill had paid to H. H. Hill on the judgment. Exceptions to the Commissioner's report were filed by the complainants' solicitor, that he had not allowed them the whole amount for which all the negroes embraced in the deed had been sold, and that he had allowed the defendants to set off the amount of said notes against complainants' demands. And urging the expediency of securing the rights of the complainant, Mrs. Hill. Other exceptions noticed in the Chancellor's decree, were also taken to the report. The Chancellor pronounced the following decree:

Johnston, Ch. This is the same case upon which a Circuit decree has been already pronounced, which, upon appeal, was affirmed in December, 1837. The case is correctly reported by Dudley [Equity Reports], at page 71; except that in the copy of the deed, the counsel who carried up the case omitted the fourth clause, which is as follows.

"Fourthly, I give, grant and devise unto my son, Theodore Stanmore Bond, my negro girl, Judy, (who I purchased of Warren Hart,) and Tom and Prince, (sons of Tom and Peggy, whom I purchased of Mrs. Burket,) to be his right and title, in whose hands, custody or possession, soever, they may be; with their future increase, from the date of this deed."

The Commissioner has made a report up-

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on the accounts, *as directed in the circuit decree; to which both parties have excepted; he has decided upon the exceptions, and his decision is appealed from. It is upon these that the case now comes up. I refer to these proceedings for a statement of facts and explanation of the questions to be now adjudicated.

The first exception of the plaintiff is: "That, by the terms of the deed and the decree of the Court, the complainants are entitled to the whole amount for which the negroes, specified in the deed, were sold, in exclusion of the other supposed distributees of that fund, and that this amount, together with the price, (\$800,) for which Felix Bond sold a part of the negroes to MacCarty, constitute the separate and exclusive property of complainants, no part of which is subject to distribution as the estates of Theodore or Felix Bond."

The Commissioner's decision is as follows: "The complainants' first exception is overruled, on the ground that the accruing shares, under the deed, do not survive, but pass, as intestate property."

Neither the exception itself nor the decision upon it are sufficiently pointed, without a perusal of the pleadings and the report, to indicate the questions intended to be raised.

It appears that, of the former beneficiaries under the deed, Moses and Theodore were full brothers, and that Lucinda and Felix were brother and sister of whole blood, but related to the two former by half blood only. Lucinda and Felix had three sisters and one brother of the whole blood.

Moses died, a minor and intestate, in 1826, leaving Theodore as his sole distributee; defendant, H. H. Hill, was his guardian. Theodore died, intestate, in May, 1834, leaving Felix and Lucinda and their three sisters and one brother aforesaid, his distributees. The said H. H. Hill was his guardian, and became his administrator.

Felix died in September, 1834, leaving Lucinda and his three other sisters and brother aforesaid, his distributees. The defendants,

H. H. Hill and John Bates, became his administrators. Felix, in his life-time, had and sold part of the negroes for \$800, and his said administrators sold the residue after his death.

The exception intends to assert that the whole corpus of the property covered by the deed passed over, by the terms of the instrument, and by virtue of the decree, by successive steps, to Lucinda, the last survivor among the beneficiaries.

The Commissioner, in his report, had taken a different view, which was, that upon the death of Moses his share passed, by the terms of the deed, to the surviving grantees, Theodore, Felix and Lucinda, share and share alike; each of whom thus became entitled

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to one-third of Moses' share, *in addition to his or her own original share. That upon the death of Theodore, his original share passed over, in virtue of the deed, to the two survivors, Felix and Lucinda, in equal portions; but that so much of the share of Moses as had survived to him, became distributable as intestate property, freed from the further operation of the deed, between his brother and sisters of the half blood, Felix, Lucinda, and the brother and three sisters aforesaid, who were his only distributees. That Felix and Lucinda, by this means, each became entitled, (in addition to his or her own original share) to one-third of Moses's share, by survivorship; to one-half of Theodore's share by survivorship, and by the statute of distributions to one-sixth of so much of the portion of Moses as had survived to Theodore; and that upon the death of Felix, his original share only passed to Lucinda, by survivorship, under the deed; the rest of his accumulations aforesaid being divisible as his intestate estate, between Lucinda, her three sisters and brother before referred to.

This view is intended to be confirmed by his decision, overruling the plaintiff's first exception.

The authorities quoted by the defendants' counsel abundantly sustain his position, that where a conveyance is made to a number of persons exceeding two, with limitations to the survivors, upon the death of the grantees severally, the right of survivorship attaches only to the original shares, and not to the sub-divisions. These last are lodged by the first transfer in the then survivors, which satisfies the terms of the instrument, and being so lodged are freed from the deed.

It has been suggested, that the terms of this deed call for something beyond this; that they provide, upon the deaths of the beneficiaries successively, for a transfer, not only of each one's original share, but of what that one had received, by survivorship, from any predeceased beneficiaries; and that this process is to be carried on until the whole corpus settles in the last survivor. If the grantor has said so, he should be obeyed.

Every donor is entitled to be the sole legislator as to the terms of his gifts. *Cujus est dare ejus est disponere*. But what has the grantor said here? "That, if either one or more of the said above-named children should die, without a lawful issue, the deceased's part or parts shall be equally divided amongst the survivors nominated in this deed." Upon these words, it is contended that the proper construction is, that upon the death of any one of the beneficiaries, after the predecease of any other of them, not only his own original part, but the part he may have received from the predeceased, shall go over; and that this is called for by the word "parts" in the plural. But it is

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not evident that the words "part or *parts," are correlative to the number of children, the probability of whose decease is contemplated, and provided for, and who, in the words of the deed, may be "one or more." If "one," his "part," if "more" than one, their "parts," are limited over, meaning, certainly, the original parts of each. This is the plain intention of the paper, which is not to be sacrificed to a construction too narrow and literal. Such a construction, it may be pertinent to observe, by the way, would defeat the plaintiff, Mrs. Hill, altogether; and that by the same process of insisting upon the full effect of a plural noun. The limitation is to "survivors;" she, as the last, is only a "survivor." The latter would restrict the operations of the deed, by way of limitation, to the last deceased, when "survivors" were left, and deprive her not only of the original "part" of Felix, but of those "parts" he had acquired from his two ante-deceased brothers.

The exception insists not only upon the terms of the deed, but upon the terms of the decree, as sustaining the plaintiff's claim. The only points decided by the decree, were that such limitations as are contained in this instrument might be effectually made, by a paper which is neither a trust deed, a marriage settlement, nor a testament; and that the limitations themselves were not void for remoteness. The answer sufficiently sets forth the facts upon which the accounts, which were ordered to the Commissioner without directions, might be made up. The Court concurs with the Commissioner in overruling this exception; and it is overruled accordingly.

The plaintiff's second, third, fourth, and fifth exceptions, were neither argued nor insisted upon. Upon looking at the report and the Commissioner's decision upon these exceptions, I see no error, although the account might have been, and should have been, more methodically cast. These exceptions are overruled, and the Commissioner's decision upon them confirmed.

The sixth exception has been allowed by the Commissioner, and the report corrected accordingly, which correction is confirmed.

The plaintiff's seventh exception is, that "the Commissioner erred, in allowing the defendants credit for the amount of the notes of Jonathan M. Hill, and others: the circumstances of the complainants rendering it highly expedient, that the rights of Lucinda Hill should be secured to her; and at all events, no larger credit should be allowed than the balance due on these notes."

The Commissioner's decision on this, is thus expressed. "The seventh exception is

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sustained so far as to allow the *defendants credit only for the balance due on the notes, and the report is corrected accordingly. In other respects, it is overruled."

The notes referred to in this exception, (which should have been specified in the exception itself,) I find, upon examining the report, are:

1. A joint and several note given by Jonathan M. Hill, Theodore Hill and Bryan Deen, to the representatives of Theodore Bond, for \$2,544, payable 12 months after date, and dated Dec. 23, 1834, the consideration of which is stated in the report to be "property purchased at the sale of Theodore Bond's estate," (by Jonathan M. Hill.)

2. A joint and several note of Jonathan M. Hill and Theophilus Hill, given to the representatives of Felix Bond, for \$5,812, due and dated as the foregoing note. The consideration of this note is stated in the report to be "property purchased at the sale of Felix Bond's estate," (by Jonathan M. Hill.)

The report states that "judgments have been obtained on both the above notes, against the sureties only; and the surety, Theophilus Hill, has paid to the Sheriff, in the first case, (on the note first mentioned,) \$31.50, and in the second case, \$987.70; of the latter sum, \$946.21, was paid Oct. 11, 1838; the balance in both cases was paid 9th December, 1839, which was for costs.

It appears that the sales of Theodore and Felix's estates took place at the same time, and are spoken of in the bill as one sale. In the bill, which is brought by Jonathan Hill and Lucinda, his wife, jointly, it is stated "that the complainant, Jonathan, was present at the public sale made by the defendants; but having recently arrived from Alabama, where he resided, and not being well advised of his rights, he did not forbid the sale, but gave notice of his intention to seek advice, and bid and purchased largely."

We are to infer, from detached passages in the pleadings and report, as well as from the intent with which these purchases were made, that the property purchased consisted of negroes covered by the deed.

The first question under this exception, is, whether the purchases made by her husband amounted to a reduction of Mrs. Hill's interests into his possession. I cannot perceive that this did. It may be, that a sale made for division, with a distinct understanding

and agreement, that the amount of the purchases made by the respective parties in interest, shall have the effect of satisfying the claims. But there was no such understanding here; at least we have no evidence of it. The sale itself was not impugned. It was

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disputed, that *Mrs. Hill had an interest in the property or proceeds. The property was allowed to be sold, as the property of the intestates, respectively. Jonathan Hill became indebted for the amount he bought, as any other purchaser. The property purchased became his individual property, in virtue of his purchases. Now suppose that he had died, immediately after he effected them, will it be said that Mrs. Hill's right to demand an account from the administrators, would not have survived to her, or that that right would have been defeated, simply by the administrators presenting the note of her husband?

Then, there is no doubt, the administrator might have paid the husband the amount of the wife's claim, without suit, and thereby barred her equity to a settlement, and this payment might have been made in his notes. But they have not done so. They contested her claim, and drove her husband and herself to a suit. Having come into this Court, is it competent for either the husband, or those in possession of that to which the wife is entitled, by any indirection to defeat her equity? a remedy always administered by the Court at her solicitation, when it obtains possession of the subject matter. I think not.

It will be remarked, that neither the husband nor wife requests or desires that his notes shall be given up to them in payment of her demands. The administrator, in opposition to their wishes, desires to discount them. Now, are they a good discount? Set-offs must be mutual. That is, the parties must be the same on either hand. Are the notes of Hill and others, third persons, a set off against the claim of Hill and wife? I incline to the opinion, that they are not.

I incline, but with hesitation, to the opinion, that this exception should be sustained; and it is ordered accordingly.

Before quitting this subject, however, I would observe, that in no view that I can take, could the Commissioner's report, as regards these notes, be sustained, by allowing the balance as established as due the defendants, by the plaintiffs. If the report were confirmed, it would amount to a judgment that the plaintiffs pay that balance; and, in case of Mrs. Hill's surviving her husband, she would be bound for it; which amounts, in effect, to a decree, that the wife is bound as survivor, for the notes of her husband alone. The balance should have been reported against him.

We come, now, to the defendants' exceptions.

Of the first of them I shall take no further notice, than to observe, that I am satisfied with the reasons given by the Commissioner in overruling it; and it is overruled.

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*The second complains of an error which the Commissioner has corrected; which correction is confirmed.

The third was abandoned, except as to the following part: "that the Commissioner has erred," "in disallowing the note of plaintiff, J. M. Hill, to John P. Bond, of whom H. H. Hill is committee; and such portions of the notes of J. M. Hill, for purchases at the sales of Felix and Theodore's estates, as have been paid by his sureties."

The latter part refers to the payments already spoken of, made by the surety, Theophilus Hill, upon the notes which are the subjects of the plaintiffs' seventh exception. The sureties are no parties to this suit, and, of course, cannot be recognized as asking to be repaid the amount advanced by them; and it would be a novelty, at least, if the defendants, already in possession of the sums paid, should be decreed to be entitled to the same amount from either of the plaintiffs, especially from Mrs. Hill.

The first part relates to a note, mentioned in the report, "of J. M. Hill, dated March 13, 1835, payable to John P. Bond, on or before the 1st day of January thereafter, for \$180.00."

The Commissioner deciding this exception says: "as to the note of Jonathan M. Hill, due John P. Bond, it would be a proper discount, if Bond was a party to the suit, which he is not."

After what I have said on the plaintiffs' seventh exception, it is hardly necessary that I concur in the remark of the Commissioner, with this exception, that I do not think it would have been a good discount if Bond were a party. This exception is overruled.

It is ordered, that the report be re-committed, to be reformed according to the present decision.

Recurring to the 7th exception of the plaintiffs, it was stated that Jonathan M. Hill had abandoned his wife, and having run through all the property in his possession, had left her in destitute circumstances; and an application was made for a settlement upon her of what may be recovered in this case.

It is ordered, that it be referred to the Commissioner to enquire into the truth of these facts, and report the facts which he may ascertain by evidence; and that he report what would be a suitable settlement to be decreed in the premises, the name of a proper trustee, and the terms and form of a decree.

The defendants appealed from the decree of the Chancellor, and moved to reverse the same, on the following grounds:

1. Because, under the circumstances, they

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had a right to *set off the amount of the notes of Jonathan M. Hill, given for his purchases at the sales made by the defendants, against the claims of the complainants.

2. Because the defendants were, at least, entitled to set off the value of the negroes embraced in the deed, which were purchased by the said Jonathan M. Hill, against the claims of the complainants; and because the decree was, in other respects, contrary to law and equity, and the practice of the Court.

Wardlaw, for the motion.

The complainants also appealed, on the ground, that they were entitled to recover the whole amount for which all the negroes included in the deed of J. P. Bond, the elder, had been sold.

Bauskett, contra.

In December, 1844, without hearing the other matters involved in the appeal, the Court of Appeals made the following decretal order:—

It is ordered, that this cause be continued, and that the defendant have leave to file a cross bill, making Bryan Deen and Theophilus Hill, defendants, charging them, as sureties, with the amount of the notes of Jonathan M. Hill, for his purchases at the sales of the estates of F. P. Bond and Theodore S. Bond: and that the brothers and sisters of Felix P. Bond, not provided for by the deed mentioned in the pleadings, as well as such other persons as the defendants, H. H. Hill and John Bates, may deem expedient, be also made parties defendants.

That the bill allege, if such be the fact, that at the sales of the estates of Felix P. Bond and Theodore S. Bond, there was an understanding between the administrators of those estates, or either of them, or any of the parties claiming an interest in the said estates, and Jonathan M. Hill, that the amount of such purchases as might be made by Jonathan M. Hill, at the said sales, should be credited with the amount of his wife's interest in the said estate, when it should be ascertained what the extent of that interest was; or that the cross bill allege such other agreement in that behalf as was made by the parties in interest; and that it set forth the understanding, if such existed, upon which the sureties of Jonathan M. Hill suffered judgment to be had against them at law, by the administrators as aforesaid, for the amount of Jonathan M. Hill's purchases, for which they had become bound; together with all other matters necessary to put in issue the points which may affect the final determination of this case.

David Johnson.

17th December, 1844.

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*Under this order the cross bill was filed, and the subsequent facts developed, as they appear in the following decree of his Honor,

Chancellor Dunkin, who heard the case at Edgefield, June term, 1846:

Dunkin, Ch. The principal cause has been twice before the Court of Appeals. The decision on the main question is reported in Dudley's Eq. R. 71. It is proposed now to advert only to some of the facts, in order to a correct understanding of the decretal order, made by the Court of Appeals in December, 1844, under which the cross bill was filed, and the subsequent facts developed.

Of the four children interested under the deed from John P. Bond, three had died intestate, to wit: Moses in 1828, Theodore in May, 1834, and Felix P. in September, 1834. Moses died an infant, leaving Theodore, his only brother of the whole blood and next of kin. The distributees of Theodore were his four sisters and two brothers of the half blood, of whom Felix was one. At the death of Felix P., his estate was distributable among his sisters and brother. Henry H. Hill administered on the estate of Theodore Bond, and he, with John Bates, administered on the estate of Felix P. Bond. An order was granted by the Ordinary of Edgefield District, to sell the estates of Theodore and Felix P. Bond, on 23d December, 1834, on a credit of twelve months, purchasers to give note with approved sureties. At that time, J. M. Hill and his wife resided in Alabama. He attended the sale, however, and purchased largely. The sale bills amounted to \$14,887 of which his purchases amounted to \$8,356. He passed the winter in Carolina, and either at the sale, or in April following, gave notes with sureties, to the administrators, for the amount of his purchases.

Proceedings were then instituted in this Court, in the name of J. M. Hill and wife, against the administrators of Theodore and Felix P. Bond, for the purpose of ascertaining the extent of their interests under the deed of 1823, and for an account of the estate of the intestates. The cause was heard at June Term, 1836, and a final decree pronounced by the Court of Appeals in December, 1837.

The result of that decree was, that the complainant was absolutely entitled to one-third of the negroes which Moses Bond took under the deed of 1823, to one-half of those taken by Theodore, and to the whole of those taken by Felix P. The right of the complainants to a distributive share of the particular estates of Theodore and Felix P. Bond was not disputed, and an account was ordered to be taken on the principles of the decree.

Pending the litigation, judgment had been

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entered against *the sureties on the notes, but it was under the particular circumstances stated in the pleadings. The payment of about \$1,000, which one of the sureties made

in October, 1838, the administrator, H. H. Hill, afterwards offered to refund.

From the time of the decree in 1836, affirmed in 1837, no proceedings whatever appear to have been taken by either party until June, 1842. This delay would appear entirely unaccountable, were it not for the fact, perfectly well known to the parties, that the amount due according to the principles of the decree, was about equal to the amount of J. M. Hill's notes to the administrators. The impression of the acting administrator seems to have been, that the balance would be in favor of J. M. Hill. According to the report of the Commissioner, the balance may have been, slightly, the other way.

But in this interval sad events had taken place. The intellect of the complainant's wife had become disordered. Pecuniary embarrassment had overtaken him, and they were now separated.

A reference was had on 2d June, 1842, under the decree of 1836. At that reference, it was insisted, on the part of the administrators, that the notes given by J. M. Hill should be discounted against his purchases; and, they further insisted, that the amount paid by the surety should not be deducted from the discount, thus carrying out the promise which had been made by H. H. Hill, the administrator, to the surety, that he would endeavor to protect his interests. The Commissioner accordingly allowed credit to the administrators for the amount due on J. M. Hill's notes, but deducted what had been paid by the surety. On exceptions to this part of the report, the Chancellor says, "I incline, but with hesitation, to the opinion that this exception allowing the discount, should be sustained, and it is ordered accordingly."

In December, 1844, the Court of Appeals, without hearing the other matters involved in the appeal, gave leave to the defendants (the administrators) to file a cross bill, making the sureties of J. M. Hill parties defendants, as also the other distributees of their intestates; that the bill allege, if such be the fact, that, "at the sales in December, 1834, there was an understanding between the administrators, or either of them, or either of the parties interested, and Jonathan M. Hill, that the amount of such purchases as might be made by him at the said sales should be credited with the amount of his wife's interest in the said estates, when it should be ascertained what the extent of that interest was; or that the cross bill allege such other agreement in that behalf as was made by the parties in interest; and that it set forth the understanding, if such

which may finally affect the determination in this case."

The cross bill was filed on the 6th February, 1845. In relation to the matter embraced in the order of the Court of Appeals, the substance of the allegation in the bill is, that at the sales on the 24th December, 1834, and when the notes of J. M. Hill were executed a few days afterwards, it was "well known to the administrators that J. M. Hill and wife set up a claim on the estates of Theodore and of Felix P. Bond;" and it "was supposed and expected," that when the shares were ascertained, a settlement would be made, by discounting the notes of J. M. Hill against the amount of the shares in the estates, although the administrators allege that they "do not know or admit," that there was any express agreement, or obligatory arrangement, to that effect.

In his answer to the bill, thus filed, Jonathan M. Hill states that, immediately previously to the sale of December, 1834, he and his wife arrived in Edgefield, from their residence in Alabama, and that the leading object of their visit was to assert the said Hill's exclusive claim to the negroes embraced in the deed of John P. Bond; that from the shortness of the interval between his arrival and the time appointed for the sales, he had no opportunity to consult counsel, or adopt measures to prevent the sale, and under the circumstances, he thought it best for the interest of all the parties not to forbid the sale, but to give notice of his claim, to the administrators. That he did give notice to both the administrators, that he claimed an exclusive right to all the negroes embraced in the deed from John P. Bond—that "prior to the day of sale, and on the day of sale, he held full and free conversations with the said Henry H. Hill and John Bates, representing the estates aforesaid of the said Theodore S. and Felix P. Bond," in reference to the sales about to be made by them, and the interest of the defendant in the property to be sold—that they were not disposed to admit the claim of the defendant to the extent asserted by him, and the result was an understanding, distinct, "express and positive," between the said administrators and himself, that he would bid at the sales, and that the interest of the defendant, in right of his wife, in the negroes, and in the estates of Theodore S. and Felix P. Bond, should be credited on the purchases of the defendant at the said sales, whenever the interest should be ascertained; that "it was upon this distinct agreement and understanding" between the administrators and himself, that he bid at the said sales; that after the sale, on a conference held with the

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*existed, upon which the sureties of Jonathan M. Hill suffered judgment to be had against them at law; together with all other matters necessary to put in issue the points

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administrators, it was supposed that his purchases of the property of Theodore would, (or might,) in any view, exceed his interest in that estate, and for that reason, it was

agreed that Hannah and her two children, which had been bid off by him, should be set down to Walter S. Daniel, which was accordingly done. It may be as well, in this connexion, to remark that, at the hearing, it was admitted that this change had been made.

The defendant, J. M. Hill, in his answer further states, that after the sales, the administrators and himself attempted to ascertain and determine, without litigation, the extent of his interest, but their efforts were unsuccessful, the said H. H. Hill insisting that the defendant had no interest whatever in the negroes, as survivor; that their attempts at settlement were protracted until the 20th April, 1835; that the defendant becoming then satisfied that their efforts would be unavailing, was about to return to Alabama, leaving instructions with counsel to prosecute his rights; that it was thereupon agreed between the administrators and himself, that he should give his notes for his purchases, upon the same understanding as existed at the sales—that he accordingly, on that day, gave his note for \$5,812.50, with Theophilus Hill as surety, for the purchases at the sales of Felix P. Bond's estate, and a note for \$2544, with Theophilus Hill and Bryan Deen, as sureties, for his purchases at the sale of Theodore's estate—that he remembers the notes to have been executed on that day, although dated as of the day of sale, from the fact that on that day a mortgage of four negroes was prepared and witnessed by the complainant, Henry H. Hill, from the defendant, to his sureties, to indemnify them against any loss on account of the note of \$2544. That the mortgage was given in the presence of the said H. H. Hill, and of the mortgagees, upon the conclusion, after an estimate made, and belief of the defendant and H. H. Hill, that as his interest in the proceeds of sales would, in any event, secure the said Theophilus Hill on the note of \$5,812, it was not necessary for the said sureties to take any sort of indemnity beyond the note for \$2,544, aforesaid—that, at the execution of the notes and mortgage, it was expressly stated, and well understood by all the parties, that the said notes were only given to secure the administrators the excess, if any, of the defendant's purchase over his interest in the property sold, "and but for this distinct agreement and understanding, existing at the said sales, and renewed when the said notes were given, the defendant never would have consented to the said sales, or executed said notes, nor would the said Theophilus Hill and Bryan Deen, as the defendant believes, have become his sureties."

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*The defendant insists, that he is entitled to have the interests derived under the deed of J. P. Bond, and the interests in right of his wife in the estates of Theodore and

Felix, discounted against his notes, according to the agreement and understanding; and that especially as to his interest in the proceeds of the negroes embraced in Bond's deed, as declared by the Court, he had a plain, legal right therein, and the amount should be credited on his notes as of the day of sale.

The answer of Theophilus Hill and Bryan Deen is to the same effect, and they "solemnly aver, that it was their distinct understanding, at the time of the execution of the notes, that they were only to be held responsible for any excess which might remain due on those notes, after deducting the interest of Jonathan M. Hill, in right of his wife, in said estates." They further aver, that about the time they became sureties, and afterwards, they were told by H. H. Hill, who had almost the entire management of the estates, that he believed there would be enough in his hands belonging to the said Jonathan M. Hill to satisfy the said notes.

As to the judgments at law, obtained in 1838, the defendants aver that they were permitted to be entered at the earnest solicitation of the complainant, Henry H. Hill, who assured the defendants, that it would be better for them, so far as concerned the application of Jonathan M. Hill's interest in the estates to the payment of the notes. And the defendant, Theophilus Hill, avers that it was the express understanding and agreement, between the said Henry H. Hill and himself, when he consented that judgment might be taken against him, that he, the said Theophilus, was only to pay upon the said judgment whatever might remain after deducting the interest of the said Jonathan M. Hill in the said estates. That when the defendant, in October, 1838, made the payment mentioned, it was at the earnest request of the said Henry H. Hill, for the purpose of enabling him to meet a debt, due by him, as administrator, and under a positive and distinct understanding, that if J. M. Hill's interests equalled the amount of the notes, this sum should be refunded; and that, on two different occasions, when the defendant afterwards applied to the said Henry H. Hill to refund the money so paid, the said Henry was willing and agreed to do so, provided the defendant would take in payment a negro man, valued at one thousand dollars, or a tract of land adjoining the defendant's residence, but which he declined to do.

It was proved that the mortgage of 20th April, 1835, from J. M. Hill to his sureties, was in the hand-writing of Henry H. Hill, and was attested by him. It was also proved

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ed by *James Richardson, that sometime in 1842, at his father's house, Henry H. Hill told the witness that he had offered Theophilus Hill a negro at \$1,000, in part for the money which he had advanced for Jonathan

M. Hill—that the impression left on the mind of the witness was, that they did not trade, because the price asked by Henry H. Hill was too great.

Another witness, Benjamin Stevens, said that he had talked with H. H. Hill at his (witness') house, two or three years after the decree in Jonathan M. Hill's favor. Henry H. Hill said that "things had not been settled in the Clerk's Office;" he said "he thought he would fall in debt to Jonathan M. Hill from eight hundred to a thousand dollars, from a rough calculation—said that a man was not apt to force a settlement on himself when he knew he would fall in debt."

Sanders Guignard testified, that a few days before the hearing, he was at the house of John Bates, one of the administrators, who resides in Lexington. In reply to an inquiry of the witness as to the agreement, at the sales in December, 1834, Bates told him it was his understanding at the sales, that the purchasers should have credit for their legacies, (as he expressed it.) He mentioned the amount at which the shares were estimated, and particularly the mode of settlement with Daniel, one of the distributees, and requested the witness to inform the counsel of the sureties of what had passed between them.

It is proper to remark, that in 1845 Henry H. Hill was appointed the committee of Mrs. Hill, the wife of Jonathan M. Hill, and that he filed an answer, on the 26th June, 1846, insisting on a settlement of her interest.

The Court need hardly say, that for the purposes of this judgment, the decree of 1837 is the law of the case, and that the Circuit decree of June, 1843, is equally so, except in relation to the right to discount the notes of J. M. Hill. On this subject, it is presumed, the Court of Appeals expected the opinion of the Circuit Court on the state of facts as they might appear on the new pleadings and proofs.

In *Heath v. Heath*, 2 Hill Eq. R. 104, the Court say, "there is no doubt that when the wife has a perfect legal estate in goods and chattels, whether it be in severalty, joint tenancy, or in common, it will vest in the husband, *jure mariti*."

If he can obtain possession without the aid of the Court of Equity, he will hold them discharged of the rights of the wife. In relation to the rights of J. M. Hill, under the deed of John P. Bond, it is only necessary to apply this very familiar doctrine to what was declared by the Court, in the decree of 1837; the right to one-third of the negroes held by Moses, to one-half of those held by

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Theodore, and to the *whole of those held by Felix P. Bond, was a perfect legal estate, which he could have established, and reduced the property into possession by an action at law, in his own name. After the negroes had been sold, the proceeds might have been

recovered by the ordinary action for money had and received to his use.

The negroes formed no part of the estate of the intestate. No aid whatever was required from the Court of Equity. The complainants, Henry H. Hill and John Bates, were in possession of his funds, under an implied contract, which the law would recognize and enforce, and his right to direct the appropriation was perfect and irresistible.

But the complainants in the cross bill held also other funds in which J. M. Hill was interested in right of his wife, as one of the distributees of Theodore S. Bond and of Felix P. Bond. This right had accrued during the coverture. As is very fully explained in *Boozar v. Addison*, (MS.,) May, 1846, [2 Rich. Eq. 273, 46 Am. Dec. 43,] the administrators might have settled with the husband, and on his individual receipt. He could have instituted proceedings in his own name for the recovery of the claim, and the only effect of joining his wife was, that in the event of his death before judgment, or after judgment and before satisfaction, the right would have survived to the wife. But the husband had, at all times, the right "to assert his exclusive claim," either by discontinuing the suit, compromising the debt, or receiving payment, and entering satisfaction on the judgment.

Such being the rights of the defendant, J. M. Hill, as a distributee of Theodore S. and Felix P. Bond, deceased, on the 23d December, 1834, it appears to the Court to have been very satisfactorily established, that the sale was permitted to proceed, and the purchases of J. M. Hill were made, under a distinct understanding, which both parties knew to be mutually entertained, that the amount of Hill's purchases were to be discounted against the amount of his interests in the property sold, whenever the extent of his rights was ascertained. That the same understanding existed, was known by all parties to exist, and was permitted to exist, when the notes of J. M. Hill, for the amount of his purchases, were afterwards executed by himself and his sureties.

In addition to the evidence of the agreement itself, the conduct of the parties speaks a language not to be misunderstood. The memory of witnesses may fail. A change in their interests may imperceptibly warp their recollection of facts, or change their construction of language or of facts. Assuming the existence of the understanding or agreement that the notes were to be discounted against

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the shares when *the extent of the right was ascertained, the subsequent conduct and declarations of the parties are uniform and consistent.

The defendants Jonathan M. Hill and his sureties, aver that such was the agreement, distinct and positive, without which the notes would never have been executed. The admissions of John Bates were proved at the hear-

ing. The only one of the original parties who does not admit an "obligatory agreement," although he "admits the understanding" to have existed, is H. H. Hill. He was the acting administrator, charged principally with the settlement of the estates, and most intimately acquainted with the rights of the several parties. From December, 1837, when the extent of J. M. Hill's rights was definitely settled by the decree of the Court of Appeals, until June, 1842, no proceedings whatever are taken under the decree. His receipt of nine hundred and fifty dollars, from one of the sureties, in October, 1838, is no exception, but strongly confirms the inference deducible from this long acquiescence; for it is distinctly proved that he offered, subsequently, to refund the amount which had thus been received from the surety. But the declaration of Henry H. Hill to the witness, Benjamin Stevens, two or three years after the decree of 1837, fully explains the delay. The notes of J. M. Hill, if they were not to be discounted, were probably barred, as to him, by the statute of limitations. But judgments had been entered in the Clerk's office against the sureties. Under these circumstances the conversation took place, in which Henry H. Hill said to witness, that "things had not been settled in the Clerk's office; that from a rough calculation, he thought he would fall in debt to J. M. Hill from eight hundred to one thousand dollars—that a man was not apt to force a settlement on himself when he knew he would fall in debt." And doubtless, it was under this abiding conviction, and that, at least, nothing was due on Hill's notes, that he offered to repay to his brother, Theophilus Hill, the money which he had, (in his language) advanced for J. M. Hill.

But it was furthermore proved by the witness, James Terry, Esq., the former Commissioner, that at the reference in June, 1842, H. H. Hill was present, and he, with John Bates, his co-administrator, insisted that J. M. Hill's notes should be discounted against his share of the estates, and that there should be no deduction from the discount on account of the payment by Theophilus Hill, the surety. When the Chancellor sustained the exception to so much of the report as allowed the discount, the appeal was made and prosecuted on behalf of the administrators. But the

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facts in relation to the mortgage of 20th April, 1835, afford strong circumstantial evidence, that the administrator, H. H. Hill, as well as Jonathan M. Hill and his sureties, acted on the understanding and agreement, that so far as J. M. Hill's shares extended, they were to stand as a discount against his purchases. J. M. Hill was about leaving the country, carrying with him the negroes which he had bought. In order to indemnify the sureties against any possible liability, H. H. Hill himself prepares the mortgage and witnesses its execution, by which the sureties

are protected from loss on account of the note of \$2,544 alone, thereby leaving the note of \$5,812 to be paid by the shares of J. M. Hill, known to be amply sufficient.

Without dwelling farther on the testimony, it appears to the Court very conclusive to establish the agreement that the interests of J. M. Hill in the sales of December, 1834, were to be deducted from, or discounted with, his purchases at the said sales; and that this agreement was well understood by all the parties when the notes were executed for the purchases, with the defendants as sureties. This agreement was, on the part of Jonathan M. Hill, such "an assertion of an exclusive claim," as is stated in *Booz v. Addison* to be sufficient to vest the right in himself. Having directed the appropriation of the fund in the hands of the administrators, to the payment of his own notes, held by the same parties, and they assenting to the arrangement, the Court will consider that as done which was agreed to be done, so soon as the amount was ascertained.

The Court is of opinion, that the account should be stated on these principles, and that the administrators should be perpetually enjoined from enforcing their judgments at law against the sureties, beyond any balance which may be ascertained to be due on these accounts, thus stated. The Court is further of opinion, that under the facts now developed, the surety, Theophilus Hill, is entitled to re-imbursement from any portion of the shares of J. M. Hill which may remain after payment of what was due on his purchases. It is ordered and decreed, that the sales of the lots in Hamburg, described in the pleadings, be confirmed.

It is further ordered, that the Commissioner state and account between the parties, on the principles of this decree, and that he report the result.

The defendant, Lucinda Hill, by her committee, Henry H. Hill, appealed from the decree of his Honor, Chancellor Dunkin, on the following grounds:

1. Because there was no sufficient evidence of an agreement between the administrators

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of T. and Felix Bond, on the one part, and Jonathan M. Hill, on the other, that the amount of his purchases at the sales should be discounted against the shares and interest of his wife, Lucinda Hill, in the property sold, to make such alleged agreement binding on the parties.

2. Because the cross bill of the administrators having been filed under the compulsory order of this Court, the facts stated in the answers of the defendants thereto, should not have been received and considered on the hearing as established by the ordinary rules of evidence and practice of this Court.

3. The sale of the property by the administrators did not change or affect the equity of Lucinda Hill, as distributee of the estates,

or as survivor of Moses, Theodore and Felix Bond.

4. That as there was no partition made of the negro slaves, held by Moses, Theodore and Felix Bond, under the deed of John P. Bond, or of any portion of their absolute estates, the interest of Lucinda Hill in the same never vested in possession, and consequently the marital rights of the husband never attached.

5. Because the marital rights of Jonathan M. Hill, in the shares of his wife, as a distributee of the estates of Moses, Theodore and Felix Bond, or as survivor of them, under the deed of John P. Bond, have never vested in possession.

6. That even if the marital rights of Jonathan M. Hill did attach to the interest of his wife, Lucinda, in the negro slaves limited over to her as survivor, successively, of Moses, Theodore and Felix Bond, yet the said Jonathan M. Hill conceded to her an interest in the same, by joining her with him, as plaintiff in the suit instituted by him in this Court, and by claiming the proceeds of the sales instead of the specific slaves.

The defendants also appealed from the decree of his Honor, Chancellor Dunkin, in this case, on the ground:

That his Honor erred in adopting the decree of his Honor, Chancellor Johnston, in the case of Jonathan M. Hill et al. v. H. H. Hill and John Bates, administrators, as the law of this case in relation to what are denominated the accruing shares of the negroes embraced in the deed from John P. Bond, the elder, and will insist that all the negroes, by the proper construction of said deed, passed to Mrs. Lucinda Hill, as the last survivor of the donees, and were vested absolutely in her husband before the sale by the administrators of Theodore and Felix Bond, on 23d December, 1834.

Bauskett, for the motion.

Griffin, contra.

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*HARPER, Ch., delivered the opinion of the court.

The questions made in this case relate to two portions or classes of property. The first is that contained in the deed of John P. Bond, of the 2d August, 1823. I do not think it necessary to go into a consideration of the cases cited, with a view to the question, if there be a donation of property to several persons, with a limitation to survivors, in the event of the death of either without issue, if one dies and his portion is distributed among the survivors, and then a second dies, whether the proportion of property of the first, taken by survivorship by the second, goes over to the remaining survivors. It is conceded in argument, that the general rule is otherwise, and that the portion so taken becomes the absolute property of the survivor to whom it so accrues;

though it is contended that the circumstances of each particular deed or case may lead to a different conclusion. This has been considered by the Chancellor who delivered the second decree in the original cause. There is no doubt but that if property be given to several persons jointly, by the English law, the property will vest in the surviving joint tenants successively, so that the whole may become vested in the last survivor, independently of any limitations to survivors. If such limitation be expressly inserted, it can, of course, make no difference.

The only circumstance relied upon in the present instance, is the introductory part of the deed, in which the grantor states himself to have given and granted to his four children therein named twelve negroes. I do not know if this is relied on as forming a quasi joint tenancy. But he goes on in the body of the instrument to give specific slaves to each severally, as much so as if it were by several deeds. I suppose that a partition was hardly necessary to enable each to enjoy his property as in his own right. No doubt a grantor may give severally to several donees, and provide that each of the parcels of property shall go entire to the survivors in succession, so that the whole may vest in the last survivor. But there is no indication of any such intention here.

Then upon the death of Moses, the first of the donees who died, his slaves vested immediately, by virtue of limitation, in the three survivors, Theodore, Felix P. and Lucinda, as held by the Chancellor. There was no necessity of any legal representative of Moses to perfect their title, nor would such representative have had any title to the property or any thing to do with it. The survivors might at once have sued him, or any other person in whose possession the slaves had been found, at law, for their recovery. There are some cases at law, in which it has been held that each of several tenants in common of a chattel interest, may

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maintain trover for his *own share of the common property. But this I do not think it necessary to investigate.

Then upon the death of Theodore, the property taken by him under the deed, not including that derived from his survivorship of Moses, vested in like manner in Felix P. and Lucinda. And so upon the death of Felix, the whole of his slaves taken originally under the deed, vested in Lucinda.

I say that the legal title vested in Lucinda, but I am of opinion that the marital rights of her husband attached upon the property so as to vest the legal title in him absolutely. The well known rule of the court is, that the possession of one joint tenant is the possession of the whole, and this constitutes such a reduction into possession, as that the marital rights of the husband of a feme joint

tenant will attach, though he has none of the property in his actual possession. Such are the cases of *Geiger v. The Ordinary*, 2 N. & McC. 151, note, and *Burgess v. Heape*, 1 Hill Eq. 397. The rule is well known, that if there be a perfect legal title and the present right of possession, this is enough to vest the property in the husband; though there may be no actual, manual possession. And the husband may sue alone for the property, being thus vested with the perfect title. There can be no question, in the present case, with respect to the slaves taken originally by Felix. But there is as little doubt with respect to the other slaves which he held in common. No other person had any right or interest in them.

It is true, Jonathan Hill might have joined his wife in the action; as in the case of a bond or note given to the wife during coverture, when she is the meritorious cause of action, the husband has his election, either to sue alone or to join his wife. If he should so join her, and recover a judgment or decree in their joint names, and the husband should die before satisfaction, leaving the wife surviving, she might be entitled to the whole as survivor; according to the decision in *Muse v. Edgerton*, Dud. Eq. 179. It is true, that in the present case, the husband has joined his wife; as, for some of the purposes of the suit, it was necessary for him to do; but there is no survivorship, nor can we anticipate one. There has been no judgment or decree; the parties are before the Court, standing severally on their rights, and the Court must proceed, *reddendo singula singulis*.

It seemed to be urged, that by standing by and seeing the property sold as the estate of Felix P. (and perhaps of Theodore) Jonathan Hill has waived his personal right to it, consenting that it should constitute a part of that estate, and claiming only a share of the proceeds as the chose of his wife. It is hardly necessary to remark on this. A man

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may adopt the act of one undertaking to sell his property as a voluntary agent. He may, at his election, go against the vendor for the purchase money, or against the purchaser for the property. So he may stand by and see his property sold by another as his own, if he prefers the money to the property, and claim the proceeds. Only in this case the purchaser would have an equity to restrain the owner from following the property in his hands. It would be a very strange stretch of inference that Jonathan Hill gave up his title to, or transferred, his property, because he forbore to injure the sale by raising a question of disputed title. It follows that one-third of the slaves originally given to Moses, one-half of those so given to Theodore, and the whole of those given to Felix, or their value or proceeds, are the property

of Jonathan Hill, and must be adjudged to him.

We are next to consider the case with respect to the property of which Theodore and Felix P. Bond died intestate—no matter whether acquired from their right of survivorship or from any other source. To a distributive share of these, Jonathan Hill and his wife are entitled in right of the latter. The only question made as to this is, whether the wife is entitled to have a settlement of the whole or any part of this upon herself. The general doctrine is not questioned, that a wife is entitled to have a provision made for her out of her choses in action, which are sued for in this court, as against her husband or any one claiming under him. Various questions have been heretofore made as to the circumstances, and as to the manner, in which this claim shall be allowed. It was formerly held, that only when the husband was suing in this court for the property of the wife, the court might impound the fund and allow it to accumulate until the husband himself should make proposals for a settlement. Afterwards, the husband was acted upon in invitum, and a settlement directed; and I take it now to be the settled law, that while the fund remains under the power of the court, the court will, on a proper application in the cause, or when there is an original proceeding by the wife for the purpose, direct such settlement to be made. I had occasion to consider the subject fully in the case of *Lindsay v. Lindsay*, [1 Desaus. 150,] decided at Spartanburg, from which decision there was no appeal.

But most of this it is unnecessary to consider for the purposes of the present case. The husband is in court, claiming in right of his wife; and though the claim on her behalf is only set up in the cross bill, both bills constitute but one suit.

Then the alleged agreement is relied on, between the administrators and Jonathan

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Hill, in confidence of which the sureties of Jonathan Hill, parties to the suit, were induced to become sureties. The proof of the express agreement was not very distinct, nor do I think it very material. No doubt the court would execute such an agreement as between the parties to it. Or without any agreement or understanding, the arrangement contemplated would have been carried into effect, but for the interposition of the claims of the wife. If the administrators had actually paid over to Jonathan Hill the amount of his wife's distributive share of the estates of Theodore and Felix Bond, this would have put the fund out of the reach of the court, and the marital rights would have become absolute. Or if, as ruled in the case of *Gillett v. Powell*, Speers' Eq. 142, there had been a final settlement of those estates, and the notes given up, this would

have amounted to an actual payment to the husband, and the court could not interfere. The case of *Heath v. Heath* seems to have been decided on the ground of actual payment to the husband. But it is said the court regards that as done which is agreed to be done—and so it often does, with respect to those who are parties to the agreement. It is hardly necessary to say that an agreement binds none but those who are parties to it. The wife was not a party to this agreement, and this court regards her as a distinct person, entitled to vindicate her own rights. It is the misfortune of the sureties, if they have incurred a liability on the faith of an agreement, by which the parties entering into it had no right to bind a third person, in relation to the subject matter of it. There is no suggestion or surmise that any act or conduct of the wife induced the confidence by which the sureties were persuaded to incur their liability. In the case of *Eli-bank v. Montolien*, 5 Ves. 737, the bill was by the wife against the administrator and the husband. The administrator claimed inofficially to retain the fund for a debt due him by the husband. This he might have done, if the claim of the wife had not been interposed, against any claim of the husband. It is plain that the consent of the husband to this retainer could have added nothing to the administrator's right, as the proceedings were adverse, both to him and the administrator. Similar, and perhaps, in some respects, stronger, was the case of *Carr v. Taylor*, 10 Ves. 574, where the bill was by the wife against the administrator and the assignees of a bankrupt husband.

One claim was accidentally overlooked by the Chancellor in framing his decree. This relates to the proceeds of certain real estate (lots in Hamburg) sold, as it is understood, by the consent of all parties, as the property of Felix P. Bond. Mrs. Lucinda Hill was

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entitled to a share of this. In the case of *Wardlaw v. Gray*, [2 Hill Eq. 644,] and in other cases, it has been settled, that while the proceeds of a married woman's real estate remain in court, they are subject to its disposition, and stand on the footing of her chose in action. The commissioner in making up his report must regard it accordingly, as part of the fund out of which provision is to be made for the wife.

It is therefore ordered and decreed, that the amount found due to Jonathan Hill by survivorship in right of his wife, under the deed of John P. Bond, be credited on the notes in question, and the enforcement of the executions so far enjoined; and it is further ordered, that the commissioner inquire and report what provision for Mrs. Lucinda Hill should be made out of her distributive share of the intestate estates of her deceased brothers, Theodore S. Bond and Felix P.

Bond. In other respects the decrees are affirmed.

DUNKIN, Ch. I concur in this judgment, as I entertain doubts whether the answers of J. M. Hill and his sureties could properly be regarded as evidence of the agreement, and without which, it was imperfectly established.

JOHNSON, Ch., absent.

JOHNSTON, Ch. I concur, fully, in the opinion of my brother, HARPER, that the marital right of Jonathan M. Hill did not attach upon his wife's share of the proceeds of the land, sold by consent; nor upon her share of the intestate estates of Moses, Felix and Theodore:—in which are included the shares of the deeded property which accrued to them by survivorship.

And I concur in the opinion, that the agreement, set up in the answers of Jonathan M. Hill and his sureties, was, in its nature, executory; and could not deprive his wife of her equity, unless it had been carried into execution before the filing of the bill. The court would not allow it to be executed, to her prejudice, afterwards. Besides, I conceive, the answers were not competent evidence of the agreement; and the evidence, aliunde, was not sufficient to establish it.

The doubt I entertain is, whether the marital right of Jonathan M. Hill attached on the shares of the deeded property which accrued to his wife by survivorship, (at least to the extent to exclude her right to a settlement, according to the practice of this court)—those shares not having been partitioned and set off to her; and the husband having been obliged to establish her right by suit; and having joined her in the bill for that purpose. On this point I am not, however, prepared to dissent.

Decrees modified.

I Strob. Eq. *27

*JANE REID v. PETER LAMAR et al.

PETER LAMAR v. JANE REID et al.

(Columbia. Nov. and Dec. Term, 1846.)

[*Husband and Wife* ⚭29.]

An agreement, entered into in contemplation of marriage, between the intended husband and wife, providing for the wife's having, through the intervention of a third person, called her "agent," "the full and free disposal" and the "sole direction" of all her property, and registered in conformity with the laws of Georgia, the State in which it was executed, was supported by the Court as a marriage contract.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 163; Dec. Dig. ⚭29.]

[*Husband and Wife* ⚭179, 182.]

It is the settled law of this State, that where property is given or settled to the separate use of a married woman, she has no power to charge, encumber or dispose of it, unless in so far as

power to do so has been conferred on her by the instrument creating her estate; which power must be strictly pursued—in contradiction to many English cases, in which it has been held that she is a feme sole with respect to her separate property, and may charge or dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument.

[Ed. Note.—Cited in *Ward v. Glenn*, 9 Rich. 130; *Rochell v. Tompkins*, 1 Strob. Eq. 116; *Holloway v. Rochell*, Id., 121; *Brooks v. Penn*, 2 Strob. Eq. 130; *Waterman v. Kennerly*, 3 Strob. Eq. 77; *Taylor v. McRa*, 3 Rich. Eq. 105; *Reese v. Holmes*, 5 Rich. Eq. 566; *Adams v. Mackey*, 6 Rich. Eq. 76; *Porcher v. Daniel*, 12 Rich. Eq. 357; *Dunn v. Dunn*, 1 S. C. 354; *Oliver v. Grimball*, 14 S. C. 566; *Pelzer, Rodgers & Co. v. Campbell & Co.*, 15 S. C. 589, 40 Am. Rep. 705; *Witte v. Wolfe*, 16 S. C. 270; *Wallace v. Craig*, 27 S. C. 521, 4 S. E. 74; *Gwynn v. Gwynn*, 27 S. C. 534, 535, 4 S. E. 229.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 711, 715; Dec. Dig. ¶¶ 179, 182.]

[This case is also cited in *Porcher v. Daniel*, 12 Rich. Eq. 349, as to facts, and in *Moore v. Hood*, 9 Rich. Eq. 324, 70 Am. Dec. 210, as to the doctrine of stare decisis.]

Before Johnson, Ch., at Abbeville, June, 1845.

Johnson, Ch. The case made by the last stated case is precisely that made by the original bill, and the object seems to have been to obtain, by the cross bill, a relief which the complainant supposed he could not obtain at law. I propose, therefore, to consider, in the first place, the case made by the original bill, unconnected with the cross bill, and with reference to the parties to that bill.

The complainant, Jane Reid, (then Jane McKinney,) and the defendant, William R. Reid, in contemplation of a marriage between them, on the 31st July, 1828, entered into a marriage contract, which, on account of its peculiarities and the questions growing out of it, requires a particular notice.

They were both residents of Lincoln county, Georgia, and the property intended to be settled was there. The contract, after reciting the intended marriage, and the necessity or propriety of making a settlement, proceeds:—"The said William R. Reid doth hereby agree that Harvey Wheat shall act as agent for and in behalf of the said Jane McKinney, for the better security and management of all and singular the property in her vested at this time, or in which she has or may hereafter have any interest, and all proceeds which may hereafter arise therefrom; and the said William R. Reid doth further agree and contract with the said Jane McKinney, through and by her said agent, to surrender to her the full and free disposal of all and singular the property which she has now in possession, consisting of negroes, stock of different kinds, household and kitchen furniture, together with all she has now or may have any interest or

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claim to, with all the *increase that may hereafter arise therefrom or in any wise from their proceeds, and all choses in ac-

tion, to have and to hold the sole direction and guidance thereof; and the said Jane McKinney, of her own good will and free choice, and through Harvey Wheat, her chosen agent, doth hereby agree and firmly contract to afford the said William R. Reid a decent and competent support by her labor through the proceeds of her above named property; provided he also give his labor and assistance thereto in rendering to his own and the support also of her and her family; and the said Jane McKinney doth further agree, not to interfere, dispose of, or in any wise intermeddle with any or singular the effects or property of the said William Reid, which he has now or may hereafter accumulate by his own industry or labor, or with any of the proceeds arising therefrom."

It is signed and sealed by William R. Reid, Jane McKinney and Harvey Wheat. The marriage was shortly after solemnized, and it is conceded on the part of the defendant, Lamar, that the deed was registered in conformity with the laws of Georgia, and that he had actual notice of its existence and contents, he being himself the Register.

The complainant states in her bill that the property protected by this settlement included, amongst other things, ten slaves, who are named; the possession of which she had transferred to her brother, Gabriel Cox, residing in this District; that on the day of 18 , the said slaves were seized by the Sheriff of the District, in virtue of certain writs of attachment sued out of the Court of Common Pleas of the said District of Abbeville, against her said husband, William R. Reid, at the suit of the defendant, Lamar, and other creditors residing in Georgia, and that under subsequent proceeding had in the said causes, her said husband was held to bail, and his sureties having surrendered him in discharge of their liability, he, to enable himself to take the benefit of the prison bounds Act, rendered his schedule, and made an assignment to the defendant, Lamar, of all his interest in the negroes and other property included in the settlement, who has obtained possession of them; that Harvey Wheat, the trustee, has declined to act in the matter, and desires to be discharged from the office of trustee. The prayer of the bill is, that Wheat, the trustee, should be removed and another substituted in his place; that defendant, Lamar, should be enjoined from disposing of or removing the slaves out of the State; and that he should be decreed to deliver them to the complainant and account for the hire. The defendant, Lamar, admits all the material allegations of the bill; the fact of the execution of the settlement; the identity of

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the property; the *regular registration of the deed according to the laws of Georgia, and his knowledge of its existence and contents; that the complainant removed the negroes from Georgia, and put them into

the possession of her brother, Gabriel Cox, in Abbeville District in this State; that they were seized by the Sheriff of that District, by virtue of writs of attachment issued at his own suit, and that of Felix Crossen; that William R. Reid was surrendered by his bail; and that to obtain his discharge, he assigned and delivered to him, the defendant, the said slaves, for the benefit of himself and Felix Crossen, another suing creditor; and he insists:

1st. That the contract is void for want of a schedule or other apt description of the property. 2nd. That the deed does not operate as a conveyance of the property to Harvey Wheat; but that the legal estate remained in the complainant, and vests in her husband, *jure mariti*, and was subject to the payment of his debts. He states, 3dly. That the causes of action on which the suits at law were brought against William Reid were three several promissory notes made to himself by the said William R. Reid and the complainant, with the knowledge and consent of Wheat, the trustee, amounting together to more than eleven hundred dollars, three other notes amounting together to about \$360, likewise signed by the complainant and her husband, with the like consent of the said trustee. The assignment of the negroes by William R. Reid to this defendant, was intended to satisfy the judgments obtained against him on these demands and the judgment in favor of Felix Crossen. That the consideration of the notes due to this defendant and his partner, Daniels, was goods and merchandize furnished the complainant and her husband, and for money paid and advanced for them at the particular request of complainant, with a distinct understanding, that her separate property should be liable for the payment; and he insists, in the 3d place, that if the complainant has a separate property in the negroes, it is in law liable for the payment of these debts.

Felix Crossen was not a party to the original bill, but in his answer to the cross bill he stated that the consideration of the judgments obtained by him against William R. Reid, consisted of \$324, advanced by him at the particular request of complainant and her husband, to pay a note given by them to one Perry Griffin, and for which he, the defendant, was bound as their surety, and to reimburse which the complainant promised to mortgage one of her negroes—of \$150, advanced by him at the request of complainant, to pay a note given by her and her husband to one Trammel—and of \$30, to pay a note given by them to one Reynolds.

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*The object of the cross bill is to charge the complainant and her separate property with the payment of these demands, in the event of its being determined that the complainant took a separate estate in the property, and nothing passed to the defendant, Lamar, un-

der the assignment made by William R. Reid, and the bill does not vary materially the case before stated. The complainant in the original bill admits in her answer to the cross bill that she joined her husband in the notes to Lamar, and Lamar & Daniels, and Crossen. But denies that their consideration was for the benefit of the trust estate, and states, on the contrary, that they were given for debts due by her husband exclusively, contracted some before and some after their marriage, and that she was induced to join her husband in the notes by the importunity of the creditors.

On looking through the evidence, all of which is in writing, I am satisfied that the consideration of the judgments obtained by Lamar, Lamar & Daniels, and Crossen, were principally debts contracted originally by Reid himself, and an inconsiderable part only on account of the complainant, without being able to distinguish how much of either. The notes signed by Jane Reid all bear date subsequent to the marriage; but the evidence shows that some, perhaps most of them, were for debts previously contracted by the husband, but whether before or after the marriage, does not appear; that can be ascertained on reference, if it becomes necessary.

There is no evidence of any one of the creditors practicing any importunity to procure the complainant to join her husband in the notes. Reid was insolvent and much involved in debt, and the creditors were doubtless willing to obtain the security which the name of complainant would, as it was supposed, give to their debts, and she, on her part, was, it would seem, influenced by a desire to obtain time for her husband, in the hope that he would be able to pay his debts.

The proposition that the marriage contract is void, because there is no schedule of the property or other particular description of the property, is obviously founded on the provisions of our own statutes, which provide that such contracts shall be void unless they are accompanied with a schedule describing the property intended to be settled; and it was argued, that in the absence of any evidence as to what the laws of Georgia are on the subject, we are bound to follow the rule prescribed by our own statute.

There is no doubt, as a general rule, contracts are to be construed and have effect according to the *lex loci contractus*, and that in the absence of any evidence as to what those laws are, they will be controlled by the

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laws of the place or *State in which they are to be enforced; but this rule applies only to the general, and not the statute laws. Now we know that the common law of England, as it existed in 1776, was declared to be of force in Georgia, by an Act of the legislature of that State, unless altered by statute, or was inapplicable.—Prince Dig. Laws of Georgia, 570. 2d Ed. And if it has been altered

in this respect by statute, it was incumbent on the defendant, Lamar, to prove it. Now if the description of property conveyed, is such as to render it impossible to ascertain what it was, the conveyance is of course void, because there is nothing upon which it can operate; but *id certum est quod certum potest*, and if it be so described that its identity can be ascertained by extrinsic evidence, it must prevail: that is the rule of the common law. The proof here is, that the negroes in controversy are those, with their issue and increase, which belonged to the complainant when she married Reid, and thus their identity is ascertained.

Marriage contracts, as a class, seem to be more ill fated than any other in their preparation. This is another of the many instances which have occurred, in which the Court has been called on to give effect to a marriage contract which, for want of proper skill in the draftsman, does not express what the parties probably intended. Reid was involved in debt at the time of marriage, to the extent, it is said, of more than he was worth, and was, according to the account which he gives of himself, intemperate and improvident. The complainant had some fortune, and I should suppose that it was desirable to both, that it should be secured to the use of the wife. The ordinary and proper mode would have been, to convey it to a trustee, for that and such other uses as she might think proper; and the introduction of the name of Harvey Wheat into this deed, was no doubt intended for that purpose; but it gave him no title to or interest in the property, nor any control over it; on the contrary, the contract on the part of Reid is "to surrender to her (complainant,) the full and free disposal of all and singular the property which she has now in possession, consisting of negroes, &c. to have and to hold the sole discretion and guidance." Wheat is characterized as the agent of the complainant, but no duty is assigned him, nor does it impose any obligation on him. As the mere agent, he could do nothing but what she might authorize. The legal right in the property remained, therefore, in the complainant, and vested in the husband on their marriage.

These contracts are so much favored, that however irregular and informal, if a practical legal intent can be deduced from them, the Court of Chancery will give them effect.—In *Ballard v. Taylor*, 4 Desaus. Rep. 550, the

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husband and wife entered into an agreement before marriage, without the intervention of a trustee, by which it was stipulated, "that the property belonging to each shall remain as if no marriage had taken place, and that the husband shall not have it in his power to sell any part of the same without the consent of the wife," and it was held, that the property was liable to the debts of the husband,

contracted after, and not before, the marriage, and a settlement to the separate use of the wife, of what remained after paying the debts, was decreed. *Allen v. Rumph*, 2 Hill Eq. Rep. 1, is to the same effect; and so in *Colclough v. Colclough*, cited in the last case. In both, contracts entered into by husband and wife before marriage, were set up as valid settlements, although there was no trustee.

Now, informal as this deed is, it very plainly expresses an agreement on the part of Reid, to allow to complainant, "the full and free disposal" of the property, and the "sole direction" thereof; and on the part of complainant, to allow him "competent and decent support" out of the proceeds, provided he would contribute "his labor and support" in aid thereof; and this is utterly inconsistent with the absolute right of property remaining in him. Such are the rights of the complainant and her husband.

Lamar and Crossen both admit that they had explicit notice of this deed; as creditors of the husband only, they are bound by the equities of the wife. Whether the wife's separate property is chargeable with the payment, in consequence of her joining him in these notes, is another and the only remaining question.

I am much indebted to the learning and ability with which this important and somewhat novel question has been argued, particularly by the Junior Counsel, (Mr. McGowen, for complainant, and Mr. Martin, for the defendant, to whom I supposed it had been more especially confided,) and having bestowed on it a good deal of consideration, I have come to the conclusion, that the complainant's separate property is chargeable with the payment of these notes and all her pecuniary obligations.

According to the common law, husband and wife are so identified, that they are regarded as one person, of which he alone is the representative. By the marriage, all her rights of property vest in him absolutely as to personality, and the "usu fruct," in the realty during their joint lives. She cannot, therefore, incur any personal obligation, because of the paramount right of the husband, nor can she contract about property, for she cannot have any which is not under the control of the husband during their joint lives; and

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these rules, to the extent of their application, are enforced in Equity. But looking beyond the positive rules, and with a juster perception of the rights of married women, the Court of Equity, following the civil law, recognize, for some purposes, the individuality of the wife as distinct from and independent of the husband, and although the boundaries between the absolute rights of the husband, and the qualified rights of the wife, are not minutely defined throughout all their ramifications, some principles regulating

them have been well established. Amongst the first of these, is the right of a married woman to possess and enjoy a separate estate, independent of the control of her husband. Secondly, that she may exercise over it all the powers which the grant, or other muniment, contract or bequest, under which she acquires it, authorizes, and a fortiori. Thirdly, that when the power is absolute, she may dispose of it as she thinks fit.

The deed here confers on the wife the "sole direction," and the "full and free disposal" of the property, powers as ample as any owner can exercise over property in which he has an absolute and unqualified right, and it is not questioned, that under this power she might have disposed of it by a parol or written contract, with or without consideration, or by will; or that it would have been bound if she had mortgaged it for the payment of these debts; and the question is, whether it is chargeable with the payment of them.

The question as to the liability of the wife's separate property, for debts contracted by her, has been very fully considered in *Magwood & Patterson v. Johnston*, 1 Hill. Eq. Rep. 228, in which all our own cases up to that time were reviewed; and again in *Clark v. Makenna*, Cheves Eq. Rep. 163; but none of these involve the precise question. That of *Clark v. Makenna* approximates it more nearly than any of the others, and that was put upon the ground, that by the terms of the marriage contract, the wife was expressly authorized to contract debts, and that her separate estate should be chargeable with them. The cases of *Herbemont v. Herbemont*, and *Baskins and Giles*, [Rice Eq. 315,] which followed, turned upon the power of the wife to dispose of the corpus of her separate estate.

Conceding, as before stated, that the wife might dispose of her separate estate, or charge it with the payment of debts, the Court of Equity, in analogy to the rule of the common law, held that she is not generally bound by her personal contracts, on account of her legal incapacity to make a personal contract. But a rigid adherence to such a rule might operate to disappoint the

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object of conferring on the wife a *separate estate. It might be unproductive, at the time when her wants were most pressing, and impose on her the necessity of selling or charging it for every item of her daily supplies, and the necessity of doing either might subject her to positive loss or great inconvenience; and falling back upon her right of disposition, the Courts have held, that her separate property is liable for her engagements, whenever her intention to charge it is manifested, even impliedly, by her contract; and the making of a bond, note or other written promise for the payment of a debt, is sufficient evidence of that intention. The question is too well settled

in the English Courts to render it necessary to travel through the numerous cases and authorities which relate to the subject. I will refer, however, to some of the more recent, as illustrative of the principle, and showing its application. In *Murray v. Barlee*, 4 Sim. 82, reported 6 Eng. Con. Ch. Rep. 43, the defendant, a married woman, having a separate estate, had employed the complainant, as her solicitor, in a suit in Chancery, between herself and husband, and in the course of her correspondence with him, she promised to pay his costs and charges in the cause; and the question, whether her separate property was bound by this undertaking, came before the Vice Chancellor, on demurrer. In deciding that it was, he remarks that the security is evidence of a contract to pay the debt out of her separate property. As a married woman is bound, by giving the security providing for the payment of her debt, it must be paid out of the only property which she has. The separate property is hers for all the purposes of enjoyment, and to answer all her obligations. The security is evidence of a contract to pay the debt, and it must be considered as an obligation to pay it out of her separate property. This judgment was affirmed on an appeal, and the Lord Chancellor, (Brougham,) in delivering his opinion, remarks that the wife has a separate estate subject to her own control, and exempt from all other interference. If she cannot affect it, no one can, and the very object of the settlement, which vests it in her exclusively, is to enable her to deal with it as if she was discoverer; and he goes on to ridicule, I think most successfully, the distinction which cases make between written and verbal obligations, the latter having been held not to be a charge upon the separate property. The case on appeal is reported in 3d Mylne & Keen, 209, but not having access to that book, I cite it from a note to the 3d Ed. of 2d Story's Eq. Jur. 774, where the opinion is given at length.

In *Stead v. Nelson*, 2d Beavan, 245, reported 17th Eng. Ch. Rep. 245, husband and

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wife, by writing not under seal, *for valuable consideration, undertook to mortgage the wife's separate property when required. The husband died before a mortgage was executed, and it was held that the wife was bound by the agreement, and specific performance was decreed, the Master of the Rolls observing, that a separate estate in the wife gave her, during coverture, the same right over the estate, as if she had been a feme sole, and having that right, she was bound by the agreement to mortgage. The case proceeds on the principle, that a married woman having a separate estate, is capable of contracting in reference to it, and that the agreement to mortgage, although not a mortgage, was evidence of her intention to charge the estate with the payment of the debt.

The right of a married woman to dispose of, incumber or charge her separate estate, over which, as in this instance, she has unlimited control, is fettered by many arbitrary rules, growing out of what I regard as an idolatrous devotion to the common law, which denies to her the right of volition, and even an existence independent of the husband. As conventional rules, they subserve, generally, the purposes of society; but by nature, she possesses all the faculties, passions and necessities of the sterner sex, and in the more ordinary and amiable pursuits of life, equal prudence and address; and the Courts of Equity having, so to express it, endowed her with the capacity to hold property independent of the will of her husband, what motive can exist, to restrict her in the enjoyment of it? Is it for the benefit of those to whom she may sell or give it in her life-time, or for those who may inherit it after her death? Men obtain credit upon the faith of the property which they own. They are under no necessity to sell or mortgage it to supply their daily or other wants. Their credit alone often enables them to raise funds for carrying on trade profitably, or to make profitable investments in the anticipation of accruing income: and why are these rights and privileges denied to a married woman? It is said that the common law denies it. The Courts of Equity have broken the fetters which bound her as to her separate estate, so far as to enable her to dispose of or charge it; and why, as Lord Brougham says, should she, by a scrip of paper, for money borrowed to be lost at play, bind her estate, when it would not be bound for necessities to supply her absolute wants, without that formality? I agree with him, that there ought to be no distinction. There is certainly none in reason, and when the case arises, I shall be prepared to go the whole length. The question does not, however, arise here, for these demands are all on promissory notes and fall within the rule before laid down.

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*The negroes were not bound by the executions against the complainant's husband obtained at law, nor did the property in them pass under his assignment. The cross bill was, therefore, properly brought, as this Court alone could furnish an adequate remedy. The prosecution of the suits at law was unnecessary and useless in obtaining this remedy, and the costs there, are not chargeable on this property; and Lamar must, for the same reason, account for the hire of the negroes during the time he has had them in possession.

It is ordered and decreed, that the defendant, Lamar, do, upon demand made, deliver to the Commissioner of the Court, the negro slaves named in the pleadings, with their issue and increase, since he has had them in possession, if any: and that he ac-

count before the said Commissioner for the hire of the slaves during the time he has had the possession or control over them. And it is further ordered, that the said Commissioner do sell the said slaves, or so many of them as may be necessary to raise a sum sufficient to pay the principal debt and interest of the judgments referred to in the pleadings, deducting the amount of the hire of the negroes from the debts due to Lamar, and the costs of the original and cross-bills, and apply the same to the satisfaction thereof.

The complainant, Jane Reid, appealed, and moved the Court of Appeals to reverse the decree, on the grounds:

1st. Because a married woman has no power to contract, so as to sue or be sued.

2d. Because a married woman having a separate estate, has no control over or power to contract in relation to it, except what is expressly given by the deed which creates the estate. Her incapacity is general, and her power of disposition is limited by the instrument, both as to its extent and the manner of exercising it.

3d. Because a married woman cannot bind her separate estate by a general personal engagement.

4th. Because the decree is contrary to the equities of the case, as administered in South Carolina.

Perrin & McGowen, for motion.

Wilson & Martin, contra.

HARPER, Ch., delivered the opinion of the court.

We agree with the Chancellor, that the very informal instrument set forth in the decree, must be supported as a marriage contract.

It is hardly necessary to consider the ground chiefly debated (though perhaps not

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strictly involved in the case). If any thing can be considered as settled, it is the settled law of this State, that where property is given or settled to the separate use of a married woman, she has no power to charge, encumber, or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating her estate; which power must be strictly pursued—in contradiction to many English cases, in which it has been held that she is a feme sole, with respect to her separate property, and may charge or dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument. This has been the settled law since the decision in *Ewing v. Smith*, cited in argument, (3 Des. R. 417 [5 Am. Dec. 557]) followed by a great number of cases decided in conformity to it, for a period of more than thirty years, and without any decision impugning or conflicting with it—though some dicta of judges were found, seeming to imply, that they thought the sub-

ject might still be open to consideration. But no such dictum or intimation has been found since the decision in *Magwood & Patterson v. Johnston*, decided in 1833. I can say that, while at the bar, I considered the doctrine so well settled as not to make the question where it might have been raised, and as Chancellor, I have decided several cases involving the principle, in which it was not mooted. The general doctrine was not questioned in *Cater v. Eveleigh*, [4 Desaus. 19, 6 Am. Dec. 596,] in *James v. Mayrant*, [4 Desaus. 591, 6 Am. Dec. 630,] in *Montgomery v. Eveleigh*, [1 McCord Eq. 267,] or in *Magwood & Patterson v. Johnston*, though it was contended that the transactions in those cases came within the exception to it.

The court certainly does, sometimes, review its own decisions, and I am apprehensive there is too general a disposition to regard it a matter of course, that every question, however well settled, may be agitated again and again, and argued as *de novo*. Nothing can be better calculated to shake all confidence in the administration of Justice and the security of property. Where the operation of decided principle has been found inconvenient or injurious in practice, there is more reason that it should be reviewed and the mischief corrected. Though even when such consequences have been felt, yet if the decision has long obtained, and rights may have been acquired on the faith of it, the court refuses to interfere. But with respect to the decision in question, even those who dissent from it on the score of authority, acknowledge the wholesomeness of its operation, and its tendency to promote the objects which the Court of Equity had in view, in recognizing a separate property in *femes covert*, and in protecting them against the influence or practices of their husbands; which might be exercised without the possibility of detection; as also to guard them against their

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own generous or devoted impulses. The Judges who dissented from the opinion of the majority of *Ewing v. Smith*, afterwards acceded to it, and I am yet to learn that any inconvenience has followed to married women or their children—the objects of the court's protection.

But it is contended that though this may be the law of our own State, yet this instrument must have effect according to the law of Georgia—the State in which it was made: that Georgia has generally adopted the English law, from which she is not known to have departed, and that we should determine according to the general current of the English decisions.

I do not know whether it is worth while to remark that, at the time our Act of 1721 was passed, adopting the principles and practice of Equity law, as administered in the high court of Chancery of South Britain,

South Carolina and Georgia constituted one colony. Upon such a separation as that which afterwards took place, each party carried along with it its own laws—such as before had been common to both. It must be observed that, in following the case of *Ewing v. Smith*, we are to regard it as a decision upon English law; the court had no other law to decide upon; and if the decision be binding on us as authority—as every decision of our courts in the last resort must in general be—we must regard it a correct decision upon English law. The court disclaims all power to introduce new law; though they thought themselves at liberty, in deciding for a new community, amidst the conflicting decisions and jarring opinions of the English courts, to adopt such views of the law as might obviate the inconveniences of which the British courts had so much complained, and which seemed most conformable to general principle and the sounder opinions. And were they not so at liberty? As I have said, we sometimes review our own decisions, when inconvenient consequences are found to follow from them; unless they have been so long established and followed, that the alteration might interfere with vested rights. In England, it may well be, that under the predominant current of decisions, for a great length of time, rights had become so fixed, and property so disposed of, that the Judges who most strongly condemned those decisions, would not venture to depart from them. Such reasons would not apply to our own courts, deciding, so far as we know, for the first time. Was it not their duty to guard against the evils so loudly complained of in the country from which our laws are derived? They were as much at liberty to review the English decisions as their own.

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*I need not do that which has been done before by abler men; compare and collate the cases (though I have examined many of them) with a view to shew that they are uncertain and contradictory between themselves; many of them referable to no fixed principle, and a source of embarrassment and regret to the ablest Judges who have administered the English Chancery law. I need only, for this purpose, refer to the opinion of Chancellor Kent in the case of the Methodist Episcopal Church v. Jaques, 3 John. Ch. 77—and indeed to the dissenting opinion of Chancellor DeSaussure, in *Ewing v. Smith*. It is true, that the decision of Chancellor Kent in the former case, was overruled by the Court of Errors of New-York. But neither the one decision nor the other, is conclusive on us as authority: they only receive the consideration to which their reason and justice may seem to entitle them. The opinion of the Court of Errors seems to have a strong leaning against the making of any separate provision for a married woman, and in favor of carrying back the doctrine to that of the

old common law; by which the existence of the wife is, to every purpose, merged in that of the husband. But whatever may be the opinion as to the superior strength of the argument for each decision, I think the argument of Chancellor Kent quite sufficient for this purpose—to shew that, in adopting the doctrine of *Ewing v. Smith*, the Court was guilty of no usurpation or flagrant violation of unquestioned principles; but might well adhere to that which seemed the safer and better rule. It might be different in relation to the present case, if it were shewn that a different course had been pursued in the Courts of Georgia, the State in which the contract was made; but this was not alleged or shewn.

Were the cases contradictory? I believe no one has attempted to reconcile the case of *Sackett v. Wray*, 4 Br. Ch. Ca. 473, and other cases to the same purport, with *Pylus v. Smith*, 3 Br. Ch. Ca. 340; 1 Ves. Jr. 189, and others which are supposed to be the more numerous and governing English decisions. The former cases are said to be opposed to the current of previous decisions, and to be overruled by subsequent ones. It is held, in consequence of the general expression, that a married woman must be regarded a feme sole in relation to her separate estate; that although a particular method of charging or disposing of her separate estate is directed by the instrument creating it, yet she may charge or dispose of it any way she thinks proper—in violation of the general principle, that *expressio unius exclusio alterius*. In *Jones v. Harris*, 9 Ves. 497, Lord Eldon thought it a doubtful question, and deserv-

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ing a very full review, whether a married woman could charge her separate property in any other manner than that prescribed by the deed. If he was prepared to review, he was not unprepared to reverse, the previous decisions, by which he so far considered himself bound. So in *Parker v. White*, 11 Ves. 209, this Judge declares his mind to be in a state of great distraction on the subject, and elsewhere speaks of the law's being in a distracted state. There are contradictory cases, whether a married woman can bind her separate estate by her general personal engagement, without a specific charge. And supposing her to have such power, there are various cases inconsistent with each other or separated by impalpable distinctions. It has been questioned, whether such engagements must be in writing—by note or bond—or whether an express verbal promise will do, or whether an implied undertaking will be sufficient. Yet, I think there was a stronger equity against the wife in the cases of *Duke of Bolton v. Williams*, and in *Jones v. Harris*, where the wife herself had received the money, than in *Hulme v. Tenant*, where she became bound for her husband's debt. The former were cases of an implied undertaking.

The case cited by the Chancellor, of *Murray v. Bartlee*, in which a married woman was living apart from her husband, was one in which a verbal promise was held to bind the separate estate. That case may, perhaps, be supported on the ground that, apart from the express promise, the services of the lawyer constituted a necessary part of the expenses of the trust estate. The husband could not be expected to pay the costs of the suit against him. If there was any thing which could be considered necessary to the trust estate, it was that the wife's title to it might be vindicated, and its possession or profits recovered or secured to her. It might well come within the distinction laid down in *Magwood & Patterson v. Johnston*, 1 Hill Eq. 228, that when a person has paid his money or given credit to effect the purposes of the trust, he may have an equity to stand in the place of the cestui que trust for his reimbursement. The ridicule of the distinction between written, verbal, or implied engagements only proves that such distinctions existed, and were insisted on. Questions have been made in the case of a trust merely to the separate use of a married woman, without specifying any method of appointment or disposition; whether she must necessarily have the power of making a will, or what was the further extent of her power.

There has been a conflict also, in cases where the trust was, generally, to pay rents and profits into the hands of a married woman, or to pay them from time to time. In short, doubt, contradiction and uncertain-

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ty overspread the whole *mass of decisions growing out of the fundamental doctrine—that in the disposal of her separate property a married woman is to be regarded as a feme sole; so as well to justify the complaint of Mr. Sugden, in his treatise on Powers, p. 114, that it is almost impossible for a practitioner to advise confidently in any case where the very words have not received a judicial determination. From this labyrinth, the case of *Ewing v. Smith* has happily extricated us, and I feel no disposition to plunge into it again. I believe it may be said, that since the time of Lord Hardwicke, hardly any Judge has sat on an English Chancery bench, before whom the subject was brought, who has not condemned the doctrine or some of its modifications.

It is contended, however, that this is a case in which the requisite power has been conferred on the wife by the settlement; the property being placed at her “sole direction and free disposal.” Suppose this equivalent to a power to give, sell or charge at her discretion; and the question is, does the joining her husband in the notes of hand, constitute a charge on her separate estate? This is, in fact, but a modification of the doctrine we have already considered; and one of those which the English Judges have regarded as

most exceptionable. Lord Thurlow perceived the absurdity, in the case of *Hulme v. Tenant*, the case principally relied on—that by the execution of an instrument purporting to bind herself personally, which she could not do, and which, by the general law, was absolutely void, she might bind her separate estate. He yielded to the weight of previous authorities, determining that a married woman was a feme sole with respect to her separate estate; and if a feme sole, that her estate must be bound by all her engagements. It was in relation to this case, that the strong expressions were used by Lord Roslyn, in *Whistler v. Newman*, 4 Ves. 143,—that “nothing could be more perfectly without all law than the bond in that case.” “It seems to require this principle in all its extent; that where the married woman has the property in the principal or dividends, whatever disposition she makes of it, if it is her pleasure to do it, even in so absurd a way as by giving a bond, supposing her to know she is doing it, this Court will support it and build upon it. It takes away all the protection from married women, and makes trusts for their benefit of little importance.” Lord Alvanly expressed himself hardly less strongly, and so said Lord Thurlow, though he conceived himself bound by authority; and none more frequently than Lord Eldon, who often expressed his wish that the cases should be reviewed. The cases are very well collated

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*and commented upon by Mr. Clancey in his treatise on Marriage Settlements, p. 137.

But it is a misconception to suppose that this point of the case is to be separated from the general doctrine I have considered. A married woman is supposed to bind her property by her general engagements, because with respect to it she is regarded as a feme sole.

But though it has sometimes been said in relation to our doctrine, that she is only a feme sole sub modo, or to the extent that the settlement makes her so; yet these expressions are inaccurate. She can, in no manner of respect, be considered a feme sole. A feme sole disposes of, or charges, her property by her own act, and according to her own will, by her inherent power as owner. A feme covert exercises a delegated authority, and cannot exceed it. She is enabled to execute a power, as, in some instances, any third person—feme covert or other—even those having no interest in the property, might be enabled to execute it, and bind her by their act. The case of *Clark v. McKenna*, Cheves Eq. 163, rested on no authority of the wife to bind her property as a feme sole, but upon the terms of the instrument, by which the property was made liable to her “debts and contracts.” This resulted from the power of the grantor over the property.

It follows, that the notes in question in this

case were void, both at law and in equity, the complainant having no power to charge her estate in that way.

It is hardly necessary to advert to a distinction attempted to be enforced, between a case in which the wife has the fee, and those in which she has only a particular estate. Nor should I do so, but for a suggestion thrown out in the circuit opinion of a Judge to all whose suggestions I listen with deference. But this does not amount even to a dictum, and I have found no such suggestion in any other case. The case of *Ewing v. Smith* was one in which the wife had joined her husband in a bond, and payment was sought out of a fund of which the property was hers absolutely. The truth is, that the protection of the Court is more necessary and useful where the wife has the absolute property, than where she has a particular estate. If there be a life estate with remainder to children, or contingent limitations, she cannot defeat these by any disposition of her estate, any more than in any other case of a life estate with remainders. The power to dispose of her own estate, does not imply that she may dispose of the estates of others. But if she squanders the fee, children may be left destitute, when by restraining her power of disposition, the property might be secured to them.

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*It is ordered and decreed, that the decree of the Chancellor be reversed, and that the defendant, Peter Lamar, deliver up to the complainant the slaves in question, and account for their hire, and that the cross bill be dismissed.

JOHNSTON, Ch., and DUNKIN, Ch., concurred. Decree reversed.

I Strob. Eq. 43

S. W. BENTLEY and B. H. BRADLEY,
Adm'rs, v. ELIZABETH LONG
et al.

(Columbia. Nov. and Dec. Term, 1846.)

[Wills ⇐634.]

When testator gave to his wife the whole of his estate, both real and personal, during her life or widowhood, and at her death or marriage, to be equally divided among his children, each child, surviving the testator, took a vested transmissible interest; and the administrator of any child dying afterwards, during the lifetime of the widow, will, on the falling in of the life estate, be entitled to that portion of the estate which his intestate would have taken, if he had survived the tenant for life.

[Ed. Note.—Cited in *McCreary v. Burns*, 17 S. C. 53; *Roundtree v. Roundtree*, 26 S. C. 474, 2 S. E. 474; *Brown v. McCall*, 44 S. C. 518, 22 S. E. 823; *Tindal v. Neal*, 59 S. C. 11, 36 S. E. 1004.

For other cases, see Wills, Cent. Dig. § 1495; Dec. Dig. ⇐634.]

[Wills ⚡628.]

The rule laid down to distinguish between vested and contingent interests, is, that if the devisee is in a capacity to take, at the death of the testator, whenever the possession becomes vacant, and is only withheld from the possession by the temporary right of enjoyment in another, then the devisee has a vested transmissible interest, and not one that is merely contingent.

[Ed. Note.—Cited in *Gourdin v. Deas*, 27 S. C. 487, 4 S. E. 64; *Ketchin v. Rion*, 68 S. C. 275, 47 S. E. 376; *Roberts v. Herron*, 78 S. C. 119, 58 S. E. 968.]

For other cases, see Wills, Cent. Dig. § 1460; Dec. Dig. ⚡628.]

[Wills ⚡723.]

Where the widow of testator is, under the will, tenant for life, and apportioned off any part of the estate to his children, under a power vested in her by the will to give off to those who may marry, &c. any part which she might be able to spare—an account to be kept of its value, to be discounted against their full shares at the final distribution, the portions assigned to the children thus advanced, vest in them absolutely, subject only to be accounted for at the final distribution on the falling in of the life estate, and not to be thrown back as a part of the general estate to be then distributed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1730; Dec. Dig. ⚡723.]

[Execution ⚡450.]

If a creditor under ca. sa. take from his debtor an assignment of his undivided interest in a personal estate, such assignment is valid to the amount of his credit; and if he afterwards purchase the same interest from the sheriff, who sells it under a levy to satisfy senior executions to his own, the sale is void, but the creditor so purchasing will stand in the place of those senior creditors and be subrogated to all their rights.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1302; Dec. Dig. ⚡450.]

[Life Estates ⚡6.]

It is the constant practice of the court to require security for the production of slaves at the termination of the life estate, or any other contingency where the rights of the remainderman spring up, whenever these rights appear to be in danger.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 18; Dec. Dig. ⚡6.]

Before Johnson, Ch., at Union, June, 1846.

Johnson, Ch. The following is a copy of the second clause of the last will and testa-

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ment of the late William *Long, who died some twenty or thirty years ago, and on which the rights of these parties mainly depend.

"2d. I give unto my beloved wife the whole of my estate, both real and personal, during her life or widowhood, and at her death or marriage, to be equally divided amongst our children: and should my said wife have any thing to spare out of my estate, previous to her death or marriage, I wish her to give it to those of my children who may marry or settle off—the amount to be valued and kept as an account, to be deducted from their equal shares; and whenever the amount of my estate is to be divided according to the above conditions, I desire and wish that each

of my children shall select a person disinterested, and that the said persons may equally divide my said estate, and that the whole of my said children may, by lot, receive their equal share."

He was, at the time of his death, seized of a plantation, a number of slaves, and other chattels, and left surviving his widow, the defendant, Elizabeth Long, whom he appointed executrix, and ten children:—Henry, the intestate of complainant, Bradley, and the defendants, James, William, Ben, John, Elizabeth Farnandes, Letitia Ezell, Caroline, wife of Amasa Ezell, Sarah, wife of Smith Willis, and Mary, wife of Daniel Mabray, all of whom are defendants, and the issue of the testator and the defendant Elizabeth Long, his widow.

The complainant, Bradley, insists that under the provisions of the will, he will, on the death of the widow, be entitled, as the legal representative of his intestate, Henry Long, to his interest in the estate, being the one-tenth part; and this raises the question, whether the children took a contingent interest, dependent on their surviving the widow, or a vested transmissible interest, to take effect in possession, on her death—and one of the objects of the bill is, to have this question settled, and their rights ascertained and declared.

In *Bankhead v. Carlisle*, 1 Hill Eq. page 357, testator gave to his wife, during her widowhood, all his estate, real and personal, and directed that on her death or marriage it should be equally divided among all his children. Gideon, one of his children, survived the testator, but died in the lifetime of the widow, who remained unmarried until her death, and it was held that Gideon took a vested transmissible interest. The rule laid down to distinguish between vested and contingent interests, is, that if the devisee is in a capacity to take, at the death of the testator, whenever the possession becomes vacant, and is only withheld from the possession by the temporary right of enjoyment in another, then the devisee has a vested transmissible interest, and not one that is merely contingent; and it is hardly necessary to observe

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*that this case is governed by that rule. The terms employed in the two wills are substantially, and indeed almost literally, the same. On the falling in of the life estate, the complainant Bradley will be entitled to the interest his intestate would have taken if he had survived the tenant for life, to be disposed of in the due course of administration.

On the 5th December, 1839, the defendant, Benjamin Long, was arrested on a ca. sa. issued from the Common Pleas, at the suit of the complainant, Bentley; and on the 7th, two days after, he filed in the office of the Clerk of that court a schedule of his property, with the intention of applying for the

benefit of the Prisons bounds Act. One of the items in this schedule is, "my interest in my father's estate." (I use the words.) In addition to this, the schedule contains numerous other items, consisting of choses in action, live stock, farming utensils, a bale of cotton, household furniture, &c. On the 9th of the same month only two days after, the defendant, Benjamin, endorsed on the schedule an assignment to complainant, Bentley, in the following words:—"I, Benjamin Long, the defendant in the within stated case, do hereby assign over to Samuel W. Bentley, the plaintiff in this action, all the within named articles, accounts, &c. reserving to myself what the law in such cases made and provided, allows." (Signed) "B. F. Long." Following, is the written consent of complainant, Bentley, to his discharge, on his delivering to him all the within named articles, accounts, &c. and he was accordingly discharged.

The amount of the principal sum due by defendant, Benjamin Long, on the ca. sa. was about \$70, increased by the amount of interest and costs. The value of the articles specifically enumerated in the schedule, would seem, from a rough estimate, to be more than sufficient to pay the debt, but it does not appear that they were ever delivered to Bentley, or how they were disposed of. He subsequently received \$36, leaving about \$50 of the whole demand unsatisfied. Subsequently, the complainant, Bentley, procured the Sheriff of the district to advertise for sale the undivided interest of the said Benjamin Long in the estate of his father, in virtue of the assignment so made to him, and on the 2d March, 1840, the Sheriff offered the same for sale at public outcry, and complainant, Bentley, after a fair competition, became the purchaser at \$500; a sum, I suppose, approximating its value at the time. There were several writs of fi. fa. at the time of the sale, in the hands of the Sheriff, against defendant, Benjamin Long, at the suits of other persons, which the Sheriff stated had been levied on his interest in the estate, and that the sale was made as well under their

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authority as *under the assignment to Bentley; and the proceeds of the sale have been exclusively applied to them, they being older than Bentley's judgment. But the sheriff did not take the slaves (the only subject of controversy here,) into his possession, nor were they present at the time of the sale. Bentley subsequently received from the defendant, Farnandes, the balance due him on his judgment against Benjamin Long. Complainant, Bentley, claims to be entitled to the undivided interest of Benjamin Long in the estate, when the life estate falls in—1st, under the assignment of Benjamin Long to himself; and, 2dly, under his purchase at Sheriff's sale. And the leading object of the bill, in which both complainants were supposed to be

interested, was to obtain an injunction, to restrain the defendants, who are in possession of the negroes, from removing them out of the jurisdiction of the court; but supposing that complainant, Bentley, has no legal interest in them, I will first dispose of his claims.

It has been repeatedly held, that a fi. fa. has no lien on the defendant's undivided interest in personal estate, nor is it the subject of levy and sale by the sheriff. The possible uncertainty as to the identity of the thing to be sold; the want of knowledge of the value; the difficulty, expense, delay and uncertainty of obtaining possession, are a sufficient foundation for the rule. I refer only to the case of *Dargan v. Richardson*, *Dud. Rep. 62*. The complainant, Bentley, took, therefore, nothing by his purchase at sheriff's sale.

The Act of 1788, 5 Statutes at Large, 78, provides that a prisoner in execution in civil process, shall have liberty, at any time during his confinement, to render a schedule, on oath, of his whole estate, or so much thereof as will pay and satisfy the sum really due on the action on which he may be confined, and if no cause be shown to the contrary, be discharged on his assigning to the plaintiff the estate and effects mentioned in the schedule—whereupon the creditor may take possession of the property, and, if necessary, sue in his or her own name, for the recovery thereof; and it is further provided, that the property mentioned in the schedule must be visible property, if the prisoner is possessed of any such; but if he is not, choses in action must be mentioned, with the names and places of abode of the witnesses thereto.

The interest which defendant, Benjamin Long, had in the estate, was a chose in action, and the effect of his assignment to complainant, Bentley, was to constitute him his agent to reduce it into possession, and to pay himself out of it the amount due to him on the judgment, and no more. It did not invest him with the unqualified right of property, but invested him with a power which

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he had no authority to *assign to another. And if a stranger had purchased at the sale, he could, under no circumstances, have been in a better condition than Bentley himself. The proceeds of the sale were about ten times the sum due to Bentley, and supposing that the full value, the purchaser could be entitled to no more. Besides, that was an abuse of the power, as Bentley was entitled to sell no more than what would pay his debt, and at the rate of the sale, one-tenth, instead of the whole, would have paid it. But without further speculation, Bentley sold and Bentley purchased. The legal title was in him, and he acquired no more by the purchase. It was assigned to him, to be used to pay the debt due him by defendant, Benjamin Long, and that has been paid to him by other

means, and clearly he has no further claim to the property. The bill is, therefore, dismissed, so far as complainant, Bentley, is concerned.

The only remaining question is, whether the complainant, Bradley, is entitled to the security he prays against the removal of the slaves now here, out of the limits of the State, or for their forthcoming at the termination of the life estate.

In 1839, about the time, or after, that the defendant, William Long, had married, the defendant Elizabeth Long, in pursuance of the powers vested in her by the will gave to him a negro boy, called Reuben, which, by persons selected for that purpose, was valued at \$550. On the marriage of her daughter Caroline, to Amasa Ezell, she, in like manner, gave her a negro, called Laura, valued in like manner, at \$225.

The life estate of defendant, Elizabeth Long, in all the remainder of the estate, real and personal, consisting of land and negroes, was sold by the sheriff under a fi. fa. against her, and was bid off by Z. Hooker, (except one negro bought by Robert Thomson,) some time in 183-, and was assigned by him to defendant, James Long. They remained, notwithstanding, in her possession, until November, 1845, when the defendants, by mutual consent, called in the aid of three disinterested persons, and partitioned the negroes among themselves, as though the life estate had fallen in. Complainant, Bradley, had notice of this proceeding, and was requested to attend, but did not. The defendants proposed to let him into the partition, in right of his intestate, but in consequence of his neglect to participate, they set apart no portion for him, and now put themselves on their rights.

In this partition, four negroes were assigned to defendants, Farnandes and wife, and are now in his possession, to wit: Silena and her three children, Walter, Minerva and Joe. They claim two others, Adolphus and Minerva, who they state in their answer are

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out of the State, but it is not stated, *nor does it appear, when or by whom or for what purpose they were carried out of the State. The remainder of the slaves belonging to the estate of the testator—how many in number are not stated, nor are their names or ages—are represented to have been carried out of the State by James Long and John Ezell, and are supposed to be in their possession, in Tennessee. Neither of these defendants, nor Amasa Ezell and wife, have been made parties by process, and the property or negroes claimed by them being out of the State, the court can make no order affecting their interest that could be carried into effect. It appears, from the answer of defendant, Farnandes and wife, that he is in possession of a negro girl, called Amanda, one of the negroes that belonged to the estate, left with them by defendant, Smith Willis; but I

have been unable to ascertain, from the pleadings, whether this negro was given to Mrs. Willis by the executrix, in execution of the powers vested in her by the will, or assigned to her in the general partition, nor is there any evidence on the subject; and I propose to direct an inquiry into that matter.

The question more immediately affecting defendant, William Long, is, whether the negro given to him by his mother on his marriage, vested an absolute estate in him, or will be subject to distribution on her death, as part of the general estate. The will provides that "should my said wife have any thing to spare out of my estate, previous to her death or marriage, I wish her to give it to those of my children who may marry or settle off—the amount to be valued and kept as an account to be deducted from their equal share." That the power was fairly and legitimately executed in this instance, is shewn by the fact, that at the general division of the negroes, their aggregate value, including those that had been given to the married children, was estimated at more than \$7000. The share of each child being worth about \$700, and the negro given to William Long was valued at \$550, less by \$150 than he was entitled to out of this fund. The direction that an account should be taken of the property so given to the children, and that the amount should be deducted from the share of the child so advanced, on the final distribution of the estate, negatives the idea that the property itself should be brought into the final division. William Long, therefore, took an absolute estate in the negro Reuben, and was only bound to account for his value at the time of the final distribution; and the same rules apply in all cases where other children have been so advanced.

On the principles before laid down, the complainant, Bradley, will be entitled, on the

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death of Elizabeth Long, the tenant for life, to the share to which his intestate would have been entitled if he had survived, in the negroes now in the possession of defendants, Farnandes and John Long; and his right to security against the removal from the State, is the only remaining question affecting these defendants.

The life estate of Elizabeth Long in the negroes, was legally in James Long, who derived his title from Hooker, who purchased at Sheriff's sale. The defendants, Farnandes and John Long, derived their possession from him, and that possession is therefore rightful. Now it is not enough that one who will become entitled to property on the happening of a future contingency, that he apprehends danger, or the possibility that another, who has the rightful possession, will remove it out of the jurisdiction of the Court, to entitle him to the extraordinary aid of this Court to prevent it. There must be some reasonable ground to apprehend it. In the

case of John Long there is none. He has been long and permanently settled in the neighborhood—has a family around him, and the means of comfortable support, and there is no evidence of any purpose or intent of removing or disposing of the negro in his possession.

Defendant, Farnandes, has also a family and permanent settlement in the neighborhood, with even more abundant means. The only evidence against him, was the declaration that he intended to remove to Texas next fall, and this was qualified, according to another witness, by the addition that he did not intend to go until he had fought out "this battle,"—meaning this suit. Defendant, Farnandes, was among the volunteers for the Mexican War, and this declaration was made while the volunteer company to which he belonged, he being among them, were parading the streets of the village, under the eye and during the sitting of the Court—perhaps on the day the cause was heard. This certainly was not the foundation of the bill, and I am disposed to regard it rather as a declaration made under the excitement of the moment, than as a settled purpose of removing himself or his property out of the State, or with the intent to deprive complainant, Bradley, of his rights. It strikes me as too trivial to justify the Court in imposing on him the rigid terms demanded by the complainant:

If defendant, Willis and wife, have put in their answers to the amended bill, which was filed after the partition of the negroes, and out of which the principal difficulties arise, I have not been furnished with them, nor do my notes furnish any evidence of any fact indicating his intention of removing. On the contrary, my recollection is, that on

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an inquiry from *the court, it was answered at the bar, either that he had no permanent residence, or that he was then in North Carolina. Their case seems indeed, to have been, in a great degree, overlooked by the court or the counsel, or both. It is therefore ordered and decreed, that the Commissioner of the Court do ascertain and report, whether the defendant, Willis, has a permanent residence in this State or elsewhere, or is transient, and whether, having a permanent residence in this State, there is any reason to believe that he is about to remove or carry the said negro out of the State, and to report any other special circumstance that he may deem material.

I have not been put in possession of any answer from the defendants, Daniel Mabray and wife. It appears, however, from the answer of Farnandes and wife, and I take it to be true, that in the general partition, a negro, (Phil.) was allotted to them. They, it seems, have a permanent residence in Spartanburg, and there was no evidence be-

fore me of his intention to remove, or to remove the negro.

It is also ordered and decreed, that the bill be wholly dismissed, as to the defendants, William Long, John Long, Daniel Mabray and wife, Elizabeth Long, and Farnandes and wife. These defendants, it is understood, under former orders made in the cause, were arrested under the process of the court, and compelled to enter into bond with security, not to remove the negroes in their respective possession, without the jurisdiction of the court. Neither the orders nor the bonds have been put in my possession—their precise forms are not therefore known. It is fit, however, that they should be annulled; and it is further ordered, that all orders heretofore made in the cause, requiring these defendants to give security, in whatever form they may be found to exist, be, and they are hereby, set aside and rescinded, and all bonds or other securities made or entered into in pursuance of such orders, be delivered up and cancelled.

The parties will be at liberty to move any other or further orders that may be necessary to carry this decree into effect.

I do not think it a case for costs. Each party must pay their own.

I have stated in the decree that James Farnandes had volunteered for the Mexican war. I took that for granted, from seeing him, from the Bench, marching in the streets with the company of volunteers; I am satisfied since, that I was mistaken, and that he was not one of the volunteers.

There is some mistake, too, in the statement as to Bradley's having notice to attend the division of the property. He was told the family were about to divide the property,

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*and requested him to appoint a time to attend, and he declined having any thing to do with it. I was the less particular, as I supposed that neither of the foregoing facts had any material bearing on the case. I think a schedule rendered by Ben. Long to obtain the benefit of the Prison Bounds Act, on being subsequently arrested on a ca. sa. at the suit of Bentley, was offered in evidence.

The complainants appealed from the decree of the Chancellor in this case:

1st. Because the complainant, Bentley, acquired a good title to the interest of defendant, Ben. Long, in the estate of his father, by virtue of his assignment of the same under ca. sa. to complainant, Bentley, and by Bentley's purchase of said interest for a full and valuable consideration, under a fair sale and competition.

2d. Because, if complainant, Bentley, acquired no title to said interest by said assignment and purchase, he should at least be refunded or reimbursed the amount which he paid for the benefit of Ben. Long, on executions then existing in the sheriff's office

against him, and that the said interest of Ben. Long in the estate of his father, should stand pledged as a security for the refunding of the amount so paid.

3d. Because the defendants, who are now in possession of any of the property derived from the estate of the testator, should be enjoined from removing said property beyond the limits of this State, and be required to give security for the forthcoming of the same, upon the termination of the life estate.

Dawkins & Wright, for the motion.

Herdon, for defendants, Farnandes and wife.

Thomson, for defendants, Wm. Long, Smith Willis and wife.

CALDWELL, Ch., delivered the opinion of the Court.

This court concur with the circuit decree in the construction of the will of William Long, deceased, that his children take a vested transmissible interest in his estate, to take effect in possession on the death of his widow; that the assignment of Benjamin Long (one of the children) of his undivided interest in the personal estate of his father, under the Act of 1788, to Samuel W. Bentley, who had had him arrested under a ca. sa. was valid; and that the subsequent sale of the same interest under the senior judgments and executions against Long, by the sheriff to Bentley, was void.

But this court differs from the circuit de-

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creed, as to Bentley's right to relief; he paid the sheriff five hundred dollars, which has been applied to older judgments and executions against Long. Bentley's claim is that of a junior creditor, who has paid prior debts, and he must be substituted in the place of the senior creditors, and subrogated to all their rights.

The judgment creditors of Long have already done all that can be done at law, to establish and secure their rights, and this court alone possessed the power to enable them to pursue the equitable interest of the debtor, in the hands of the tenant for life, or of those who have possession of the property, with knowledge of the rights of the remaindermen, so as to subject it to these claims when the life estate falls in. *Kennedy, ex'or. Simmons et ux. et al. Dud. Eq. R. 141.* An account must be taken between Bentley and Long, to ascertain what the former has received on his own execution, and what he has paid to the sheriff on the senior judgments and executions, (which must stand for his benefit,) the balance to be re-imbursed to him out of Long's undivided interest in his father's estate.

The tenant for life of personal property, or one that purchases from him, with a knowledge of the estate in remainder, is a trustee for the remainderman; but before security

for the forthcoming of the property at the termination of the life estate, will be required, the remainderman must have reasonable grounds to apprehend the loss or removal of the property, or that his rights are in danger; otherwise, only a schedule of the property will be ordered to be given.

James Long, one of the remaindermen, and of the defendants, has purchased his mother's life estate; the defendants have partitioned the property, which consisted principally of negroes, among themselves, without apportioning any part to either of the plaintiffs; the defendants now hold in severalty the negroes; they resist the plaintiffs' claim, and in the language of one of the answers, stand upon their rights; several of the defendants have removed out of the State, and have taken a large number of the negroes with them. These acts of the defendants are sufficient to shew that the plaintiffs' rights are not only in danger, but that a loss has already been sustained by the removal of part of the property beyond the jurisdiction.

The case of *Cordes v. Ardrian*, 1 Hill Eq. R. 157, and others, is analogous; there a creditor of the legatee, who was in possession of the slaves bequeathed to him, (with a limitation over to his surviving brothers and sisters,) levied an execution on two slaves, and sold his life estate in them. Ardrian purchased them with notice—the re-

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maindermen became fearful that all the slaves in the same situation, (the legatee being in debt and embarrassed,) might be sold and scattered over the country, or carried beyond the State, and insisted on having their interests secured, and that the slaves should be produced and delivered on the event's accruing which would entitle them to the possession; the court said that it had been "the constant course to require security for the production of the slaves at the termination of the life estate, or any other contingency, when the rights of the remainderman spring up, whenever these rights appear to be in danger," and granted the relief.

Mrs. Long, the mother, has executed the power under the will, of apportioning off such part of the estate as she could spare, by delivering the slave Reuben to William Long, and the slave Laura to Amassa Ezell and Caroline his wife; these slaves are therefore vested absolutely in them—they must account for the value of their respective slaves, on the final distribution of the estate.

It is ordered and decreed, that the part of the circuit decree that dismisses the bill as to Bentley, and rescinds the previous orders requiring the defendants to give security for the negroes in their possession, (except the two slaves Reuben and Laura,) and orders the bonds or other securities made or entered into, in pursuance of such orders, to be

delivered up and cancelled, be reversed—that the parts of the circuit decree inconsistent with this opinion, be modified by it, and that the other parts be affirmed.

HARPER, Ch., JOHNSTON, Ch., and DUNKIN, Ch., concurred.
Decree modified.

I Strob. Eq. 53

FREEMAN & FREEMAN v. TOMPKINS.

(Columbia. Nov. and Dec. Term, 1846.)

[*Gifts* ⇨42.]

Where the donor retains possession of the property after the execution of the deed, and his note, for the payment of money, is either taken, or signed as surety, by another not having notice of the deed, it constitutes a charge upon the property in the hands of the donor; and a release of the debt, afterwards made in order to support the deed, constitutes a good consideration to charge the trust estate.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 78; Dec. Dig. ⇨42.]

[*Trusts* ⇨225.]

The removal of an existing incumbrance is a ground for reimbursing the party removing it, out of the fund thus exonerated; any expenditure made for the benefit of a trust estate, constitutes a good claim against it, to the extent of the benefit conferred.

[Ed. Note.—Cited in *Kincaid v. Anderson*, 33 S. C. 265, 11 S. E. 766.

For other cases, see *Trusts*, Cent. Dig. § 322; Dec. Dig. ⇨225.]

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[*Life Estates* ⇨25.]

*Where the life tenant has rented or hired the land or slaves, to another who employs them in planting, should the life tenant die after the first of March, the hirer's possession shall not be disturbed until the crop of that year is finished, but he shall secure to the remainderman that proportion of the rent or hire arising after the accrual of the remainder.

[Ed. Note.—Cited in *Clifford v. Read*, 3 Rich. Eq. 221; *Newton v. Odom*, 67 S. C. 9, 45 S. E. 105.

For other cases, see *Life Estates*, Cent. Dig. § 47; Dec. Dig. ⇨25.]

Before Johnson, Ch., at Edgefield, June, 1845, whose decree is a sufficient explanation of the case.

Johnson, Ch. In April, 1821, Wiley Freeman made a deed of gift to his wife, Mary, of two negro slaves, Jane and Nancy; to her during her natural life, and after her death to his three sons, the complainants, and Yancey G. Freeman. There was no trustee appointed by the deed, and the negroes remained in possession of the donor until 1835. About that time, a bill was filed in this court by complainants, praying the appointment of a trustee, and at January sittings following, Stephen Tompkins was appointed. He died shortly after, and at the June sittings of 1836, the defendant was substituted in his place. The negroes remained, however, in the possession of Mary Freeman, until her death, in May, 1837. The defendant then took and retained possession of

them for several years; and this is a bill for an account of the complainants' portion of their hire; the defendant having accounted with Yancey G. Freeman for his interest.

By an order of the court at the June sittings, 1843, an account was ordered to be taken, with instructions that all just expenditures for the preservation of the property, and all proper discounts against the complainants, should be allowed, charging the tenant for life, and the complainants, with their just proportions of the expenditures; and that the income of the year 1837, in which Mary Freeman died, should be apportioned between her and them, in reference to the day when she died.

The report of the Commissioner, under this order, has given rise to exceptions on both sides. I will notice first, those on the part of the defendant.

The first is, that the whole income of the year 1837 ought to be credited to the life tenant, and not apportioned between her and the remaindermen. That is concluded by the order of reference, and I think rightfully. Her interest ceased with her life, and the remaindermen were entitled to immediate possession.

His commissions, the subject of the second exception, ought to have been allowed. The Act of the Legislature, on the subject of for-

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feiting commissions, applies only to ex*ecutors and administrators, and provides for their forfeiture if they neglect to make their annual returns. It might, I think, be profitably applied to all persons acting in a fiduciary relation under the authority of the court, but the court is not authorized to make the law.

There are six exceptions on the part of the complainants. But they involve but one question, and that is, whether the property, or income from it, is liable for disbursements and expenditures made on account of it, or for the contracts or engagements made by Mary Freeman; and I can hardly conceive how such a question was seriously raised.

All the interest which Mary Freeman had in the negroes, was the right to the use and possession of them during her life, and of course she could not create a charge on the corpus or the subsequent income. This rule is violated in the report by charging the incomes, since the death of Mary Freeman, with \$79.33, paid by defendant to P. Searles, on account of a debt of Wiley Freeman, upon the agreement of Mary Freeman, that it should be a charge upon the property, at the time the defendant accepted the office of trustee. There may be other items in the account reported, that fall within this rule, but they are not stated and I cannot distinguish between them.

It is ordered and decreed, that the report be referred back to the Commissioner, and

that he reform the accounts on the principle before stated.

The defendant appealed from the decree of his Honor, Chancellor Johnson.

1. Because his Honor errs in supposing the defendant relies upon the agreement of Mary Freeman, as entitling him to be reimbursed out of the trust fund, the sum of \$79.33—two-thirds of the amount for which Searles was liable as one of the sureties of Freeman, on the debt to the executors of Samuel Tompkins. But on the contrary, the defendant himself, the executor of Samuel Tompkins, in order to sustain the trust, released Searles, and looked to the trust fund for one-half of the said judgment, which judgment he might at that time have enforced against Freeman's negroes, or which Searles might in equity have enforced to save himself.

2. Because the decree of his Honor is in contravention of the order of reference passed by his Honor, Chancellor Johnston, June 10, 1843, which orders, among other things, "that the hire of the slaves for the year 1837, be allowed to the estate of the life tenant."

Bonham, for the motion.

Carroll, contra.

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*JOHNSTON, Ch., delivered the opinion of the court.

It is stated that the deed of Wiley Freeman was executed in April, 1821; and that the slaves conveyed by it, remained in his possession until 1835; when a bill was filed by his wife and children, (the beneficiaries under the deed,) for the appointment of a trustee, to preserve and protect their interests. This suit was brought to a hearing in January, 1836. It is stated that, at that time, Wiley Freeman, the donor, was much embarrassed; and, indeed, considered insolvent. Among other debts for which he was liable, was a note given by him to the defendant, James Tompkins, as executor of Samuel Tompkins, for \$238; which fell due the 15th of February, 1832. To this note, one Pleasant Searles and another person, were sureties. Searles, hearing that an application was about to be made to establish a trust in relation to these slaves, raised an objection on account of their liability for the note referred to. Mrs. Freeman told him, that if he would withdraw his objection, she would save him harmless, out of the trust property. He then called on the defendant, who, as executor of Samuel Tompkins, held the note, to know if Mrs. Freeman had made any arrangement in conformity with her promise; and learned from him that, at her suggestion, he was to release him from the debt. Being satisfied with this arrangement, he withdrew his objections; and at January sittings, 1836, the court declared a trust in favor of the wife and children, under the deed, and appointed Stephen Tompkins trustee; to whom the defendant subsequently succeeded.

It appears to the court, that if the note was taken by the executor of Samuel Tompkins, or given by Searles, without notice of the deed, it constituted a charge upon the property, which was then in the hands of the donor; and that the release of the debt, which was made in order to support the deed, is a good consideration to charge the trust estate. Any expenditure made for the benefit of a trust estate, constitutes a good claim against it, to the extent of the benefit conferred; and surely that must be in the nature of a beneficial advancement which removes incumbrances, without the removal of which, the trust estate would not be allowed to exist.

We do not put the case on the agreement of Mrs. Freeman. The Chancellor rightly decided, that she was not competent to create a charge on the estate. But we take the removal of an existing incumbrance to be a ground for reimbursing the party removing it, out of the fund thus exonerated. This is a ground which seems to have been overlooked on the circuit; and the case is sent

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back to the Com*missioner, that it may appear whether the debt released was, in fact, contracted with or without notice of the deed; upon which depends the question, whether it was or was not a charge on the property conveyed.

On the other question presented, (whether the hire of the slaves for the year in which Mrs. Freeman, the life tenant, died, should be apportioned,) we concur with the Chancellor. His decree, on this point, was made without having before him the precise terms of the order of reference made by myself in June, 1843; and there appears to be a conflict between his decree and the order. But the appeal opens the order of reference to our examination: and we are satisfied it was erroneous in allowing to the estate of the life tenant, the hire accruing after her death, in May, 1837.

The order of reference was made upon the authority of *Leverett v. Leverett*, 2 McC. Eq. 84; the correctness of which I have always questioned, although I felt bound by it.

The Act of 1789. (Pub. Laws, 494,) declares:—"If any person shall die after the 1st. day of March, in any year, the slaves of which he or she was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands, which were in the occupation of the deceased, until the crop is finished; and then be delivered to those who have the right to them: and such crop shall be assets in the executor's or administrator's hands, subject to the debts, legacies and distribution, (the taxes, overseer's wages, expenses of physic, food and clothing, being first paid); and the emblements of the lands which shall be severed before the last day of December, following, shall, in like manner, be assets in

the hands of the executor or administrator; but all such emblements, growing on the lands on that day, (or at the time of the testator's or intestate's death—if that happens after the said last day of December, and before the first day of March,) shall pass with the lands. And if any person shall rent or hire lands or slaves, of a tenant for life, and such tenant for life dies, the person hiring such land or slaves, shall not be dispossessed until the crop of that year is finished, he or she securing the rent or hire when due."

This Act seems to contemplate several cases:—

1. Where the decedant is absolutely entitled to the slaves and lands in his possession. In this case, if he die after the 1st of March, being employed at the time in making a crop, his arrangements shall not be changed, but pursued "until the crop is finished." So much of the crop as shall be gathered, or of the emblements as shall be severed, before

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the last of *December, shall go as assets to the executor; but on that day the slaves and the land (with the emblements then on it) shall pass and be given up to those entitled to them by distribution, or under the decedant's will.

2. Where slaves, held by the decedant for life, are engaged in raising a crop upon lands owned by him absolutely, or in fee, the slaves shall not be removed by the remainderman, till the crop is finished. They are then to be delivered to him. As to the crop, it is to be disposed of as in the other case. This seems to be the case more particularly contemplated by the first portion of the enactment recited.

3. The third case is, where both lands and negroes are held for life. Here the crop and emblements gathered before the end of the year, shall go as assets to the executor of the life tenant; but the slaves and land, with the remaining emblements, shall be delivered to the remainderman at the end of the year.

All these are cases in which the slaves and land are in the hands of the life tenant, and employed by him in planting.

4. The fourth case is where the life tenant has rented or hired the land or slaves to another, who employs them in planting. In that case it is declared, that the hirer's possession shall not be disturbed until the crop is finished; provided he "secure the payment of the rent or hire, when due." This is the case particularly referred to in the last sentence in the enactment.

This last clause, I think, furnishes the clue to the whole statute.

There is no division of opinion in this:—that when the Act says the hirer shall secure the payment of the rent and hire, it means that he shall secure to the remainderman the proportion of it which arises after the ac-

crual of the remainder. The proportion arising in the term of the life tenant is already secured to him by the contract of hiring.

There is as little doubt that the hirer is entitled to the crop and emblements gathered before the last of the year; and that the emblements then remaining, as well as the land and slaves, go to the remainderman at the end of the year.

In this case, the assignee of the tenant for life takes the emblements and crop, but pays the remainderman his portion of the hire of the property.

Is it reasonable to suppose that the Act intended to give them (the emblements and crop) to the estate of the life tenant upon different terms? That what is required of the assignee, is not also required of the executor of the assignee? That if the life tenant happens to retain the property in his own hands, his executor shall take the prop-

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erty without *compensation to the remainderman, but if he chances to assign it, it is liable to other creditors?

This can hardly be supposed, without some strong necessity, or unless we are compelled to such a construction by terms in the statute admitting of no other. The objects of the Act are plain and palpable, and lead to no such consequences.

It is plain that the Legislature looked to the injury which would result, from interrupting the planting operations after that season when preparations for the crop are usually in progress; and intended to secure against the consequences of a sudden change of the right of property by the death of the party, in faith of whose title the crop was set. As a matter of convenience it was provided that, in all cases where the crop was superintended by the executor of the decedant, it should constitute assets in his hands. But it by no means follows, that when it is raised by means of slaves or lands which, on the death of his testator, become the property of a remainderman, these shall be used without compensation. Certainly the Act does not "continue the estate of the life tenant," as it is expressed in *Leverett v. Leverett*, "to the end of the year." There can be no doubt that if it were necessary to vindicate the title to the property, (the land for instance,) the suit must be brought in the name of the remainderman.

The only object of the statute was, to prevent great injury from the loss of a crop planted, and to obviate the difficulty of employing laborers after the beginning of the planting season. This is an essential benefit to the estate of the life tenant; though that estate, into whose service the remainderman's property is pressed, should be compelled to pay an equivalent for the services rendered. And it is no greater hardship that the life tenant's estate should pay for these services than a person to whom he hires the

property:—which is expressly provided for in the statute.

It is not necessary, however, in this case, to decide any thing in relation to the case where the life tenant dies in the possession of the property. And my remarks on *Leverett v. Leverett*, are not intended to commit the court on that point. My own impression is, that the rule should be uniform, whether the life tenant, or another under him, be in possession at the life tenant's death; but the court desires to reserve its opinion on that subject.

But the court is of opinion that the case before us falls under the last clause of the statute, and that the hire of the slaves should be apportioned according to the decree.

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*The case quoted by counsel, of *Percival v. Herbemont*, (1 McM. Rep. 59,) which decides that slaves not employed in planting, either by the life tenant or his bailee, are not within the Act of 1789, has nothing to do with a case like this, where the slaves were hired for plantation work.

It is ordered that the case be remanded to the circuit court: and that the report be opened and the accounts referred again to the Commissioner, with the instructions contained in this opinion.

JOHNSON, Ch., concurred.

DUNKIN, Ch. I think *Leverett v. Leverett* is a correct exposition of the Act of 1789; but I do not consider this case as falling within the provisions of that Act, but as governed by *Percival v. Herbemont*, 1 McM. 59.

HARPER, Ch., absent at the hearing.
Order modified.

I Strob. Eq. 60

URSULA BULLOCK v. RICHARD GRIFFIN.

(Columbia. Nov. and Dec. Term, 1846.)

[Dower \S 56.]

Complainant instituted proceedings for arrears of dower, having already recovered her dower, under a judgment of the Court of Law. The proof was, that after the sale of her husband's land, she, being a feme covert, took, by agreement with the purchaser, two negroes as an equivalent for her contingent claim of dower, and had retained possession of them, without setting up any further claim for seven or eight years after her discovery. The Court held that this continued possession and silent acquiescence for so long a time, might well be construed into a recognition and renewal of the agreement, and confirmed the circuit decree refusing the application as inequitable. The Court further held, that although the claim of complainant to dower might here have encountered a defence to which it was not obnoxious in a Court of Law, yet, as she had selected her

tribunal, she must be content with the relief as administered by the rules of law.

[Ed. Note.—Cited in *Henagan v. Harlee*, 10 Rich. Eq. 288; *Phinney v. Johnson*, 15 S. C. 163.

For other cases, see *Dower*, Cent. Dig. \S 180; Dec. Dig. \S 56.]

Before Dunkin, Ch., at Edgefield, June, 1845, whose decree sufficiently explains the case.

Dunkin, Ch. The complainant is the widow of Richard Bullock, deceased. Her husband died at his residence in Mississippi, on the 1st January, 1836. He formerly owned a plantation in Edgefield District, on which he resided, until his removal from the State in

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November, 1829. On the 24th *February, 1843, the complainant instituted proceedings in the Common Pleas to obtain her dower in this plantation, which had been sold by the Sheriff as the property of her husband in 1828, and was purchased by the Bank of the State; and, in 1835, sold and conveyed by the Bank to the defendant. Judgment was rendered for the demandant at July Extra Term, 1845, and her dower was set off by metes and bounds.

On the 27th November, 1845, these proceedings were instituted for an account of the rents and the profits since the death of Richard Bullock, and for arrears of dower in the same.

The authority of this Court to decree an account of rents and profits in dower is not open to discussion since the decision in *Keith v. Trapier*, Bail Eq. 63. It was there held that the practice of the Court in giving an account for arrears in dower and for rents and profits of real estate, depended on general principles of Equity, and were on precisely the same footing. The account, however, would be restricted to the accrual of the right, or to four years, or to the time of demand, according to the circumstances of each case.

In *Heyward v. Cuthbert*, 1 McC. R. 386, Judge Nott, adverting to the practice in the Law Court not to allow damages in dower, remarks, "There may be cases where it would seem reasonable that a widow should recover damages for the detention of her dower, but there are few in which they ought to be considerable; because she may have her writ at any time, and the delay is not usually great."

And so, in *Rowland v. Best*, 2 McC. Eq. R. 320, the Chancellor on the circuit says, "It is not an uncommon case for a party, who lies by and permits another to occupy and enjoy property as his own, under an apparent good title, which he might and ought to have brought into discussion much earlier, to be restricted in his demand for an account of rents and profits, to the filing of the bill, or four years before." The Chancellor

restricted the account to four years, and, in reviewing his judgment, the Court of Appeals declared that they "would have been better satisfied if it had been allowed only from the time of demand." But the defence presents a state of facts which, it is insisted, afford abundant reason why the demand of dower was not made earlier, and why it should never have been made at all.

The Hon. James A. Black was examined, by commission, on the part of the defendant. He testified that, in 1828, he was the Cashier of the Bank of the State, at Columbia—that, as the agent of the Bank, he attended the Sheriff's sales of the property of Richard

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Bullock. The plantation and negroes *were sold, and were purchased by the witness on the part and behalf of the Bank—that he had a conversation with Mrs. Bullock on the subject inquired of, as he thinks, after the sale of the land and negroes—that the witness advised the Bank to give Mrs. Bullock the furniture and a woman and child for her dower—that "the Bank agreed to do so, but he does not remember whether she agreed to accept it. He cannot remember that Mrs. Bullock agreed to accept the negroes for her dower—understood that she carried away two of the negroes, which he bought for the Bank, and that she took them for her dower—she had no other claim upon them in any way." He afterwards said, "he was pretty well satisfied that Mrs. Bullock did carry away two negroes of the value of six hundred dollars—their names he does not know."

In reply to the eighth cross interrogatory, whether, if any negroes were delivered to Mrs. Bullock by direction of the Bank, it was not done through charity, the witness replied "it was to be done in lieu of her dower—it was not done through charity." The testimony of this witness being in writing, it is not deemed necessary to extract more of it.

James Griffin testified that, "he was present at the Sheriff's sales of Richard Bullock's negroes, and he cried the sale—the land had been sold previously—that Richard Bullock was entirely insolvent. All the negroes returned to the plantation. About a month afterwards, Bullock and his wife removed to the West—they took Silvia and Chima with them—the other negroes were left on the plantation. Witness was on the road with them in Georgia. The two negroes were worth six hundred and fifty dollars. The complainant is very old, between 70 and 80."

Mrs. Penn proved "that, some years since, she had passed some months in Mississippi, and visited frequently at Mrs. Bullock's—her husband had been dead about two years—she had some negroes. She and her son lived together—she had two negroes which she called hers, named Silvia and Chima—don't know if she called them her's. She and her son Richard lived together, he was about thirty-five years of age. Silvia was the

mother of Chima—Silvia was about thirty years old—Chima about sixteen."

In the trial at Law the testimony of Mr. Black was relied on to bar the claim of dower. But it is quite clear that, at Law, the complainant could not be precluded on this evidence.

The Statute prescribes the mode in which dower shall be renounced; and, at the utmost, the transaction amounted only to an agreement to release dower. Whether such

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contract *could be specifically enforced when made with a feme covert, it is not now necessary to determine. But the Bank have assigned to the defendant all their right, title and interest to the negroes, Silvia and Chima; and the defendant insists that it is inequitable for the complainant to retain the negroes and, at the same time, prosecute her demand for arrears of dower.

The testimony of James A. Black and James Griffin, taken together, leave no doubt that the negroes Silvia and Chima were sold as the property of Richard Bullock, and were purchased by the Bank—that they were of about the value of six hundred dollars.

It seems scarcely more doubtful that a negotiation or conversation took place between James A. Black and the complainant, in relation to her contingent claim of dower, in which Mr. Black proposed to let her take a woman and child for her claim—he does not remember whether she acceded to the proposal, nor does he remember the name of the woman and child. But James Griffin proves that a month afterwards, they removed to the West, taking with them Silvia and Chima, two of the negroes purchased by the Bank, and leaving the rest on the plantation. And Mrs. Penn proves that, two years subsequent to R. Bullock's death, she was frequently at the house of the complainant, in Mississippi, and she was then in possession of these same negroes. Mr. Black says she had no other claim to the negroes which she carried away, but in consideration of her dower. When Mrs. Bullock left Carolina, the son, who now lives with her, was a man grown. After what Mr. Black has testified, it cannot be questioned that her right to dower in her husband's plantation was well known to her and admitted by the purchaser.

Unless the complainant had been satisfied with what had been done, it is difficult to account for her acquiescence from January, 1836, until February, 1843, when she instituted her suit in the Common Pleas. Her right was clear, and, as is said by Judge Nott, her remedy plain and easy. But, on the trial of the case at Law in July, 1845, this defence was known to the complainant, viz.: that she had taken away these negroes belonging to the Bank, in consideration of her abandonment of any claim of dower. This

was fourteen months prior to the hearing in this Court.

The original right of the Bank to the negroes was established, and the subsequent possession and appropriation of the negroes by the complainant, alleged to be under the agreement. If the complainant had any other right to the negroes, she had the oppor-

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tunity of making the proof. The *only suggestion of any other claim was that implied in the cross interrogatory propounded to Mr. Black, whether the negroes were not a donation from the Bank to the complainant, and which was conclusively rebutted by the reply of the witness.

Upon the whole of the testimony the Court is well satisfied that this is a case in which the complainant's account for rents and profits would be restricted to the filing of the bill. But the bill was not filed until the complainant was in actual possession, or might have been in possession, under the judgment of the Court of Common Pleas then already rendered, and it may possibly have been deferred from the diffidence of the complainant in making an original application for her dower and arrears of dower to this tribunal.

It is ordered and decreed, that the bill be dismissed.

The plaintiff moved the Court of Appeals to reverse the Circuit decree, upon the following grounds:

1. That there was no sufficient evidence of any actual agreement of the plaintiff to sell or renounce her dower.

2. That if such agreement was made by the plaintiff, it was not obligatory, because of her coverture; because by no act or declaration since discoverture has she affirmed the same; and because the slaves, the consideration of the alleged agreement, were never delivered or settled upon or otherwise secured to her.

3. That in suits for dower, Equity universally gives an account of mesne profits from the death of the husband—and the mere delay of the plaintiff in asserting her claim furnished no ground to restrict such account to the filing of the bill.

4. That the right to mesne profits is the inseparable incident of dower, is as clearly and purely a legal right, and after a recovery at law, cannot be resisted by a defence merely equitable, especially where such defence would be no bar to an original application to this Court for assignment of dower.

5. That there was no valid assignment to the defendant by the Bank of its claim to the slaves Silvia and Chima, and that even if valid, the claim is long since barred by the Statute of Limitations, and were it now of force, could only be asserted against the legal representative of Richard Bullock.

6. That in any event the plaintiff was entitled to an account of mesne profits from the commencement of her action at Law, and in

no event is she chargeable with more than a third part of the value of the slaves alleged to have been delivered to her, in satisfaction of her dower.

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*7. That no one of the grounds upon which the Circuit decree is founded, presents any lawful bar to the plaintiff's claim to an account of the mesne profits from the accrual of her right to her recovery at Law.

8. That the evidence of the alleged agreement of the plaintiff to renounce her dower, is too dubious and uncertain to warrant the rejection of a claim so highly favored by the law as the right of dower.

Carroll, for the motion.

Dunkin, Ch., delivered the opinion of the Court.

The testimony of the witnesses leaves no reasonable doubt that the negroes were retained and were carried away as an equivalent or consideration for the complainant's contingent claim of dower. Although this Court might not be warranted in enforcing such agreement when made by a feme covert, her silent acquiescence for seven or eight years after her discoverture, and keeping possession of the consideration, might well be construed into a recognition and renewal of the agreement. But the complainant has resorted to a Court of Law, where this defence could not be noticed, and has recovered her dower, and her application to this Court is now for the intermediate profits since the death of her husband. According to the testimony, the claim is inequitable, and the Court is satisfied with the decree.

But we are also of opinion that, in appealing to the Court of Law, the complainant selected her tribunal, and must be content with the relief as administered by the rules of law. By the well established principles and usages of this Court, she might have instituted proceedings in the Court of Equity both for dower and arrears of dower. It is true that her claim might here have encountered a defence to which it was not obnoxious in the ordinary tribunal. She has selected the mode, and must abide by the measure, of redress. It cannot be conceived that in *Heyward v. Cuthbert*, the demandant would have been entitled to a bill in Equity after the refusal of the Court of Law to recognise her claim for arrears in dower. The absence of any precedent for such proceedings is an argument against its introduction. It concerns the interests of the country that there should be an end of litigation.

The decree is affirmed and the appeal dismissed.

JOHNSON, Ch., and JOHNSTON, Ch., concurred.

HARPER, Ch., absent from indisposition.

1 Strob. Eq. *66

*ELIZABETH S. GARRETT v. THE BANK OF HAMBURG, S. C.

(Columbia. Nov. and Dec. Term, 1846.)

[*Executors and Administrators* ⇨303.]

Where, by authority of the will of a testator leaving several children, his executor gives, by way of advancement, certain negroes to the husband of his daughter on her marriage, and after having possession of them for some fourteen years, the husband, having no other property, mortgages them for valuable consideration, (although the will further required the property advanced to be valued and receipts to be given for it, so as to ensure equality among the children at the final division,) the executor cannot defeat the sale of these negroes in satisfaction of the mortgage, by claiming a specific delivery of them under a receipt given by the husband for them as a loan, at the time of their delivery to him by the executor, of which receipt the mortgagee had no notice.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1237; Dec. Dig. ⇨303.]

[*Estoppel* ⇨75.]

Where one obtains credit on the faith of his ownership of the property in his possession, and on this confidence only, the claim of the creditor cannot be defeated by a latent right of which he had no notice.

[Ed. Note.—Cited in *Brown v. Wood*, 6 Rich. Eq. 172.

For other cases, see *Estoppel*, Cent. Dig. §§ 192-195; Dec. Dig. ⇨75.]

This case was heard by Dunkin, Chancellor, at Edgefield, June, 1846, and will be fully understood from his decree.

Dunkin, Ch. On the 24th January, 1840, Britton Mims executed to the Bank of Hamburg a mortgage of a negro woman, Viney, and her eight children, of which negroes Mims was then in possession, and had been, with little or no interruption, for about fourteen years. On the 14th December, '42, the Bank caused the negroes to be seized and advertised for sale, to satisfy the mortgage thereof.

On the 31st December, 1842, this bill was filed by the complainant, claiming a specific delivery of the negroes, and an account of their hire.

The negroes originally belonged to Stephen Garrett, deceased. By his will, executed in December, 1823, he devised and bequeathed his whole estate, real and personal, to his widow, the complainant, during her natural life, "to be kept together by her for her use and support, and the support, raising and educating of his younger children." By the next clause it is provided, that the complainant should "have the sole power and authority to advance his six young children, as they respectively marry or come of age, in the following manner, by allotting off and giving to them, each, one or two negroes, and such other articles of property as she might spare from the plantation, to be taken by them at a valuation to be made by and under the hands of any two or three respect-

able persons in the neighborhood, to be named by her, the children giving, respectively, receipts for the same, so that equal justice may be done to the whole of them upon a final division of my property, after her death." By a subsequent clause, it is pro-

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vided as follows, viz: "After *the death of my beloved wife, I give, devise and bequeath all the above property, either not sold to pay my debts, or advanced to my said six younger children, together with all my other property, to them, their heirs and assigns forever, to be equally divided between them, share and share alike, still having in view the principle of equal justice referred to in the third clause of this my will." Of this will the complainant was appointed sole executrix, during her life, and after her death, his sons were appointed executors.

Britton Mims married Mary Ann, one of the testator's six younger children, on the 15th December, 1825; and on the 20th March following, the complainant delivered to Mims the woman Viney, with her infant children, Moses, and Jack.

Britton Mims testified, that about the time of receiving the negroes, he gave to the complainant a receipt, which was exhibited at the hearing, and in the following words, viz:

"Received of Mrs. Elizabeth S. Garrett, as a loan to her daughter Mary Ann Mims, one negro woman named Viney, being of yellow complexion, about twenty-six years old, also her two children, Jack and Moses, which I promise and oblige myself to return to the said Elizabeth S. Garrett, her heirs or assigns, together with her increase, at any time, when I may be required by the said Elizabeth S. Garrett, her heirs, executors and administrators. Given under my hand and seal, this 20th day of March, 1826.

(Signed,) B. Mims. [L. S.]"

The paper had no witness to its execution, and was never recorded. Mims said that he drew or copied it from a draft made by Wm. Garrett, complainant's son; that the complainant brought the paper, and said that her son, who was an executor, thought it necessary. Mims also said, that when he took the negroes, it was the understanding that they were to be brought back to the estate. He also testified, that when he executed the mortgage, he had no property of any consequence, but what was mentioned in the mortgage. Mims further said, that about the time of executing the receipt to the complainant, she borrowed from him the sum of five hundred dollars, and that he was to have the use of the negroes, for the use of the money; and that the complainant had never paid the money—that previous to filing the bill, she had demanded the property, and that he had consented, so far as he was concerned, that she should take it.

As to the time of giving the receipt to the complainant, and the time of the loan of five hundred dollars, there is a painful uncertainty, which is rather enhanced by the

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absence of *any attesting witness to what purports to be a sealed instrument. It is true, that it is unnecessary that such paper should be under seal. If it had been necessary I should hold, on the authorities of *Allston v. Thompson*, Cheves, 271, and the cases there cited, that a deed requires a witness. But if, in this case, the parties deemed it desirable to give to the paper the formality of a sealed instrument, it would seem a consistent caution to have secured an attesting witness, who could not only prove the delivery, but the time of the delivery, and, perhaps, the loan of the money, said to have been made about the same time, but the evidence of which seems to have been left to depend on the frail recollection of the parties themselves. It is not to be questioned, however, that the witness, William Garrett, corroborates the testimony of B. Mims, in most of the important particulars, although differing as to the amount of the sum loaned.

The Court would be gladly relieved, if possible, from questioning, in any manner, the accuracy of the recollection of these witnesses, testifying to transactions which took place twenty years ago.

From the whole tenor of the testator's will, it is quite manifest that he intended what he said, when he authorized his executors to give to each of his younger children one or two negroes, and other property, by way of advancement, as they respectively married or became of age. The property advanced was to be valued and receipts given, so as to ensure equality on the final distribution, at the death of his widow. The Court cannot but believe, that the complainant acted in the exercise of this authority, and was understood by the parties to be so acting, when, after the marriage of her daughter, she delivered to her husband the negroes mentioned. Doubtless it was understood that they must be accounted for in the final division, in the manner provided by the will. Mims says it "was understood at the time he took the negroes, that they were to be brought back to the estate." And in one view, this is not only true, but in accordance with the will, and yet quite consistent with his absolute ownership. The will directs that a receipt shall be given by the parties advanced. The object, too, is stated. Accordingly a receipt is taken from Mims, which the complainant's son, who was an executor, thought necessary. In the receipt the advancement is termed a loan: and supposing the parties intended to fulfil precisely the injunctions of the testator, it is not unlikely that the receipt would assume this form.

On the contrary if, as was suggested, the

transaction was a mere loan of the negroes,

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or rather a hiring of the negroes, *in consideration of a loan of five hundred dollars, and that the hire was to stand against the interest, it is quite clear that the parties adopted not only a very inappropriate mode of expressing their agreement, but one from which no such understanding could be inferred.

There is no evidence whatever, however, that at the time when the negroes were delivered into the possession of Mims, he received them on hire, or agreed to pay hire. It was either a loan, according to the literal terms of the receipt, or an advancement, as authorized by the will of Stephen Garrett.

Supposing the transaction to have been strictly a loan, the principle recognized in *Archer v. McFall*, Rice, 73, as having been "settled by a series of decisions," is entirely conclusive. That was the case of a general creditor merely. The court say "the possession of the debtor was such as held him out to the world to be the true owner of the property. If he acquired a credit upon the faith and confidence that Sarah and her children belonged to him, a creditor who trusted under these circumstances, has a right to subject the property to the payment of his debt. It is wholly immaterial whether Archer (the original owner) intended to defraud or not."—And again, "to deprive a creditor of his position as a subsequent creditor, some evidence must be given to satisfy the jury that he knew, or, by the exercise of ordinary diligence, might have known, that Lawhorn's possession was a mere loan."

The defendants were not merely creditors of Mims: they were purchasers for valuable consideration, and, certainly, without notice. It is true, the will of Stephen Garrett was on record, and, supposing them to have exercised diligence they were aware of its provisions. This knowledge would only have assured them of Mims's right to dispose of the property, and the act of Mims himself, in undertaking to dispose of the negroes absolutely, could leave no suspicion on their minds, of any defect in the title. His conduct was either a gross fraud on the defendants, or his testimony now, as to the fiduciary character of his possession, is entitled to very little consideration.

It is not to be disguised that both the witnesses, Mims and Garrett, testify under a strong bias, and it would be hazardous in the extreme to permit the right of property to be disturbed by vague recollections of what was said, or understood, in the family, twenty years past.

It is ordered and decreed that the bill be dismissed.

The plaintiff maintained the following propositions before the Court of Equity Ap-

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peals, and moved that the decree of *his

Honor Chancellor Dunkin be reversed and modified accordingly.

1. That the negro slaves, Viney and her children, were, on the 20th day of March, 1826, lent, and were shortly thereafter let to hire, by the plaintiff to Britton Mims, and so continued until their seizure by the defendant under his supposed mortgage, and that the conclusion of the Chancellor that they were given absolutely to the said Mims, is unauthorized by the evidence.

2. That in the absence of all fraudulent intention on the part of the owner of chattels lent or let to hire, there is no rule or principle of the law which subjects such chattels to liability for the debts of such bailee, beyond his special property in the same, even though he may have acquired credit upon the faith that he was the owner of such chattels.

3. That the defendant's supposed mortgage, (if operative to any extent,) secured only such of the individual debts of Mims, in the form of promissory notes or bills of exchange, as arise out of the purchases of cotton, contemplated by him, at its date, and cannot therefore include the note of \$3,124.09, executed by Mims, more than eighteen months after his dealing in cotton had ceased, and in liquidation of a demand for which he was bound merely as surety.

4. That if the supposed mortgage be construed to include the note of \$3,124.09, it is, to all intents and purposes, a prospective guaranty of payment to the Bank of all its debts that might hereafter arise against the said Mims, without any limitation of the form or grade of those debts, or of the periods within which they should occur, or of the dates at which they should fall due, or of their consideration, or of their amounts, save only, that they should not, at any one time, exceed \$10,000; and it is respectfully submitted, that such an instrument is of a character unknown among legal securities, is against the policy of the law, and as a mortgage is absolutely void, and confers no lien upon the demands of the Bank claimed to be thereby secured.

5. That the legal title to the said slaves being in the plaintiff, and no valid transfer of them to the defendant having been made, even by Britton Mims, the plea of purchase for valuable consideration cannot be sustained.

Failing in these objections to the Circuit decree, the plaintiff will move that the case be remanded for a new hearing, upon the ground:

That the Chancellor erred in excluding the evidence offered by the plaintiff, to show that the note of \$3,124.09 was procured by fraud, or at all events, was without legal considera-

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*tion, and was given by Mims, under the mistake that he was already bound for the sum therein specified.

Carroll, for the motion.

DUNKIN, Ch., delivered the opinion of the court.

The appeal has been argued with great zeal, chiefly, as is said, from the doubts expressed by the decree as to the facts testified to by the witnesses. It is very difficult to add any thing on this point to what is said in the decree. Mrs. Garrett and her son may very well have been under the impression that, in fulfilling the will of Stephen Garrett by advancing his children, the executrix only loaned the property. As they were to account for the value in the final distribution, it might naturally assume this character in her contemplation. As to Britton Mims, if he swore to the truth at the hearing, it is difficult to resist the inference that, in January, 1840, he obtained money from the Bank on false pretences, by mortgaging to them property which, he well knew at the time, did not belong to him.

But notwithstanding the uncertainty in which the mind of the court was left, as to some of the facts deposed by the witnesses, it was assumed, and it is the basis of the defence, that, in March, 1826, the negroes were loaned by the complainant to Britton Mims, and that he held them as a loan. It is, nevertheless, conceded by the candor of both the solicitors for the appellant, that, unless *Archer v. McFall* be overruled, such loan cannot be supported against the rights of the defendants, and that the decree must stand.

Archer v. McFall was decided by the unanimous judgment of a full court, after two trials, and on great consideration. The legal propositions are announced with singular clearness and precision. Yet cases may well be conceived as falling within the language of that judgment, to which the court would hesitate to apply its principles. But the circumstances of this case create no such reluctance. Mims was in possession of the negroes, as apparent owner, for at least twelve years anterior to his transactions with the defendants. They had been the property of Stephen Garrett, whose daughter he had married. The will of the testator, which was on record, authorized his executrix to give his children negroes and other property on their marriage. Mims, having no other property, in January, 1840, mortgaged this property to the defendants as a substitute for an indorser, and obtained a loan for four or five thousand dollars, at or about the time. Other transactions followed, and, in December, 1842, Mims being then indebted to the Bank, be-

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tween *three and four thousand dollars, the negroes were taken under the mortgage, and the claim of the complainant was interposed. The question is not, as was said in *Archer v. McFall*, whether the complainant intended any fraud in leaving the negroes in possession of Mims, for of this there is no suspicion, but whether she did not thereby enable him to

commit a fraud on others, whose rights are entitled to the protection of the court, in preference to her's, on acknowledged legal principles. It cannot be doubted that the Bank trusted Mims on the faith of his ownership of this property, and on this confidence only; and their claim cannot be defeated by a latent right of which they had no notice, and the existence of which they had no reason to suspect.

It is ordered and decreed that the appeal be dismissed.

JOHNSON, Ch., concurred.

HARPER, Ch., absent from indisposition.
Appeal dismissed.

I Strob. Eq. 72

EXECUTORS OF THOMAS W. MORTON,
Deceased, v. WILLIAM H. ADAMS
and Wife.

(Columbia. Nov. and Dec. Term, 1846.)

[Trusts ⇨274.]

Without some special emergency, to be justified by the Court, the trustee cannot encroach on the capital of the trust estate; but, confining his discretion to the appropriation of income, he may be guided by the wants of the cestui que trust. In this view of the case, the Court was of opinion that the surplus income had been properly applied towards the reimbursement of money advanced by him for necessities to the trust estate, and ordered the deficiency to be made up from portions of the subsequently accruing income.

[Ed. Note.—Cited in *Anderson v. Silcox*, 82 S. C. 115, 63 S. E. 128.

For other cases, see *Trusts*, Cent. Dig. § 389; Dec. Dig. ⇨274.]

[Trusts ⇨217.]

A trustee has no authority to purchase lands for, or to bind, the trust estate; and the Court ordered such lands to be sold, and an estimate made of the relative proportion of the sales, which may have arisen from improvements made thereon by the cestui que trust—the proceeds of the land to be applied first, to discharge the amount due for the purchase with interest—the proceeds of the improvements to be applied first, to the extinguishment of the demand of the trustee on the trust estate; and the surplus to any demand against the cestui que trust, for which he had no claim on the trust estate.

[Ed. Note.—Cited in *Adams v. Mackey*, 6 Rich. Eq. 77; *Nance v. Nance*, 1 S. C. 221; *Mathews v. Heyward*, 2 S. C. 243.

For other cases, see *Trusts*, Cent. Dig. § 302; Dec. Dig. ⇨217.]

Before Dunkin, Ch., at Edgefield, June, 1846.

A bill in this case was filed on the 29th April, 1842, by the complainant's testator,

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as trustee of the defendant, Mary G. *Adams, for an account and settlement, and especially to have paid to the complainant various sums of money, which he had advanced out of his own funds on account of the trust estate. It appears that on the 17th of October,

1830, in contemplation of their marriage, the defendant executed a deed of marriage settlement, whereby the defendant, Mary G. Adams, (then Evans,) conveyed all her estate, real and personal, to John Key, in trust for her use and benefit.

The defendant, Mary G. Adams, before her marriage aforesaid, was the widow of Cadwell Evans, who died intestate, leaving his widow and brothers and sisters entitled to his estate.

John Key became his administrator. The real estate was very inconsiderable, and was sold by the Ordinary for \$170. The personal estate was sold by the administrator. At the sale by the administrator, Mrs. Evans bought property exceeding her interest in the estate by \$1,914.98. It appears from the evidence, that after the marriage contract was executed between the defendants, they took possession of the negroes embraced in the settlement, and for some years employed them on rented lands with the approbation of John Key, the trustee, and that land for their use was rented of Dr. Washington. It appears also that a judgment debt, due by Cadwell Evans to Samuel Tomkins for \$456.27, was, whilst the said John Key was trustee, arranged between the executors of Samuel Tomkins, the said John Key and the defendants, by the said John Key giving his note as trustee of Mrs. Adams, for the amount of that judgment. In the year 1835, John Key was relieved from his trust, leaving the debts to Tomkins and Washington, for which he had given his notes, unpaid, and the complainant was appointed trustee in his place. After his appointment, the complainant, at the request of the defendants, but of his own private funds, paid the debt due on Key's note, given for the debt due to Tomkins, to Mrs. Rochell, to whom the note had been transferred by the executors of Tomkins, and made various other advances of monies from time to time for the trust estate. Most of these advances were made for the benefit, and in many cases for the absolute necessity, of the trust estate; such, for instance, as for the purchase of hogs, pork, wagon and provisions, actually necessary to the support of the cestui que trust. It may be added in this connection, that the defendant, Wm. H. Adams, was possessed of no means in his own right out of which the family could have derived a support. It appears that on 17th January, 1835, the complainant advanced out of his own money \$516, for the purchase of a

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tract of land of 172 acres, *and on 11th April, 1836, advanced out of his own funds the further sum of \$500, to Josiah Kilgore, for the purchase of another tract of land of 446 acres, taking the title in his own name. The defendants took possession of these tracts of land, which were adjoining, and still reside upon them, and have made there-

on some improvements. It appears that the complainant and defendants from time to time would adjust the accounts between them, the former taking from the latter their joint notes for the amount found due, and on these occasions would deliver them the various small notes and accounts which he had paid on their account; and it appears that on the 1st June, 1837, the complainant and defendants had one of these settlements, at which time the complainant signed a memorandum in writing, (offered in evidence by the defendants,) acknowledging that he held the titles to the aforesaid tracts of land in his own right, and that he held the two notes of defendants for three thousand two hundred and sixty-one dollars forty cents, (\$3,261.40,) and agreeing that when these two notes should be paid, he would hold said tracts of land as trustee of Mrs. Adams. The last note which seems to have been given by the defendants to the complainant on one of these occasions, and which obviously from the evidence embraced all the previous transactions between them, was given on the 3d July, 1841, for four thousand five hundred and seventy-eight dollars twenty-eight cents, (\$4,578.28,) and due one day after date, and which is in the hands of the complainant. A portion of the advances of complainant was made after the date of the last mentioned note. It appears that previous to the appointment of the complainant as trustee of Mrs. Adams, the defendants had borrowed from Drusilla Anderson \$600 or \$650, and given their note for the amount, and that the complainant paid this debt out of his own funds. It was proven by Drusilla Anderson, that \$207 of the sum lent by her to the defendants had been paid on the note of John Key and Mrs. Adams as aforesaid to Dr. Washington, for the rent of land for the trust estate; the balance was appropriated to buy provisions for the family, and to pay a debt due by Evans' estate to A. Perrin for pork. It appears that in May, 1840, the defendants and complainant presented their joint petition to the Court of Equity, in which it is set forth that the trust estate is largely indebted to the trustee for money advanced, and whereby it is admitted that the debt to the trustee is fair and just, and the parties unite in praying that the amount of said debt might be ascertained by the Commissioner, and that a portion of the trust property might be sold for the payment of that debt. The

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parties met before the Commissioner, and upon the evidence of John Rochell and Wm. H. Adams, the Commissioner made a report establishing against the trust estate the amounts paid severally to Mrs. Rochell, Jno. Hearst, Jr., Josiah L. Kilgore, and Drusilla Anderson, amounting aggregately to \$2,930.07. It is, however, stated in the report, that the petitioner Thomas W. Morton, had other demands against the trust estate, which he

was not then prepared to prove. No order was taken on this report. It appears that the trustee, about 1st January, 1842, or in December, 1841, hired out a portion of the negroes belonging to the trust estate, and sold some corn belonging to it, leaving the defendants a sufficient number of hands and provisions for a support. From the hire of the negroes and sale of the corn, the trustee is chargeable, on 1st January, 1843, with \$686.55. This case, at the last Court, was referred to the Commissioner on the matters of account, reserving the equities of the parties.

Thomas W. Morton having died in 1845, the executors of his will, Augustus Morton and Lucinda Morton, filed their bill on the 20th March, 1846. The following is the circuit decree.

Dunkin, Ch. This cause was heard on the pleadings and the report of the Commissioner. The complainants' testator was the trustee of the defendants under a marriage settlement, and the object of the proceedings is to adjust his transactions with the trust estate, and obtain payment of the balance alleged to be due to him. Prior to the marriage, the property belonged to the wife. During the coverture, she was, by the terms of the settlement, entitled to the sole and separate use. Upon the termination of the coverture, it was to be disposed of as her absolute estate. The only effect was this: by the coverture, her legal existence was, to some purposes, suspended; she was incapacitated from contracting debts. By the settlement, the marital right was excluded. The legal title was in the trustee. It was his duty to support the trust estate, and apply the income to the objects, or in the mode specified by the deed. If this had been a bill by the husband and wife to require an account from the trustee, and it had appeared that, during the years 1835 and 1836, he had hired out the trust estate, it would seem that the joint receipt of the husband and wife, or the separate receipt of the wife, for the income of those years, would afford the most satisfactory evidence that, to that extent, the trustee had discharged his trust. It is difficult to conceive what other evidence could be produced, as between trustee and

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cestui que trust. In this view, any acknowledgment from the cestui que trust, that he had received what he was entitled to receive, would be admissible. It appears from the records of the court, in a petition filed by the parties themselves, in May, 1840, that up to that period, the income of the trust estate had been barely adequate to the support of the family and the plantation—that it was absorbed in this way, and could afford no aid in extinguishing a debt due to the trustee. The only purpose for which this petition is used, is to show that the trustee had appropriated the income as directed by the settlement, and for this purpose the

court deems it proper evidence. The debt to Mrs. Rochell was, originally, a claim on the estate of Cadwell Evans. It was adjusted by Key, and afterwards paid by Morton, who became, successively, the legal owners of the estate, with the understanding, no doubt, that their legal right did not destroy their equitable lien. The exception to the report on this point is overruled. All the other demands allowed by the commissioner, (not including the notes for the land) seem to the court to be for supplies strictly to the trust estate, such as rent of land to Dr. Washington, wagon for plantation, blacksmith's work, taxes, &c. These are properly chargeable on income. But, as between trustee and cestui que trust, some discretion on the part of the trustee must be exercised and permitted. If a crop is lost one year, he may be permitted, nay is bound to keep up the plantation, purchase supplies, and may furnish food and raiment to the cestui que use, trusting to the income of the next year for reimbursement. Without some special emergency to be justified by the court, he cannot encroach on the capital, but confining his discretion to the appropriation of income, he may be guided by the wants of the cestui que trust. It is impossible to prescribe the limit accurately, nor is it necessary, perhaps, as the parties who appointed him were willing to confide in his judgment. In this view, the court is of opinion, that the surplus income received by the trustee, in 1842 and 1843, may be properly applied to his reimbursement, and if this be insufficient, a portion of the subsequently accruing income. The defendants' exceptions, in these particulars, are also overruled. The point seemed scarcely to be questioned that the land purchased by the trustee, in his own name, and paid for by his own means, or on his individual credit, should stand as a security for the purchase money and interest. But the trustee had no authority either to make the purchase, or to bind the trust estate. It was not necessary, and experience has proved it to be inexpedient. The slaves of the estate are

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now hired out, as a *more profitable mode of employment. The lands were purchased at the request and by the desire of William H. Adams and his wife. But the conveyance was not made to the trustee. It seems to have been the understanding of all the parties, that the entire property was liable to the trustee, for his advances. In this view, they all united in a petition to this court, in May, 1840, setting forth the debt due to the estate, and praying that a portion of the trust estate might be sold to satisfy it. The cestui que trust and trustee may have both acted under a misapprehension. If the land should sell for less than the amount due for the purchase with interest, the trustee will have no claim for the balance on the corpus of the trust estate. On the other hand, if

the sales exceed the purchase, with interest, it is in accordance with the understanding of the parties that any sums due to him, by Adams and wife, or either of them, should be a charge on the surplus. To this extent, the Court is of opinion that the complainants' exception should be sustained.

It is ordered and decreed, that the real estate described in the pleadings, be sold by the Commissioner, on the first Monday of January next, for one-half cash, the balance on a credit of twelve months, secured by bond, bearing interest from the date, and a mortgage of the premises; that the proceeds be applied, in the first instance, to discharge the amount due for the purchase, with interest, and the surplus, if any, towards the satisfaction of any demands of the complainants' testator, on William H. Adams and wife, or either of them, for which he had no claim on the trust estate.

It is further ordered, that the Commissioner take an account of the annual income of the trust estate, and report a mode of payment of the amount reported to be due to the complainants' testator, according to the principles of this decree, they having consented to suspend any right to subject the capital of the estate to the reimbursement of the amount paid on the Rochell debt. Parties to be at liberty to apply for any further order which may be hereafter necessary for carrying this decree into effect.

The defendants moved the Court of Appeals to reverse or modify the Chancellor's decree in this case, on the grounds:

1. That as the demands of plaintiffs' testator were not established by regular vouchers, nor verified by the oath of the trustee, nor proved, except by the admissions of William H. Adams; and as they were contracted in violation of the duty of the trustee, not to exceed the income of the estate in his expenditures, and as many of them are bar-

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red by the *statute of limitations, and others arose from his voluntary payments of the private debts of defendants, the plaintiffs are not entitled to any relief in this court.

2. That as the plaintiffs' testator had taken the note of defendants in satisfaction of his demands, and had delivered up to them the evidences of his advances, the plaintiffs were not entitled to relief in this court, until their legal remedies were exhausted.

3. That the plaintiffs, at most, were entitled to satisfaction of any portion of their demands, only out of the income of the trust estate, after reservation of so much as was necessary for the comfortable support of the defendants; and that the advance for the purchase of the lands should not have been excepted from this rule.

4. That the proceeds of the sale of the land should not have been directed to be applied to the satisfaction of any claims, except the purchase money of the lands; at

least, before defendants were reimbursed for their improvements.

Wardlaw, for the motion.
Griffin, contra.

DUNKIN, Ch., delivered the opinion of the court.

The fourth ground of appeal insists that the defendants are entitled to reimbursement for the improvements made on the land, the legal title of which is in the trustee. It is suggested that these improvements were made chiefly by the labor of the negroes of the trust estate, and were part of the annual profits arising from their labor and that of the defendant, W. H. Adams. In this view, it may be necessary to enlarge the order of reference, and direct that the commissioner should ascertain, as far as practicable, the relative proportion of the sales which may have arisen from the improvements, and that this be applied, in the first instance, to the extinguishment of the demand of the trustee, on the trust estate, and the surplus to any demand against the defendants, or either of them, as directed by the decree.

The decree of the Circuit court is modified accordingly. In other respects, it is affirmed.

HARPER, Ch., and JOHNSTON, Ch., concurred.

Decree modified.

I Strob. Eq. *79

*CHARLES J. GLOVER and Wife v. JOHN LOTT, Executor of Sarah Lott, Deceased.

(Columbia. Nov. and Dec. Term, 1846.)

[*Executors and Administrators* ⚡437.]

The defendant, as executor, in discharge of his trust, paid over to an unmarried infant, seventeen years of age, who was a residuary legatee of his testator, her distributive share of the estate, and took the joint receipt of herself and her father for the same. The court held, that twelve years after making his final return, he was entitled to the protection of the statute of limitations against a suit for the amount brought by the legatee and her husband.

[Ed. Note.—Cited in *Brockington v. Camlin*, 4 Strob. Eq. 196; *Long v. Cason*, 4 Rich. Eq. 63, 65; *Motes v. Madden*, 14 S. C. 491; *Langston v. Shands*, 23 S. C. 153; *Roberts v. Johns*, 24 S. C. 588.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1761; Dec. Dig. ⚡437.]

Before Dunkin, Ch., at Edgefield, September, 1846.

The case is sufficiently elucidated by the following circuit decree.

Dunkin, Ch. Sarah Lott died in September, 1831. The complainant, Mrs. Glover, then Martha Frazier, was a grand-daughter of testatrix, and entitled, under her will, to a share of her residuary estate. This share, it is admitted, amounted to one hundred

and seventy-five dollars, twelve and a half cents.

Miss Frazier was the daughter of the late Benjamin Frazier, and was then residing with her father, who was a man of opulence, in Edgefield village. On the 15th day of February, 1833, the complainant being then about seventeen years of age, the defendant paid to her the said sum of one hundred and seventy-five dollars, twelve and a half cents, as witnessed by the following receipt, signed by herself and her father, to wit:—"Rec'd of John Lott, executor, one hundred and seventy-five dollars, twelve and a half cents, in full of my distributive proportion of the personal estate of Sarah Lott, deceased. February 15th 1833. (Signed) Martha Frazier, Benjamin Frazier." In June, following, Miss Frazier intermarried with the complainant, Charles J. Glover.

On the 20th December, 1833, the defendant made his final return as executor of Sarah Lott, deceased, and passed his accounts with the Ordinary, in which account the payment of the 15th February, 1833, is regularly entered.

For some years afterwards, Benjamin Frazier, as well as the complainants and defendant, resided in Edgefield district. In 1836, Benjamin Frazier removed to the West, and died about the year 1844, leaving an estate worth seventy thousand dollars, which was soon afterwards distributed among his children, the complainants taking their share.

On the 1st. April, 1845, this bill was filed, praying for an account and payment of Mrs. Glover's proportion of the residuary estate of Sarah Lott, deceased. As has been stated, it appeared on the reference that her proportion amounted to the sum stated in her receipt of the 15th February, 1833.

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*The principle seems to be well settled, that when a trustee does an act purporting to be a discharge of his trust, the statute commences to run from that time. *Starke v. Starke*, Car. L. Journ. 509. *Moore v. Porcher*, Bail Eq. R. 198.

This bill is preferred in the joint names of C. J. Glover and his wife. Some three or four months prior to her marriage, she received this legacy of \$175, with the sanction and approbation of her father. If this act purported to be a discharge of the defendant's trust, it is said, and perhaps truly said, that the payment should have been made only to a guardian, duly appointed. If this course had been adopted, it would have been unnecessary for the defendant to resort to the protection of the statute. But the complainant was of an age fully to comprehend the meaning of the transaction. She was married in June, and in December the account of the defendant was passed and recorded in the Ordinary's office.

In June, 1833, the husband was entitled to demand and receive the legacy, as was held in *Starke v. Starke*. Considering the situation of the parties, and the record in the Ordinary's office, it is no violent presumption to say that both the complainants knew, in 1833, that the defendant had done an act purporting to be a discharge of his trust. If it was effectual he was discharged. If it was ineffectual, the complainants were put on the assertion of their rights. Chancellor Harper says, in *Moore v. Porcher*, that, after a general distribution, four years is time enough for a residuary legatee to discover errors, or suggest mistakes. If Mrs. Lott had made a bequest of one hundred and seventy-five dollars to Charles J. Glover, which was paid to him by the executor, when he was seventeen years of age, and no suit had been instituted, for twelve years afterwards, it is difficult to perceive on what principle the executor should be debarred from the protection of the statute.

It is ordered and decreed, that the bill be dismissed with costs.

The complainants appealed, and moved the Court of Appeals to reverse the decree in this case, on the following grounds.

1. Because the defendant's return to the Ordinary in December, 1833, shows that the money was paid to Benjamin Frazier, and not to his infant daughter, and because this return was not such an act as indicated to the complainants a termination of the trust of the executor; and the complainants having had no notice of that return, the statute of limitations cannot, therefore, be applied to defeat their claim.

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*2. Because, upon the pleadings and proof, and the report of the Commissioner, to which no exceptions were taken, the complainants were entitled to a decree confirming said report.

Griffin, for motion.
Bauskett, contra.

PER CURIAM. This court concur in the decree of the Circuit Court. The appeal is dismissed.

Appeal dismissed.

I Strob. Eq. 81

C. D. EVANS, Adm'r of Anne Waties Donnelly,
v. FRANCIS B. DURANT.

(Columbia. Nov. and Dec. Term, 1846.)

[Wills. ¶614.]

Where testator left personal property to his daughter, during her natural life, and at her death to vest, absolutely, in any issue she might leave, who had or should attain the age of eighteen years, with a limitation over, in case she left no such issue—the daughter took only a life estate, and the remainder vested absolutely in

her issue, who was eighteen years of age at the time of the daughter's death.

[Ed. Note.—Cited in *Tindal v. Neal*, 59 S. C. 11, 36 S. E. 1004.

For other cases, see Wills, Cent. Dig. § 1402; Dec. Dig. ¶614.]

Before Dunkin, Ch., at Marion, February, 1846.

This case will be fully understood from the following Circuit decree:

Dunkin, Ch. The following clauses occur in the will of James Coachman, of Prince George, Winaw, dated 22d April, 1789, viz:

"I leave the use of Bess, Scipio, Fanny, Molly, Chloe, Jenny, as shall be mentioned hereafter, for the uses and purposes thereof, to my daughter, Ann Waties Coachman; the remainder of my negroes, not mentioned, with all kinds of stock, as cattle, &c., I leave to be equally divided into four parts," &c. One part is bequeathed to each of his two sons, one other part to the use of his daughter, Mrs. Postell, with certain limitations, and then as follows: "One fourth part the use of which I leave, with the others named before, to my daughter, Ann Waties Coachman, during her natural life, and at her death, if there be no living issue of her body, that may arrive to the age of eighteen years, to whom I mean it shall descend, in failure of which, then my will is, it shall be the property forever of Hannah Postell, or the issue of her body."

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*The testator's daughter, Ann Waties, subsequently intermarried with Patrick Donnelly, and surviving him, she departed this life August, 1844. She made a will, disposing of the property derived from her father, but the executors declining to qualify, administration, with the will annexed, was committed to the complainant, Chestley D. Evans.

The only child of Mrs. Donnelly was Mary C., the wife of the defendant, Francis B. Durant, to whom she was married in 1840. Mrs. Durant now resides with her husband, in Savannah. Some of the negroes which were held by Mrs. Donnelly, under her father's will, are now in the possession of the defendant. This bill is filed against him, claiming the slaves as the absolute estate of Mrs. Donnelly, and subject to the disposition of her will.

It is first necessary to fix the construction of James Coachman's will. Without repeating the language of the clauses in reference to Ann Waties, the meaning of the testator seems to be clear enough, that the use of the property is given to his daughter, during her natural life. If, at the period of her death, there should be issue of her body living, and which issue should attain the age of eighteen years, the property is bequeathed absolutely to such issue, (to whom I mean it shall descend.) But if, at the termination

of his daughter's life estate, there should be no living issue, or no issue living who should arrive at the age of eighteen years. (in failure of which,) then, that is, at the death of his daughter, without issue, which should be then alive, or at the death of such issue before attaining eighteen years of age, then his will is, that it shall be the property forever of Hannah Postell, or the issue of her body.

The Court is unable to perceive the vice or fallacy of this construction. Every word of the bequest is satisfied, and no more. Mrs. Durant, the child of Mrs. Donnelly, was alive at her mother's decease, and had attained the age of eighteen years. She answered directly the description of the issue in whom the testator meant the property should vest absolutely. In giving effect to this intention, no rule of law is violated. See *Feemster v. Smith*, Rice's Eq. R., 37.

It was argued, that the contingent limitation, being to Hannah Postell, or the issue of her body, was bad. But it is not perceived that this inquiry is important, in the events which have occurred, if the interpretation which has been given may be sustained. I am of opinion, however, that in a different contingency the limitation over would have been valid. If at the death of the daughter, there should be no issue alive, &c., then my will is, it shall be the property,

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forever, *of Hannah Postell, or the issue of her body. No language can be more emphatic, to express the meaning and desire of the testator, that a final disposition was then to be made. It shall be the property, forever, of Hannah Postell or her issue. One or the other was then to have it forever. To borrow the expressions of Lord Eldon, in *Montague v. —*, 1 Russell, 170, "The words cannot be fully satisfied, without giving to each some interest." "Here the word is or: both are not to take, but either the parent, or the children, in the alternative; and though in many cases or has been construed and, you must shew an intention, requiring that the natural import is to exclude the one from any participation of that which is given to the other." The context of the will rather strengthens the presumption that the word was intended to have its natural signification. The bequest of Mrs. Postell's property is couched in precisely the same terms. The testator contemplated the alternative contingency of survivorship in the sisters, and seems to have provided that the issue should take what the parent would have taken. I do not understand the analogy attempted to be shown between the case at bar and that of *Postell v. Postell*, Bail. Eq., 390. The limitation over does not imply that the issue of Hannah Postell should take at any time, when the issue of the first taker should fail; but

they must take, if at all, on the death of Mrs. Donnelly. The estate vested absolutely in the wife of the defendant.

It is ordered and decreed that the bill be dismissed, but without costs.

From this decree the complainant appealed, and moved to reverse the decree, on the ground, that under a proper construction of the will of James Coachman, the complainant's testatrix took an absolute estate in the negroes bequeathed to her therein, and therefore the complainant was entitled to recover.

Evans & Dargan, for the motion.
Harllee & Munro, contra.

PER CURIAM. This Court concur in the decree. The appeal is dismissed.

Appeal dismissed.

I Strob. Eq. *84

*MARY B. SNODDY and ADELINE A. SNODDY v. ELIZABETH SNODDY.

(Columbia. Nov. and Dec. Term, 1846.)

[Wills \hookrightarrow 693.]

Where the words, in the will, relied on, in defence, are, "I leave to my dearly beloved wife, all the rest of my negroes," &c.—"to divide amongst her children, at her own pleasure"—the Court refused to grant an injunction to restrain the widow of the testator from removing the negroes from the State, on the application of the widow of one of her sons, no gift to the son having been proved under the power in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1660; Dec. Dig. \hookrightarrow 693.]

[Powers \hookrightarrow 19.]

Grand-children never can take under a limitation over to, or a power of appointing in favor of children, if there be any one answering that description, at the time the limitation over takes effect, or the power is executed.

[Ed. Note.—Cited in *Heyward v. Hasell*, 2 S. C. 520; *Logan v. Brunson*, 56 S. C. 10, 33 S. E. 737; *Robert v. Ellis*, 59 S. C. 160, 37 S. E. 250.

For other cases, see Powers, Cent. Dig. § 39; Dec. Dig. \hookrightarrow 19.]

Before Johnson, Ch., at Spartanburg, June, 1845.

The case is fully explained by the following decree:

Johnson, Ch. The complainant Mary B. is the widow and Adeline A. the infant daughter and only child of the late Alexander Snoddy, who died intestate, in 1841, and the defendant is his mother. Administration of the intestate's estate was first granted to one David Bruton, but proceedings were instituted in the Court of Ordinary, to revoke that administration and substitute the complainant, Mary B. Pending that proceeding this bill was filed. It charges that the defendant was in possession of certain slaves, eleven in number, and sundry other articles of personal chattels, which belonged

to the estate of the intestate at the time of his death, and that she was about to remove them out of the State, whereby the complainants, only distributees of the estate, would be in danger of losing the property, and prays an injunction to restrain the defendant from removing them. The bill also states that the intestate and the defendant were joint owners of certain other chattels, of which defendant had the possession, and that they had been jointly concerned in planting for some years before his death, and that she had appropriated large sums of money to which he was entitled to her own use, and prays partition of the chattels, and a general account of all the money transactions between them.

The defendant states in her answer, that the slaves named in the bill, never belonged to the intestate, but to herself, and as evidence of her right, she exhibits the will of her late husband, Samuel Snoddy, which contains the following clause.

"I leave to my dearly beloved wife, all the rest of my negroes, with all my stock and working tools, to divide amongst her children at her own pleasure, and if she thinks proper to sell a negro for the benefit of the family, she is at liberty."—Ransome and Jude, two of the negroes named in the bill, passed under this bequest, and the others are

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the subsequent issue and increase of Jude, and the right of property in them depends on the fact whether the defendant had given them to her son, the intestate, Alexander Snoddy, in his life time, and I shall proceed to dispose of that question before I enter upon the other matters in controversy.

The will of Samuel Snoddy is dated in 1817; at what time he died does not appear, nor do I find it stated in the pleadings. He gives, by his will, the land on which he lived, to his three youngest sons, Andrew, Samuel and Alexander, and this, with the legacy to his wife, constituted the bulk of his estate, having before provided for two other sons, John and Isaac. He left also several daughters. John, I think, was married and settled to himself before the making of the will. All the children, with the defendant remained on the plantation or some other place, and the slaves, stock, &c., labored for the support of the family under the direction of Isaac, the oldest son remaining with them. How long he managed it does not appear, but on his leaving it, Andrew took the management of it, and when he left it the management devolved on the intestate, Alexander. About 1836, perhaps before, the defendant purchased another plantation and procured a conveyance to her son, the intestate, and they both went to live on it, he, as before, having the exclusive management of the plantation and negroes in dispute, and all others that belonged to defendant, about twenty altogether, made crops and sent them

to market, bought and sold live stock, implements of husbandry, &c. In short, managed the plantation as his own, and as some of the witnesses said, with great propriety. The mother and son living together, as they ought to have done, he conducting the general concerns, and she presiding over the domestic.

Amongst the negroes employed on the plantation was Ransome and Jude and her children, and declarations of the defendant, made subsequent to 1835 or 1836, importing that she had given Jude and her children to the intestate, her son Alexander, were testified to by several witnesses. On one occasion she said to John Cox, that he ought to congratulate Alexander on the birth of one of Jude's children. Elizabeth Sims, who had been the widow of Andrew Snoddy, testified that in 1836, defendant told her she had given Alexander, Jude and her children, and that he was partial to them because they were his; and Holly Johnson, another witness, carries another declaration to the same effect as far back as eighteen years ago, when Alexander was going to school to Mrs. Balenger; she said she intended to give Jude and her children to Alexander. Two other

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witnesses, Herbert Collins and Abrah*ham Collins, testified to similar declarations made in 1841, but under circumstances, which are to be found in my notes of the evidence, which rendered them, as I thought, unworthy of credit, nor did I attach much, if any, weight to the evidence of Holly Johnson. Elizabeth Sims and Mrs. Balenger reside out of the State, and were examined by commission, and I had no means of judging of their credit but from their depositions. But however I might be disposed to distrust this evidence of the fact of the gift, I should feel constrained, under the authority of our decided cases, to come to the conclusion that it was established, if it had remained uncontradicted.

The evidence on the part of the defendant, shows that she had made a will sometime before the death of her son Alexander, by which she had bequeathed to him Jude and some of her children, and the impression in the family had been that she intended to provide liberally for him; and the declarations of Alexander, derived from credible sources, go to disclaim all right to the slaves up to the time of his death. Mr. Poole, the Tax Collector for the District, testified that the intestate made regular tax returns to him from 1836 to 1840, inclusive, for himself and his mother, the defendant, and that in all of them eighteen negroes were set down to the account of his mother, and none to his own, and these returns, it will be recollected, are required by law to be sworn to by the party making them. Jonas Bruton testified that in the early part of 1841, when the intestate was about to visit Alabama, he

requested witness to make tax returns for himself and his mother, and directed him to tell the Tax Collector that their property remained precisely as it was the preceding year.—The intestate died in the November of that year; and John Snoddy, a brother, testified that during the week before his death, he told him that all the negroes that he owned were three children that he had received by his wife in marriage, and one that he had bought; and that in answer to an inquiry whether his mother had given him nothing, he replied that she had not, but referring to his administration of the estate of his brother, Isaac Snoddy, she said she was afraid it might involve him in ruin, and that she would provide for him when he got rid of that.

Now it is impossible to reconcile these declarations of the intestate, made under circumstances which called his attention particularly to the subject, with the fact that Ransome and Jude and her children belonged to him—nor do I think it difficult to account for the apparent inconsistency between these and the declarations of the defendant. The intestate was the only child remaining with

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her—he was daily rendering her services, that but for him, she would have been obliged to employ strangers in,—he was her constant companion, and independent of natural affection, these considerations would have induced her to contemplate more ample provision for him than her other children, and it might reasonably be supposed, that an old and attached and fond mother might take occasion often to refer to it, without taking care to weigh her words with precision, and without, perhaps, comprehending them, sometimes employing those in the past tense as a substitute for the future; or what is equally probable, misunderstood or misremembered by the persons spoken to, and fancy, founded on a supposed fitness of things, often supplies the place of truth. The case furnishes, I think, a striking commentary on the facility with which parole gifts to children have often been sustained in our Courts.

In anticipation of this result, another question has been raised in behalf of the complainant, Adeline A., the infant daughter of the intestate, Alexander. The will of Samuel Snoddy, it will be observed, confers on the defendant the power to divide this property "amongst her children at her pleasure," and it is insisted that the discretion given to her refers only to the time, and not the manner or proportions in which it is to be divided, and that all the children will be entitled equally; that this complainant, as the sole lineal representative of her father, may become entitled to the interest he would have taken if he had been living, and is otherwise entitled to security against the removal of the negroes until the defendant shall exercise the power or die.

I incline to think that the discretion confided to the defendant, refers only to the time of the division, but it is a question of some difficulty, and has not been argued, and I shall reserve it especially, as it is unnecessary to the case, as also because none of the parties interested in it are parties to the cause. If the time and manner of the distribution are both discretionary, then the defendant is not accountable to anyone for the manner in which she exercises it. If the will controls the manner of the distribution, the will limits the distribution of the property to the defendant's children, and it is a well-known rule of law that grand-children never can take under a limitation over to, or a power of appointment in favor of children, if there is any one answering that description at the time the limitation over takes effect, or the power is executed. 4 Ves. 692, *Reeves v. Bryner*,—10 Ves. 195, *Radeliffe v. Buckley*. So that this complainant cannot, under any circumstances, be entitled to any interest in these slaves.—The defendant denies in her answer, that she has

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in her possession any monies, goods, or chattels, which belonged to the intestate at the time of his death, or that she is indebted to him. On the contrary she states, that after his death she delivered to his administrator, Bruton, all his property that remained in her possession and a portion of her own. She admits, however, that the intestate employed and superintended his own and her hands and negroes on their joint account,—that the proceeds were to be divided between them in proportion to the value of their respective properties, without stating any precise contract, and she insists that he appropriated to his own use more than his proportion, and claims an account. The evidence shews that the intestate managed his own and the defendant's property in common, made produce and sold it, bought, sold and exchanged live stock and implements of husbandry, as circumstances and their necessities or convenience required, using the common fund when necessary. The probability is, that there was no stipulated contract between them, and no allusion having been made either in the bill or answer to any account, I presume none was kept, and it is much to be regretted that the parties could not have adjusted these matters between themselves, as from the nature of the circumstances, unless they should turn out differently from those usually attending a transaction of this kind, the Court will find it difficult to arrive at exact justice between them, and I would suggest the propriety of their consenting to refer the matters of account to some of their intelligent and respectable neighbors, who, from a personal knowledge of the condition and relation of these parties, will be more likely to arrive at the truth, than a Court governed by the

strict rules of evidence; if this suggestion fails, a reference will be indispensable.

It is ordered and decreed that so much of the bill as relates to the complainant's claim to an injunction to restrain the removal of the negroes named therein be dismissed, and if the parties, or either of them, shall signify to the Commissioner of the Court, that they decline to refer the matters of account to arbitration, that he do proceed to take and state the accounts between them. The complainant, Mary B., having, as it is understood, obtained administration of the intestate since the filing of the bill. If, upon examination, he shall find that there was a special contract between the intestate and defendant, as to the proportions in which the income of their joint estates was divided between them, or any other by which their respective rights were to be determined, he will, of course, be determined by that. If none, he will then ascertain what was the nett annual income, and in what propor-

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tions they are entitled, allowing the intestate a suitable compensation for his personal services in the management of their joint property. He will also ascertain in what sums the said parties are indebted to each other, and whether the defendant has in her possession any property which belonged to the intestate exclusively, or to them jointly; and inquire into and report all other matters that he may find necessary to a final settlement of their accounts.

The complainants moved to modify the decree, on the grounds,

That if Elizabeth Snoddy's power of appointment has reference only to the time of making it, then Alexander Snoddy had a vested interest at the death of his father, and the injunction should be continued.

That if Elizabeth Snoddy had, as supposed, only the duty and power to appoint in such proportions as she pleased, uncoupled with personal interest, then the delay of appointment for nearly thirty years, is a forfeiture of her right, and the children living at the death of Samuel Snoddy had a vested interest, and they and their representatives are entitled to share and share alike, and at least the injunction should be granted with leave to amend and make all necessary parties.

That defendant had no interest under the will, as a mere trustee, and this Court is bound to execute the trust by an equal division, she having failed in the duty imposed upon her by the will.

That if she has the right to limit the proportion and fix the time of division, she takes an estate by implication, which is contrary to law and the true construction of the will, as complainants submit.

That the said decree is in other respects

erroneous, and should be corrected by the Court of Appeals.

Henry & Dean, for the motion.

PER CURIAM. This Court concurs in the decree of the Circuit Court, and the appeal is dismissed.

Appeal dismissed.

I Strob. Eq. *90

*VARDRY McBEE v. ANDREW LOFTIS
and J. W. HAMPTON.

(Columbia. Nov. and Dec. Term, 1846.)

[*Mines and Minerals* ⚡55.]

An instrument of writing which does not, and was not intended to, grant the soil in fee, but the use only, for the purpose of mining, is not a deed for the conveyance of the land, within the Act of 1795, requiring two witnesses.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 158; Dec. Dig. ⚡55.]

[*Mines and Minerals* ⚡83.]

The grantee of a right of mining, who, by the terms of the deed, is bound to surrender the right at the end of a year, if he finds it unprofitable, and who, at the end of the year, indicates no intention to do so, cannot have his right limited to one year.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 212, 214, 215; Dec. Dig. ⚡83; *Contracts*, Cent. Dig. § 996.]

[*Mines and Minerals* ⚡55.]

Where, by the terms of a grant of the right of mining, the grantee is entitled to "work free of expense," &c., and is, in no other respect, restricted, he may conduct the work in any manner he thinks proper, either by himself, his servants, agents, or assignees.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 159; Dec. Dig. ⚡55.]

[*Limitation of Actions* ⚡43.]

The Statute of Limitations, and the rules as to presumptions from lapse of time, are founded on the same principle, and neither can attach until there is some wrong done, or right withheld; because, until then, the party injured had no cause of complaint, and no right to sue.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 218; Dec. Dig. ⚡43.]

[*Vendor and Purchaser* ⚡240.]

The plea of purchaser for valuable consideration, without notice, must aver the consideration and actual payment of it, which payment must be proved—the averment of a consideration secured to be paid, is not sufficient.

[Ed. Note.—Cited in *Maybin v. Kirby*, 4 Rich. Eq. 113.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 601; Dec. Dig. ⚡240.]

[*Mines and Minerals* ⚡49.]

The right of mining can only be acquired by deed, and is not forfeited by a nonuser of less than twenty years.

[Ed. Note.—Cited in *Adams v. Richardson*, 32 S. C. 141, 10 S. E. 931.

For other cases, see *Mines and Minerals*, Cent. Dig. § 135; Dec. Dig. ⚡49.]

[*Assignments* ⚡5; *Easements* ⚡24.]

[Cited in *National Light & Thorium Co. v. Alexander*, 80 S. C. 15, 61 S. E. 214, to the point that the general grant of a privilege in land passes an assignable estate.]

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 7; Dec. Dig. ⚡5; *Easements*, Cent. Dig. § 64; Dec. Dig. ⚡24.]

Before Johnson, Ch., at Greenville, June, 1845.

The case is embodied in the following Circuit decree:

Johnson, Ch. Lemuel Loftis, the father of the defendant, Andrew Loftis, being, as it is admitted, seized in fee of the tract of land described in the pleadings, on the 23d of November, 1830, entered into a penal bond, conditioned to convey the said land to John Mosteller and Jesse Green. It seems to be conceded, too, that one J. H. Randolph, by some means, acquired the interest which Mosteller and Green took in the land, under the said bond, but at what time does not appear; and on 13th June, 1834, the said J. H. Randolph and Lemuel Loftis entered into a mutual agreement, by which the said Loftis agreed to buy of the said Randolph, the said tract of land, on certain terms, therein specified; and it is therein, amongst other things, provided that "the said Randolph, on his part, retains the privilege of working the land the present year, for a crop—the mine part, of gold, till he is satisfied; which, should he find not worth working, he will give up said claim the present year; but if it will do, he is to work it free of expense, having any necessary use of water and timber to do so." "The said Randolph must have house room," &c. On the —— day of August, 1835, the said Randolph, in consideration of one hundred dollars, conveyed to the complainant, by deed, all the mining

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privileges, with *the use of water and timber, reserved to him in his agreement with the said Lemuel Loftis, before set forth; and this constitutes the complainant's claim to the relief prayed for in the bill.

But on the 26th February, 1836, Lemuel Loftis gave and conveyed the land to defendant, Andrew Loftis, by deed, without reserving any of the rights or privileges recorded in his agreement with the said J. H. Randolph, and on the 21st December, 1844, the said Andrew Loftis, by deed, conveyed the land to his co-defendant, J. W. Hampton, in fee, without condition or reservation.

The bill charges, that the defendant, Hampton, had, for some months before the filing of the bill, been mining for gold on the land, with a large number of hands, &c.; prays an injunction to restrain him from further mining, and for a discovery of the amount of gold found and collected.

The defendants have both answered, and neither of them controverted the facts before stated. The defence relied on, in the answer of the defendant, Andrew Loftis, is, 1st. That the complainant's claim is barred by the Statute of Limitations. 2d. That the reservation in the agreement between Lemuel Loftis and J. H. Randolph, conferred on the latter only the right of mining for one year. 3d. That complainant's long acquiescence in the rights of this defendant, and permitting

him to sell the land and warrant it, operated as a forfeiture of any interest he had. The same grounds are relied on in the answer of the defendant, Hampton; and on the argument, it was further insisted, 1st. That the rights of J. H. Randolph, under his agreement, were personal, and not assignable. 2d. That that agreement was void, as there was only one witness to it. 3d. That the legal estate being in defendant, Andrew Loftis, and Hampton having purchased for valuable consideration, without notice of complainant's claim, will be protected. 4th. That complainant's rights are forfeited by non-user.

It appears from the evidence, that Isaac Randolph, the brother of J. H. Randolph, worked the mine a few months, in the latter part of the year 1834, or the beginning of 1835, with his consent or under his authority; and that in one of those years, the complainant, with a view to test the propriety of purchasing Randolph's interest, worked the mine for a short period. Lemuel Loftis lived within a mile and a half of the place, and was occasionally at the mine during the time, and made no objection to it. The defendant, Andrew Loftis, lived with him at the time. On the 14th August, 1835, J. H. Randolph gave written notice to Lemuel

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Loftis, *that he had tried the mine, and found it worth working, and therefore intended to work it, or have it done. Although he was not able to resume the work when his brother worked it, he should have it worked, or sell the privilege to some one else. In 1838, the complainant, with some hands, worked at the mine, for six or seven weeks, and was obliged to discontinue, on account of the scarcity of water. Defendant, Andrew Loftis, was frequently there during the time, and put complainant's agents in possession of one of the houses. He made no objection to the working, but said he expected complainant had or would give him up the land to plant corn on. The defendant, J. W. Hampton, commenced to work the mine last spring.

The defence, although thus diversified in the pleadings and the argument, may be resolved by a few general propositions, which strike me as of easy solution. They refer, 1st. To the form and legal effect of the agreement between Lemuel Loftis and J. H. Randolph, of the 13th June, 1834.

The objection as to the form, applies exclusively to its not having more than one witness. I have not been able to appreciate the force of this objection. The Statute of Frauds only requires that contracts concerning lands should be in writing, and signed by the party to be charged. I suppose it has its foundation in the requisitions of the Act of 1795, which prescribes the form of deeds for lands, which are intended to convey the fee, and provides that they shall have two

subscribing witnesses. Regarding it as a grant from Lemuel Loftis, of the rights which are in terms, and, as I think, in legal effect, reserved to Randolph, it does not, and was not intended to, grant the soil in fee, but the use, for the purpose of mining for gold, and is not a deed for the conveyance of land, within the Act of 1795.

But on referring to the contract, which is sealed by the parties, it will be found that it assumes that the fee was in Randolph. It begins thus: "This instrument witnesseth, that Lemuel Loftis, of one part, buys of J. H. Randolph a certain tract of land adjoining him, for which he pays in the following way:" "And the said J. H. Randolph, on his part, retains the privilege of working the land the present year, for a crop—the mine part of gold, till he is satisfied; which, should he find not worth working, he will give up said claim the present year; but if it will do, he is to work it free of expense, having any necessary use of water and timber;" and it is not, therefore, a contract by which Lemuel Loftis grants to Randolph the privileges of mining, but by which he buys the land, the fee, of Randolph—a concession

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that the fee was *in Randolph; and having been made with a full knowledge of all the circumstances, Lemuel Loftis would, at law, be concluded, and I think in this court also. He was bound by the bond to make titles to Randolph, and, for the purpose of attaining justice, this Court will presume, in many cases, that done, which the party ought to have done.

Under this head, the inquiry arises, whether the right of Randolph to mine for gold, was, by the terms of the contract, limited to a year, or not; and whether the contract is regarded as a grant or a reservation of the right, is immaterial to this question, as, in either case, it must receive the same interpretation. That it was not intended to be limited to a year, is too plain to admit of any doubt. The agreement expressly promises that Randolph should retain the privilege of working "the mine part of gold, till he is satisfied; which, should he not find worth working, he will give up said claim the present year: but if it will do, he is to work it free of expense, having any necessary use of water and timber," &c., indicating, as clearly as language can do, the intention that Randolph should have the year to test the value of the mine, and that if, in his judgment, it was not found worth working, he would "give it up," (surrender it,) to Lemuel Loftis; and if in his judgment, he found "it will do," (be worth working,) he should be at liberty to work it free of expense, without limitation of time. Now, his election to continue to work the mine, was not, by the terms of the contract, to be indicated by any act or declaration on his part; but his intention

not to do it, was to be indicated by his giving it up, (surrendering it,) to Lemuel Loftis.

I do not understand it, however, as requiring a formal surrender, or positive declaration that he would no longer work the mine. Any act indicating his intention to do so, would be sufficient—as, if he had abandoned it, without intending to return to it; but there is no evidence of any act or declaration, on the part of Randolph, indicating an intention to abandon the mine. He worked it for several months, in the latter part of 1834, or the beginning of 1835, through the agency of his brother, Isaac Randolph; and in August, 1835, he gave Lemuel Loftis explicit notice, that he did not intend to abandon it; and again, the complainant worked, in 1835, for six or seven weeks, under the authority of Randolph. Both Lemuel Loftis and the defendant, Andrew Loftis, knew that he had not abandoned his rights, and that they conceded his privilege to exercise them, is clear, from the fact that they knew that he exercised them, and opposed no objection to it.

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*Under this general head, falls also the inquiry, whether the rights and privileges of Randolph were assignable.

It is too plain to admit of a doubt, that the right of mining is a subject of grant, and may be transferred or assigned. It is said to be a right which lies in grant, and cannot be transferred without deed. See Black. Com. 22, No. 1; Chrest. Ed. And I do not understand that this defence is put upon that ground, but that by the terms of the agreement between Randolph and Lemuel Loftis, the right to mine is restricted to Randolph personally. The terms used are, "he is to work free of expense," &c., and I apprehend where, as in this case, the right of the whole, and the enjoyment, are unrestricted by the terms of the grant, or more appropriately, by the reservation, the grantee may use the thing in any manner he thinks fit—either by himself, his servants, agents, or assignees. A tenant of the freehold may underlet one entitled to all the wood growing on a defined piece of ground; may transfer that right to another; because the exercise of it by another does no wrong to the owner of the soil—and so of the right of mining.

The second general proposition which arises out of the case, is as to the effect of time, as applicable to the Statute of Limitations, and the lapse of time upon the right of the complainant. The Statute furnishes an arbitrary but wise rule, and was intended to protect persons in possession of property against claims, the evidence against which may be supposed to have been lost or destroyed. The rules, as to presumptions from lapse of time, are founded on the same principle, and it follows, necessarily, that neither can attach until there is some wrong done, or right withheld; because, until then, the par-

ty injured had no cause of complaint, and no right to sue. If for example, one having title to land, thought proper to leave the possession vacant for an hundred years, and no one entered, and a stranger then entered, could he avail himself of the time past, as a protection under the Statute, or lapse of time? Now, there is no evidence at all, that there has been any act done by either of the defendants or Lemuel Loftis, under whom they claim, inconsistent with the rights of the complainant, until the spring of this present year, a few months before the filing of the bill, when the defendant, Hampton, commenced working the mine, and no one will insist that in that time, either the Statute or the presumption would operate as a bar.

The defendant, J. W. Hampton, states in his answer, that he purchased of the defendant, Andrew Loftis, "having no notice whatever of complainant's claim, or any incum-

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brance, *until about the last of March, or first of April, 1845," and he insists, "that the long acquiescence of complainant, in the right of Andrew Loftis, and his sale and conveyance" to himself, may operate as a bar to the complainant's claim—and upon this rests the defence of purchaser for valuable consideration, without notice.

Without adverting to the informality of these averments, whether regarded as a plea or as the substance of a plea, embodied in the answer, it wants one essential ingredient, to wit, the averment that the defendant had paid the purchase money, which he was bound to prove. In Mitford's Pleadings, 216, it is said, amongst other things, that the plea of purchase for valuable consideration, without notice, must aver the consideration and actual payment of it. The averment of a consideration secured to be paid, is not sufficient—and in this all the authorities concur. See 3 Atk. 304, 814. Here there is no such allegation or proof.

The only remaining question is, whether the complainant's right has not been forfeited by non-user. The general rule is, that rights may be surrendered or lost by the same means by which they were acquired. We have before seen that the right of mining can only be acquired by deed, and we need not travel out of the numerous cases decided in our own courts, for the rule, that a grant of the freehold will be presumed from twenty years' continuous possession, and not sooner, and the same rule is applicable to the right of mining. It is familiarly applied to the right of way and other easements.

It is ordered and decreed that a writ of injunction do issue, perpetually to restrain the defendants from mining for gold, on the lands described in the pleadings; and that they do account before the Commissioner of the court, for the gold collected by them on the premises, since they have had the pos-

session thereof; and it is further ordered, that the complainant has leave to move such further orders as may be necessary to carry this decree into effect.

The defendants moved to reverse the decree, on all the grounds of exception taken in the answers and in argument on circuit. And further, that the decree, on the proofs made, is contrary to law and equity.

Henry, for the motion.

Perry, contra.

PER CURIAM. The Court is satisfied with the reasoning of the decree, and the same is affirmed.

Decree affirmed.

I Strob. Eq. *96

*THOMAS GARRETT v. JOHN W. GARRETT et al.

JOHN W. GARRETT et al. v. THOMAS GARRETT et al.

(Columbia. Nov. and Dec. Term, 1846.)

[Wills ⇨614.]

Where testator leaves his whole estate to his wife, for life, or during widowhood, remainder to his children, and makes no final provision, even by implication, of the usufruct, the court will not imply any control of her authority or discretion, as to the usufruct bequeathed to her.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1395; Dec. Dig. ⇨614.]

[Wills ⇨859.]

Whatever may be the generality or the comprehensiveness of the terms used, if it be manifest, from the context of the will, that the residuary bequest was of a particular fund or description of property, or other certain residuum, nothing else will pass.

[Ed. Note.—Cited in Swinton v. Egleston, 3 Rich. Eq. 205; Drayton v. Rose, 7 Rich. Eq. 335, 64 Am. Dec. 731.]

For other cases, see Wills, Cent. Dig. § 2184; Dec. Dig. ⇨859.]

[Trusts ⇨301½.]

If the executrix, tenant for life, purchase land, and have the conveyance made to the estate of the testator, this will be, prima facie, a declaration of trust by the executrix, and the land will be subject to partition among the remaindermen.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 41; Dec. Dig. ⇨301½.]

[Executors and Administrators ⇨307.]

If the tenant for life surrender the estate to the remaindermen, they being of full age, and it is appraised and divided among them, in their presence, and with their consent, neither they nor their representatives can afterwards charge this surrender as a waste of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1256; Dec. Dig. ⇨307.]

[For subsequent opinion, see 2 Strob. Eq. 272.]

Before Dunkin, Ch., at Edgefield, June, 1846.

Dunkin, Ch. The will of John C. Garrett, deceased, is dated 19th July, 1821, and the

testator died on the 9th February, 1833. His widow, Elizabeth Garrett, survived her husband, and died on the 13th October, 1843, leaving a will, duly executed, and bearing date the 9th March preceding.

The principal questions arise on the construction of these wills. It may not be improper, however, to premise that it is much easier to suppose what were the probable impressions of the testator, John C. Garrett, as to the course his estate would take, than to fix any disposition of it, as declared by his will.

Both at the time of making his will and at his death, his family consisted of a wife and three sons, Robert, Henry W. and Thomas. From the language of the will, the Court would infer that at that time they were all living together.

It is provided, that if the testator's widow "remains single, she should enjoy the whole of his estate, both real and personal, during her life." But if she married, he directed the whole of his estate to be equally divided between her and his sons, viz: Robert Garrett, Henry W. Garrett and Thomas Garrett, and "at her death, her said part to be equally divided among my said three sons." It appears quite clear to the Court, that the last limb of this sentence refers to the contingency of the widow's marriage, in which event the testator gives her a life interest in a child's share.

By a subsequent clause, he directs that

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there "should be no *appraisement of his estate during his wife's widowhood." Except a trifling gift of a saddle horse, &c. to Thomas Garrett, the testator makes no other direct disposition whatever of his estate. It is true that he prohibits the sale of the negroes, on the death of his widow, and uses such language in regard to the appraisement, as leaves no doubt whatever of his intention, and would well warrant the Court in construing it a bequest to his sons.

Having carved out a life interest to his wife, the testator left to the law to provide for the ultimate disposition. He probably took it for granted that his estate would then pass to his children, and only provides as follows: "It is my will, that if either of my said sons die without lawfully begotten heir, that his part of my estate return to my surviving children, or to their lawful heirs."

In reference to the usufruct, given to his widow in such ample terms, the testator makes no final provision, even by implication. The Court is left to conjecture that the testator supposed, if any thing was saved or accumulated, that the widowed mother would probably leave it to her children, for to whom else would she be likely to bequeath it? But it is enough for the Court, that the will does not even imply any control of her authority or discretion, as to the usufruct bequeathed to her.

It seems that the probable anticipations of the testator would have been fully realized, if those who lived with him and best understood his wishes, had survived until the final settlement of his estate. But in twenty-one years, many changes had taken place. Two of his three sons had died before their mother. The representatives of the elder brother, Robert, gave notice that they should claim, by possession, a tract of land which had belonged to the testator, but of which he had put his son in possession, who, with his family, had held it for many years. On this claim it is not proposed to intimate any opinion, as it is the appropriate subject of inquiry in another tribunal. But it is not to be disguised, that the announcement of the claim, and of the determination to maintain it, gave great pain to the widow and executrix of the testator, and caused her to make such a will as she never otherwise would have made, and which she was always anxious to cancel, if the claim would be abandoned, and the land be brought into distribution with the rest of her husband's estate.

Mrs. Garrett said, (testifies the witness, Charles Hammond,) "That if they, the children of Robert Garrett, deceased, would abandon the claim to the land, she would de-

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stroy the *will, and put them all on a footing. Thomas Garrett, (the defendant,) was present, and said he was perfectly willing." Other counsels prevailed. The claim was not withdrawn, and the will of Elizabeth Garrett, cutting off these grand children, was left unrevoked.

On the part of those interested, under Mrs. Garrett's will, it was contended that, in addition to the direct benefit which she derived under her husband's will, she was entitled to one-third of his entire real and personal estate, (except the negroes,) absolutely, as he has made no ultimate disposition of it; and that this interest in her husband's estate passed, by the true construction of her will, to the defendant, Thomas Garrett, and the children of his deceased brother, Henry W. Garrett.

Mrs. Garrett's will is in the following terms, viz:

"First. My will and desire is, that all my property, consisting of one tract of land, containing two hundred and sixty-nine acres, bought of G. A. McKie and Thomas McKie, three negroes, Clara, and her children, Richard and Maria, six mules, two wagons, &c. should be exposed to public sale, by my executors, hereinafter named; my notes of hand, amounting at this time to two thousand six hundred and fifteen dollars; judgments at the court of Edgefield, amounting to three hundred and seventy dollars; cash at present, (including part of my crop of cotton,) amounting to five hundred and forty dollars; all of which property I give and be-

queath, in the manner following, to wit: I give and bequeath to my grandson, John W. Garrett, five dollars, to him and his heirs. Secondly. I give and bequeath to John A. Houston, and his wife, Amy, five dollars, to them and their heirs. Thirdly. I give and bequeath to my son, Thomas Garrett, one half of the residue or remainder of my estate, to him and his lawful heirs. Fourthly. I give and bequeath unto my son Thomas Garrett, one-seventh part of the remaining half, in trust, for the benefit and behoof of Richard W. Johnson's wife, Elizabeth, and her heirs. Fifthly. I give and bequeath to my son, Thomas Garrett, one other seventh part, as aforesaid, in trust, for the use and benefit of the wife and children of my grandson, John C. Garrett. Sixthly. I give and bequeath one seventh part of the remaining half of my estate, as aforesaid, to Henry Key, and his wife, Mary. The remaining four sevenths of the one half of my estate, as aforesaid, I give and bequeath to my four following named grand children, to wit: Sarah Ann Garrett, Caroline T. Garrett, Susannah Garrett, and Martha Garrett, each one seventh part, to them and their heirs."

The question submitted is, whether the ob-

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ject, purport and *effect of this will is to dispose of the property therein specified, or will pass any other property, real or personal, to which the testatrix was entitled. The subject was very fully considered in *Peay & Pickett v. Barber*, 1 Hill E. R. 95. The English cases, as is there said by the court, go very far to favor the residuary legatee, because any thing not disposed of went to the executor, but that no such reason here exists for any strained construction, as the law makes distribution of the residue. Whatever may be the generality or comprehensiveness of the term used, if it be manifest, from the context of the will, that the residuary bequest was of a particular fund, or description of property, or other certain residuum, nothing else will pass. This is the result of the cases. On this principle, Lord Kenyon, in *Doe v. Buckner*, 6 T. R. 610, held that although the testator used the terms, residuum of my estate and effects, yet on the context of the will, a house, the only freehold of the testator, did not pass. Looking at the other parts of the will, he thought the intention might well be inferred to dispose only of the personalty. The question, says the Chancellor, in *Peay v. Barker*, is whether by the terms all the rest of my property, the testator meant the general residuum of his estate, or the residuum of a particular description of property; and it was in that case ruled, that although these terms, when unaffected by the context, were sufficient to cover all that the testator was worth, yet when construed with reference to other provisions of the will, they must be restricted to the particular property described, and did

not include the negroes of the testator, but that they were distributable among the next of kin. The will of Mrs. Garrett is drawn with unusual minuteness, and particularly in reference to the description of the property of which she intended to dispose. She first directs her tangible property, (which she specifies,) to be sold by her executors. She then describes her notes of hand, and seems to have been so particular as to calculate the amount due on them, at the time of making the will, her judgment at the court house, the amount of cash on hand, are specified, as it would seem, with an abstract before her. If she was at that time the owner, in addition to this property, of one-third of her husband's real and personal estate, it is impossible to characterize the omission as a defective enumeration, like the case of *Cambridge v. Rouex*. She could not have forgotten it. Leaving nothing to conjecture as to what she had in her contemplation, are there any terms used which can only be satisfied by including more than was in her contemplation, and more than she

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described? After directing the *sale of the tract of land which she had purchased, and of her three negroes, and enumerating her choses in action and cash then on hand, all of which property, continues the testatrix, I give and bequeath, in the manner following, to wit: she then gives five dollars a piece to John W. Garrett and his sister, and proceeds, I give and bequeath to my son, Thomas Garrett, one-half of the residue or remainder of my estate. Of the remaining half, she gives three-sevenths as stated, and concludes, the remaining four-sevenths of the one-half of my estate as aforesaid, I give and bequeath to the other four grand children.

The former part of the will seems to the court to be intended as a description of the property on which the will was to act, all of which property, she proceeds to dispose of. But she has only bequeathed ten dollars of it until the residuary clause presents itself. It might be thus transposed without any violation to the sense or manifest intention, all of which property, with the exception of ten dollars to John Garrett and his sister, I give and bequeath to my son, Thomas Garrett, and the children of my son Henry, in the proportions specified. This language would be entirely unambiguous, and the residuary clause would necessarily be restricted to the property specified. The court is of opinion, that this is the true construction of the will: that the one-half of the remainder of my estate, given to Thomas Garrett, and the remaining four-sevenths of the one-half of my estate as aforesaid, given to the four grand children, refer to all of which property she had expressed her purpose, and include nothing more. See *Woolman v. Kenworthy*, 9 Ves. 142. As to the tract of land purchased by Elizabeth Garrett from John Griffith, in

1835, the court has no other evidence or information than that the conveyance was made to John C. Garrett's estate. *Prima facie*, this would be a declaration of trust by the executrix, and the land would be subject to partition among the heirs.

The court has reflected much on the argument submitted in relation to the partial partition of negroes made in November, 1839. It is very difficult to impeach this transaction in any way. It was the action principally, perhaps, of the executrix. But it purported to be quoad an execution and discharge of her trust. It was for the benefit of the remaindermen, so purported to be, and was so understood. Robert Garrett, Thomas Garrett, and the administratrix of Henry Garrett, were all present. Highly respectable gentlemen had been selected to make the arrangement and division. Capt. William Garrett, the testator's half brother,

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was one of these *appraisers. He proved very fully and satisfactorily, the presence and consent of all the parties. He proved also the written statement of the negroes, (certified by the appraisers) allotted to Thomas Garrett, by which he was to pay to the other shares thirty-three dollars and thirty-three cents for equality, and he testified that a similar paper had been given to each of the other parties. Robert Garrett carried home the negroes allotted to him, and held them until his death, in January, 1843. Those allotted to the administratrix of Henry W. Garrett, were sold soon after the partition, as part of his estate, and Thomas Garrett has held those allotted to him, in quiet and undisturbed possession, from the time of the partition in November, 1839. The object and effect of this arrangement cannot be mistaken. Robert and Henry Garrett had received some negroes from the testator, and they had also received two from the executrix, lent to them, as directed by the will. Thomas had received none. The primary object was to place Thomas on a footing with his brothers, as to these negroes, and Mrs. Garrett, advanced in years, desired to surrender her life interest in the negroes, to be thus allotted to the several parties. For this purpose, Robert and the administratrix of Henry carried their negroes to the house of Mrs. Garrett, and the proceedings took place, which have been described. Robert was perfectly satisfied, made no complaint, and when the negroes allotted to the administratrix of Henry W. Garrett, deceased, were afterwards appraised and sold as part of his estate, he interposed no objection.

It seems to the court, that the complainants in the cross bill have no interest whatever in the question, but as the legal representatives of Robert Garrett deceased, and in that character they are precluded, by the acts of their intestate, from objecting to the valid-

ity of this arrangement. It is argued that it was a *devastavit* on the part of the executrix. But, if the testator had bequeathed all his negroes to his wife for life, with remainder to his children, and the children being all of age, the mother had surrendered her life interest, and the negroes were divided, could this be termed a *devastavit*? If so, was it a *devastavit* of which those should complain, who were parties to it? The court is not satisfied, that either the executrix or the other parties mistook the will of the testator, or violated its provisions. Perhaps the most doubtful proceeding on the part of the appraisers, was in increasing the share of Robert, in consequence of his trouble in raising the young negroes. But the persons making the allotment, were selected or approved

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by the parties themselves. Their act was the act of the parties, and if more doubt existed, it may well be placed on the footing of a family arrangement, which ought not to be lightly disturbed.

Then it was said the life tenant must keep up the estate, and leave it in the condition in which it came to her possession. There was no proof that this had not been done, nor would the question seem very material, if the court has given a proper construction to the residuary clause of Mrs. Garrett's will. But it was agreed at the hearing, that an inquiry would be taken on the fact, if it should be deemed expedient to urge this question. On the subject of the tract of one hundred and twenty-two and a half acres, the title to which was taken in the name of the defendant, Thomas Garrett, no evidence was offered to impugn his answer, and he must be held as a trustee for the children of Henry Garrett, deceased, and himself in equal moieties. An issue has already been directed to determine the validity of the claim on the part of the heirs of Robert Garrett, deceased, to the tract of land now held by them, and no further order as to this tract can be made until the title is ascertained.

It is ordered and decreed, that Thomas Garrett account for the estates of John C. Garrett, deceased, and Elizabeth Garrett, deceased, on the principles of this decree. It is further ordered and decreed, that a writ of partition issue to divide the real and personal estates of the said John C. Garrett, deceased, and Elizabeth Garrett, deceased, among the parties thereto respectively entitled.

It is finally ordered, that the parties have leave, from time to time, to apply for such further orders as may be necessary to carry this decree into effect.

Costs to be paid out of the funds of the estate of John C. Garrett, deceased.

The plaintiff, Thomas Garrett, appealed, and moved the Court of Appeals, in Equity, to reverse so much of the circuit decree, as decides that the will of Elizabeth Garrett dis-

poses of only such portion of her estate as is enumerated therein, upon the ground:

That, according to the correct construction of the residuary clauses of the said will, the testatrix has disposed of her entire estate.

The defendants, John W. Garrett and John A. Houston, appealed, and moved the Court of Appeals to modify the Chancellor's decree, on the grounds,

1. That the partition of 1839, having been made by mistake, without any design to compromise rights, and in violation of the will of John C. Garrett, should be held invalid.

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*2. That the will of John C. Garrett disposes of his whole estate, (except the small bequests to Thomas Garrett,) in equal shares, amongst his three sons, after the death of the widow, Elizabeth, including even her accumulations during life.

3. That the King tract of land, having been bought by the executrix, Elizabeth, with the funds of the estate, for the benefit of all of the legatees, and conveyed by mistake to Thomas Garrett, the resulting trust in favor of said legatees, as to said lands, could not be rebutted by the naked oath of Thomas Garrett.

4. That the estate of Elizabeth Garrett, the tenant for life, should be held to account for the estate of John C. Garrett, in the condition in which she received it.

Carroll, for the complainants.
Wardlaw, for defendants.

PER CURIAM. We concur in the judgment of the Circuit Court. It is therefore affirmed and this appeal is dismissed.

I Strob. Eq. 103

MARTHA WILLIAMS v. JOHN H. HOLLINGSWORTH.

(Columbia. Nov. and Dec. Term, 1846.)

[*Husband and Wife* ⇨120.]

The husband of a distributee, under a will leaving property in trust for the sole and separate use of testator's daughters, &c., who, at the sale of the Commissioner, under an order for distribution, had become the purchaser of a tract of land, against the price of which his wife's share had been discounted, was held to have been a purchaser subject to the trusts declared in the will; and although the land had been sold in his lifetime, for his debts, on application of the wife, after his death, the Court ordered the possession to be surrendered to her, and the rents and profits which had accrued after the death of the husband, to be accounted for.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 431; Dec. Dig. ⇨120.]

[*Trusts* ⇨72.]

The general principle is, that where land is purchased by one who takes a conveyance in his own name, but the purchase money is paid by another, there is a resulting trust in favor of him who pays the consideration; and such trust

may be established by parol, after the death of the nominal purchaser.

[Ed. Note.—Cited in *Miller v. Cramer*, 48 S. C. 289, 26 S. E. 657.]

For other cases, see *Trusts*, Cent. Dig. § 102; Dec. Dig. ⇨72.]

[*Vendor and Purchaser* ⇨226.]

To rebut the plaintiff's equity, in order to entitle the defendant to the protection of a purchaser for valuable consideration, he must prove the actual payment of the money before notice of the plaintiff's title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 476; Dec. Dig. ⇨226.]

[*Execution* ⇨273.]

A purchaser at Sheriff's sales, who is also the plaintiff in the execution—to whom the money is payable—and who, therefore, parts with no money, is not entitled to the protection of a bona fide purchaser for valuable consideration.

[Ed. Note.—Cited in *Maybin v. Kirby*, 4 Rich. Eq. 113; *Zorn v. Railroad Company*, 5 S. C. 101; *Dearman v. Trimmer*, 26 S. C. 512, 2 S. E. 501.]

For other cases, see *Execution*, Cent. Dig. § 789; Dec. Dig. ⇨273.]

Before Dunkin, Ch., at Edgefield, September, 1846.

The complainant was one of the children

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of William Jeter, *deceased. By the residuary clause of her father's will it is provided as follows, viz: "All the rest and residue of my estate, real and personal, I desire and direct to be divided into five equal shares or parts, one of which I give and devise to the children of my deceased daughter, Charlotte Phillips, one part I give to my son, John S. Jeter, and his heirs forever, as above mentioned, and the three other parts I desire may be held by my executors for the sole and separate use of my three daughters, respectively, so that each may have their shares to their own benefit during their natural life, and at their deaths the proportion of each may be divided among the children individually, to said children and their heirs forever. It is my desire, however, that this will, nor any part thereof, is to be so construed as to deprive my said daughters of any right which might promote their own interest, and the interest of their children, so that the said property, or any part thereof, be not made liable to any debts, covenants, or engagements of any present or future husband."

The testator died on the 7th September, 1820. Of his will, his son, John S. Jeter, and his sons-in-law, Edward Martin and William W. Williams, (the deceased husband of the complainant,) were appointed executors. J. S. Jeter and Edward Martin alone qualified on the will.

On the 2d February, 1821, a bill was filed by the executors and all the adult legatees and devisees of the residuary estate of William Jeter, deceased, against the two who were minors, praying that a writ of partition might issue for the division of the residuary estate, consisting of eleven negroes and two

tracts of land, described in the pleadings. A writ of partition was issued according to the forms of the Act of 1791, and was executed in strict conformity with the provisions of that Act. On the return of the Commissioners, placing an assessed value per acre on the real estate, and recommending a sale, and also on the special report of Mr. Commissioner Brooks, that a sale would be for the interest of the minors, the Court, at June Term, 1821, made an order "that the land in the report mentioned (except one half acre immediately surrounding the family burial ground,) be sold by the Commissioner in Equity, on the first Monday in September next, on a credit of two years, and that the negroes be sold by the Commissioner in Equity, at the late residence of Wm. Jeter, deceased, on Thursday, 27th December next, on a credit of twelve months, the fees and costs of suit to be paid in cash."

In obedience to this order, the Commissioner, between the 1st September, 1821, and the 8th January, 1822, sold the land and negroes constituting the residuary estate. The

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tract on *Cyper creek was purchased by William W. Williams, for one thousand and five dollars; and he also purchased two negroes for two hundred and fifty dollars. For the purchase money of the land W. W. Williams executed his bond to the Commissioner, and for the value of the negroes, gave him his note, according to the terms of sale. The gross sales of the residuary estate amounted to seven thousand four hundred and forty-three dollars. All the property, with the exception of three negroes, was purchased by parties having an interest under the residuary clause of the will. Among others, Mary P. Jeter, one of the testator's daughters, purchased to the amount of about fifteen hundred dollars, for which she gave her note. She afterwards married Christopher Mantz, and the executors of Wm. Jeter, deceased, having caused a suit at law to be instituted on the note, Mantz and wife filed a bill in this Court on the 5th of January, 1826, against the executors of William Jeter, deceased, praying an account of their interests under the will, and for an injunction against the proceedings at law. At May Term, 1827, it was ordered, among other things, "that William W. Williams and wife be allowed to become complainants; that the Commissioner do take an account of the assets of the estate, and report the several proportions due the complainants, under the will of William Jeter, deceased." This order was entered on the 29th May—on the 31st May the decree of Chancellor Thompson was filed, declaring the rights of Mantz and wife under the will of William Jeter, deceased.

In reference to the residuary clause, the Chancellor remarks, "This clause, taken in connexion with the foregoing, clearly shows that the only object of restriction was to pre-

vent the husbands of the daughters from, in any manner, disposing of the same; but that it was the intention of the testator that the sole and separate enjoyment thereof should be and remain in the said daughters during the term of their natural life."

An injunction was ordered, and also a reference.

On the same day the report of the Commissioner was filed; among other things, the account sets forth the shares of the several parties in the sales of the residuary estate.

The amount of principal and interest then due on the specialties in his hands, taken at the sales, is also set forth. It has already been remarked that the sales amounted to \$7,443. According to the report of the 31st May, 1827, this was chargeable with expenses amounting to \$150, leaving the share of each \$1,458.60, at the time of the sale.

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It is not intended *here to present any statement of the account, which will, necessarily, constitute a part of the evidence in the case.

The leading purpose of the proceedings was to settle the difficulty between Mantz and wife and the executors, and, in accomplishing this, to arrange the accounts as between the other parties, and to relieve the executors from further responsibility as such. On the day of making the report, it was confirmed by the Chancellor; and, among other things, it was directed, that "the Commissioner do credit the bonds and notes of E. Martin, W. W. Williams, J. S. Jeter, and Mary P. Mantz, with their proportions of the sales in his hands, and pay over, or receive, the balance, as the same has been ascertained in the report."

At June Term, 1828, the Commissioner reported, in his annual account of estates, that, in Williams and Wife et al. v. Phillips et al. he had disposed of the funds according to the decretal order in Mantz and Wife v. Executors of William Jeter, deceased, made at the preceding term.

It is proposed, first, to consider the case as if W. W. Williams, alone, or the executors of W. W. Williams, were the parties defendant. The particular equities of the purchaser at sheriff's sale will be subsequently noticed.

The sale of the plantation, or Cyper tract, in January, 1822, was avowedly for the purpose of partition among those interested under the residuary clause of William Jeter's will.

All the proceedings were conducted in strict conformity to the Act of 1791, authorizing a sale for the purpose of partition. In making the order for sale, the Court required neither personal security nor a mortgage of the premises.

In Pell v. Ball, Speer's Eq. 48, the power of this Court to order a sale of real estate, for the purpose of partition, in other cases than that of intestacy, was discussed and affirmed.

Referring to the previous practice, as sanc-

tioning the exercise of this authority, the Chancellor says, "The Court may have extended the equity of the Statute of 1791, in relation to intestates' estates, to all other cases of joint tenancy and tenancy in common, according to a well known practice of the English courts, as being within the mischief or cause of making the Act. Co. Lit. 246."

An examination of the proceedings in *Williams v. Phillips* will show, very clearly, that the Court referred its authority to the Act of 1791, and the omission to require the purchaser to execute a mortgage of the premises, arose from the conviction that, according to the provisions of that Act, the property sold would stand pledged for the payment of the

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*purchase money. The decision in *Pell v. Ball* is conclusive, as to the authority of the Court, and, in that view, I cannot doubt that all the provisions of the Act of 1791 should attach to such sales, when made by the order of this Court. The Cyper creek tract stood pledged, then, in possession of William W. Williams, for the price bid for it. It remains to inquire whether the debt has been paid, or the lien discharged.

In May, 1827, the Commissioner reported that the bond was in his hands, unpaid. According to the construction given by the Court, at that time, to the will of William Jeter, the extent of the legatees' rights was to the use of the property, during life. The language of the will left no doubt, and it was so declared by the Court, that this right of the wife was exclusive of the "debts, covenants, or engagements" of the husband. It would be a manifest and palpable violation, both of the will and the decree, to appropriate the share of the complainant to the payment of her husband's debts. No such construction would be given to any order of this Court, but from necessity. If the interpretation be irresistible, the Court would regard the order of the 31st May, 1827, as ministerial, and, supposing the husband or his representatives to be now the party defendant, would have it corrected.

In *Trescot v. Trescot*, 1 McC. Eq. R. 428, a receipt was ordered to be expunged, and a cancelled bond set up. But, as has been before suggested, the object of the proceedings of 1827, was to settle the accounts between the several parties.

In concluding his statement of the accounts, and of the sums severally due, the Commissioner says "which sums are to be paid out of the specialties in my hands, or which I am ready to assign, as may suit the convenience of the parties." Then follows the order confirming the report, to which reference has been made.

According to the view which seems to have been taken by the Court, the husband and wife were entitled to the use of the property, and consequently to the interest of the mon-

ey. It having been ascertained by the Commissioner's report, that the share of the wife exceeded the amount due on the husband's bond, and they being entitled absolutely to the interest, it may have been deemed unnecessary that the Commissioner should retain the bond. But if the husband had actually received the money, he held it, knowing the trust, and was chargeable as trustee, and those entitled to it were also entitled to the security of the land, which the law gave, for the debt. No irregular order of this character, obtained for the convenience either of

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the husband or of the other parties, *should be construed to defeat the rights of the wife, and destroy the protection which the will of the testator was intended to secure. If the husband were now alive, and insisting on the effect of the decretal order, as a payment of his bond to the Commissioner, the Court would give no countenance to a pretension founded on a gross breach of trust, which he, an executor named in the will, could not fail to have known. See *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, Id. 369.

It was faintly insisted that the defendant occupied a position more favorable than the husband himself. It is quite manifest, from the testimony, that he has not even the equity of a creditor of the husband. He was present at the sheriff's sale, and was informed by Charles J. Glover, of the complainant's claim. The evidence of this witness is very full on the subject of notice. The land was purchased by Dr. Mendenhall, for seventeen hundred dollars, and was immediately afterwards sold to the defendant, for twenty-five hundred dollars, who required and received from Dr. Mendenhall, a bond with ample security, to indemnify him "against any and all claims, rights or interest of Mrs. Williams, wife of William W. Williams, except as to the dower of the said Mrs. Williams," against which there was no indemnity or protection.

The complainant is entitled to have the capital of her legacy secured, and also to have the interest of the same, since the death of her husband. She has a lien on the Cyper creek tract of land, which was sold for partition among the residuary devisees of William Jeter, deceased, to the extent of one thousand and five dollars, with interest from the death of W. W. Williams, in 1845.

The complainant is also entitled to dower in the surplus, if any, between the value of the said tract, and the amount due on the mortgage, upon the principle indicated in *Keith v. Trapier*, Bail. Eq. 63.

The right of the complainant to dower in the residue of the land purchased by the defendant, was not contested.

It is ordered and decreed, that unless the defendant pay to the complainant, Martha Williams, the interest on the sum of one thousand and five dollars, from the death of Wil-

William W. Williams, and also pay to the complainant, John S. Jeter, as trustee for the said Martha Williams and her children, the principal sum of one thousand and five dollars, on or before the first day of January next, the Cyper creek tract aforesaid be sold by the Commissioner, on the last mentioned day, on a credit of twelve months, secured by bond, bearing interest, and good personal security, with mortgage of the prem-

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ises; *that from the proceeds, the principal sum and interest aforesaid be paid, and the balance be held subject to the future order of the Court.

It is further ordered and decreed, that a writ issue for the admeasurement of the complainant's dower in the residue of the lands of W. W. Williams, deceased, purchased by the defendant, and that the Commissioners make their return, according to law. Parties to pay their own costs.

The defendant appealed, and moved the Court of Appeals to reverse the decree in this case, on the following grounds, viz:

1. Because the possession by W. W. Williams of the Cyper creek tract of land from January, 1822, to November, 1842, under a conveyance in fee from the Commissioner, vested in him a good title to the land.

2. Because the order of the Court of Equity, at May Term, 1827, directing the Commissioner to credit the bond of W. W. Williams with the share of himself and wife in the sales of the residuary estate of Wm. Jeter, and this having been done, and reported to the Court by the Commissioner, was a discharge of the bond, and the land from the lien which it is alleged attached upon it.

3. Because the Act of 1791 does not relate to the case of partition like the one in which this land was sold, but is confined to the partition of the estates of persons dying intestate, and the order of the Court not requiring a mortgage of the land to secure the purchase money, the land did not stand pledged for the same.

4. Because the remedy of the complainant, Martha Williams, if enforced against any one, should be enforced against her brother, the other complainant, who was a qualified executor of her father's will, and charged with the protection of her interest; and because her rights, if violated at all, were sacrificed by his general neglect of duty, as her trustee, and particularly in permitting and procuring the bond of her husband to be satisfied and discharged by the order of the Court, aforesaid, at May Term, 1827, and by his neglect to give public notice of her claims, when the land was sold by the sheriff, in November, 1842.

5. Because Dr. M. T. Mendenhall was a purchaser for valuable consideration, without notice of the claims of Mrs. Williams, and acquired a good and unimpeachable title to

the land, which passed to the defendant, under the deed of said Mendenhall.

6. Because the defendant was himself a purchaser for valuable consideration, without notice.

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*7. Because the claims of the complainant were barred by the proceedings in Equity, in the cases of Williams and Wife et al. v. Phillips et al. and Mantz and Wife v. The Executors of Jeter, and the lapse of time and the Statute of Limitations.

8. Because, in any view, the complainant was only entitled to one-fifth of the purchase money of the Cyper creek tract of land, and that for life, and because she is not entitled to dower in the surplus, if any, of the purchase money that may arise from the sale of that land.

9. Because W. W. Williams, being in possession of the Cyper creek tract of land for many years, as his estate, obtained credit upon the faith of that land, and the debts to satisfy which the said land was sold by the sheriff, in 1842, having been made in that way with persons having no kind of notice or intimation of the claims set up in the bill, it would be a fraud on such creditors, under the circumstances, to sustain those claims.

Griffin and Bonham, for the motion.

The plaintiff moved the Court of Equity appeals to modify the Circuit decree in this cause, upon the grounds,

That the tract of land on Cyper creek should have been charged with the aggregate amount of principal and interest due upon the bond of William W. Williams; or, at all events, with the principal sum secured by the said bond, and interest thereon from the 7th November, 1842, the day on which the said tract of land was sold by the sheriff, under judgments recovered against the said Williams.

Carroll, plaintiff's solicitor.

DUNKIN, Ch., delivered the opinion of the Court.

In some respects this Court has taken a different view of this transaction, from that presented in the decree of the Circuit Court, and has arrived at a different conclusion.

It is stated in the decree, that at the sales of the Commissioner, in January, 1822, nearly the whole of the residuary estate was bid off by those interested under the residuary clause of the testator's will, and the avowed purpose of the amended proceedings, in 1827, purporting to make Williams and wife et al. parties, was to make a final settlement. The decree of Chancellor Thompson, reciting rather than construing the will of the testator, declared that the property bequeathed to the daughters, under the residuary clause, was not to be subject to the debts or contracts of their husbands, but was to be held to

their sole and separate use. On the day pronouncing the decree, the report made under

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it was *heard and confirmed, and the decretal order was made, by which the bonds of the purchasers, Martin, Williams, Jeter, and Mantz, were directed to be "credited with their proportions of the sales in the hands of the Commissioner." Neither Martin, nor Williams, nor Mantz were entitled to any proportion, or share, of the sales in the hands of the Commissioner. But the meaning of the order was not to be misunderstood. They, that is, Martin and Williams, had purchased, as persons entitled to shares, because their wives were interested in the property, and consequently would be interested in the fund. In making up his account, which had been confirmed by the Court, the Commissioner had charged the shares to which Mrs. Williams was entitled, with the purchases which had been thus made, and the interest thereon. Williams certainly was a party to these proceedings. The Court, in the same decree, had declared that the share of Mrs. Williams could not be subjected to the payment of her husband's debts; and the only rational construction of the decree and decretal order is, that the purchases were made for Mrs. Williams, or by Williams, as representing the interests of his wife and children, and therefore their shares of the sales were properly ordered to be discounted against the amount due on the purchases. Any other construction renders the order as palpable a violation of the will of the testator, as it is inconsistent with the decree itself. It cannot be doubted, that the land was paid for with the funds of the complainant, and the testimony is abundant to warrant the conclusion that it was so intended to be paid for, at the time of the purchase. No mortgage was required; no security was given; no payments made. It is true that a conveyance was executed to Williams, but it was never put on record, and was found by the complainant among his papers, after his death. The conduct and declarations of Williams confirm the conclusion. Under her father's will, Mrs. Williams was entitled to a specific legacy of certain negroes, for life, to her sole and separate use, with a limitation to her children. When the Cyper creek tract of land was under advertisement by the sheriff, as the property of Williams, in 1842, he, (Williams,) had a conversation on the subject with the witness, Glover, in which Williams said to him, "that his wife's money had paid for this land, and, if she was entitled to the rest of the entailed property, she ought to be entitled to this." The general principle is admitted, that where land is purchased by A., who takes a conveyance in his own name, but the purchase money is paid by B., there is a resulting trust in favor of him who pays

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the consideration. *It was formerly doubt-

ed whether such trust could be established by parole, after the death of the nominal purchaser; but such doubts have been removed by more recent decisions. *Lench v. Lench*, 10 Ves. 511, was a case of that character. Sir William Grant says, "All must depend upon the proof of the fact;" and "it is now settled, that a claim of this sort may be supported by parole evidence." He did not think the evidence sufficient, in *Lench v. Lench*, and dismissed the bill. But in that case he cites, from the Register's book, the case of *Wilson v. Foreman*, very imperfectly reported 2 Dick. 593. Money was settled for the purpose of being laid out in land. The husband obtained possession of the money, under a power of attorney from the trustee. Soon afterwards he purchased an estate in Kent, and took a conveyance to a trustee. He also purchased an estate in Yorkshire, and took that conveyance to himself and his heirs. The claim of the wife was upon that estate in Yorkshire. Lord Thurlow directed a reference, to inquire whether the estate was purchased with part of the trust money, with an intention to settle the same pursuant to the marriage articles. Upon the evidence, the Master so reported, and the Lord Chancellor directed new trustees to be appointed, and *Falling Foss*, (the Yorkshire estate,) to be conveyed to such new trustees, upon the trusts in the settlement. In the case under consideration, the Court is satisfied, from the evidence, that the purchase was made and paid for with the trust funds, and that it was the intention of the party that the estate should be held subject to the trusts declared in the will.

It is urged, however, that Williams was in possession of the land for many years, and that the trust ought not to be enforced after so great a lapse of time. As between Williams and his wife it is difficult to perceive in what manner his possession, or the lapse of time, could impair her rights. If the husband were now alive, and the only defendant, the Court would refer his possession to his fiduciary character, and that the enjoyment by the wife was such as was contemplated by the will.

But on the 7th November, 1842, the premises were sold by the Sheriff, under an execution against Williams, and, with other property, were purchased by Dr. Mendenhall, who, on the following day, conveyed to the defendant, Hollingsworth, and at the same time gave him a bond with security to indemnify him against any claim of the complainant in the premises, except her claim of dower. Williams died in 1845, and this bill was preferred on the 17th April, 1846. For

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the *reasons stated in the decree of the Circuit Court, it is quite clear that Hollingsworth is not entitled to the protection of a purchaser without notice. But it has been insisted in this Court that, as it appears from

the recital in the bill that the defendant purchased from Dr. Mendenhall, it ought to have been proved that Dr. Mendenhall had notice. It may be proper to remark that this defence is not taken by the answer, and the facts in that respect were not particularly developed. But there is no difficulty on this point. Mr. Sugden considers the rule as perfectly well settled, that in order to rebut the plaintiff's equity, in order to entitle the defendant to the protection of a purchaser for valuable consideration, he must prove the actual payment of the money before notice of the plaintiff's title. On the part of the defendant himself, this defence is entirely unsupported—on the contrary, is fully disproved by the evidence. But a purchaser with notice of an equitable claim, may protect himself if he has bought from a bona fide purchaser without notice, although this circumstance may influence the Court with respect to costs. His answer does not, however, assume the ground that his vendor occupied that position, and therefore the complainant may very well have deemed it unnecessary to establish notice to Dr. Mendenhall. But there was no proof whatever that Dr. Mendenhall had paid any part of the purchase money. On the contrary it is alleged here that he was the plaintiff in the execution under which the land was sold, and that he bought to save his debt. But it has been repeatedly held that a purchaser at Sheriff's sales, who is also the plaintiff in the execution to whom the money is payable, and who, therefore, parts with no money, is not entitled to the protection of a bona fide purchaser for valuable consideration. See Kirby & Dillard v. Crocker, Speers Eq. 20; Shultz v. Carter, Speers Eq. 542.

It is ordered and decreed, that possession of the Cyper creek tract of land be surrendered to the complainant, and that the defendant account for the rents and profits of the same since the death of W. W. Williams, in 1845. In other respects the decree of the Circuit Court is affirmed.

HARPER, Ch., concurred.

1 Strob. Eq. *114

*JOHN ROCHELL v. JAMES TOMPKINS,
Executor.

(Columbia, Nov. and Dec. Term, 1846.)

[Wills 865.]

Where testator, by his last will, devised and bequeathed real and personal estate to his wife, for life, and at her death to return to and become a part of his estate, and made no further disposition of it—it is a case of intestacy as to the reversion, which, on his death, vested instantly in those entitled to distribution, among whom the wife was prominent.

[Ed. Note.—Cited in Glover v. Adams, 11 Rich. Eq. 267; Kerngood v. Davis, 21 S. C. 207; Blount v. Walker, 31 S. C. 28, 9 S. E. 804;

Dukes v. Faulk, 37 S. C. 266, 16 S. E. 122, 34 Am. St. Rep. 745; Robinson v. Ostendorff, 38 S. C. 74, 16 S. E. 371.

For other cases, see Wills, Cent. Dig. §§ 2193, 2198; Dec. Dig. 865.]

[Descent and Distribution 62.]

Where, by the terms of the marriage settlement, the whole of the wife's estate is limited over to her right heirs, in the event of her not disposing of it by deed or will, should she die leaving no such deed or will, and leaving no issue, her estate is distributable under the Act of 1791, in the proportion of one-half to the husband, and the other half to her collateral relations. In such case, the husband is not the *hæres natus*, but the *hæres factus* of the law.

[Ed. Note.—Cited in Templeton v. Walker, 3 Rich. Eq. 549, 55 Am. Dec. 646.

For other cases, see Descent and Distribution, Cent. Dig. § 168; Dec. Dig. 62.]

[Husband and Wife 179, 182.]

The power of a married woman, over her separate estate, is derived from the deed or instrument creating such estate, and she has no other capacity to contract, but as authorized or empowered by the settlement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 711, 715; Dec. Dig. 179, 182.]

[This case is also cited in Holloway v. Rochell, 1 Strob. Eq. 119, as to facts.]

Before Johnson, Ch., at Edgefield, June, 1845.

This case may be fully understood from the following circuit decree:

Johnson, Ch. The late Samuel Tompkins, by his last will, devised and bequeathed to his wife, Elizabeth, the plantation on which he lived, and ten negroes, by name, his household furniture, and a portion of his live stock, for and during the term of her natural life, and at her death to return to and become a part of his estate. And after giving some specific legacies, he bequeathed two-thirds of the residue to an illegitimate son, and the remaining third to his executors; of whom the defendant, James Tompkins, was one, and is now the only survivor. The property devised to the wife, consisting of the land, negroes, furniture and live stock, was delivered to her not long after his death. Legal proceedings were instituted to test the validity of the legacy to the illegitimate son, and it was adjudged to be void, as a violation of the Act of the Legislature, and as to that, he died intestate, and upon the distribution of that portion of the estate the widow acquired six other negroes, and some other property of less value.

In 1827, the widow intermarried with the complainant, but before the marriage was solemnized, they entered into a contract by which all the property acquired by the means above stated, was secured to her special use, with power to dispose of it by deed or will, and in default thereof, then to her right heirs. She died in 1842, intestate, and without having disposed of her property by deed, and without leaving issue. Administration of her estate was granted to the defendant,

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*Thomas Ferguson, and the bill prays an account and distribution of the property devised by Samuel Tompkins to his wife for life, and also of the property which was distributed to her on the partition of that portion of his estate of which he died intestate. Mrs. Rochell left, at the time of her death, numerous collateral relatives, who, with her husband, the complainant, are entitled to distributive shares of her estate, and most or all of them are parties defendants, as also all the next of kin to her deceased husband, Samuel Tompkins.

The complainant states in his bill, that immediately after his intermarriage with his late wife, he took upon himself the management and control of her property, and continued to do so down to the time of her death, acting in all respects as her agent, and by judicious management increased and improved it. But that in discharging his duty, he necessarily incurred debts to the amount of \$2,000 or \$2,500 which remain unpaid, and now exist, in part, in the form of promissory notes, given by him and herself jointly, some in notes given by the complainant himself, and the remainder in book accounts, and having no property of his own at the time, he insists that these debts ought to be paid out of her estate, as they were contracted solely for its benefit.

The defendants, James Tompkins and Thomas Ferguson, alone have answered, and they deny the right of complainant, upon the grounds that will hereafter be stated, to any share of the estate of his wife, as well that which she took for life under the testator's will, as that which she acquired in the distribution of that portion devised to the illegitimate son. They deny also, that the debts stated in the bill as incurred on account of the estate, are chargeable on it—they state that the complainant and his late wife have used or disposed of most of the furniture and live stock, bequeathed by the testator to his wife, and insist that he is accountable therefor.

The testator provides that, on the death of his wife, the property devised and bequeathed to her, should revert to his estate, but makes no further disposition of it. It is then a case of intestacy, as to the reversion, and the defendants insist, 1st, that the wife having died before the reversion could occur, the estate is distributable amongst the testator's next of kin, to the exclusion of the wife's relations. The only argument relied on in support of this position, was that the wife's right in the reversion was incompatible with the previous life estate; but their incompatibility is not perceived. On the death of the testator, the right to the reversion vested instantly somewhere, and in whom but in

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those entitled to *distribution?—amongst whom the wife was most prominent. There

were no children, and the Act of 1791 gives her one-half, and the remaining half to his brothers and sisters, the children of a deceased brother or sister representing the parents.

But by the terms of the marriage settlement, the whole of the estate which Mrs. Rochell derived from her deceased husband, is limited over to her right heirs, in the event of her not disposing of it by deed or will. She made no deed or will, and the defendants insist, secondly, that the complainant is not entitled to take as one of the heirs of the wife. In England, the word has a technical and well defined meaning, and is used to designate the person or individual on whom the descent is cast on the death of the ancestor. The right of primogeniture is abolished by an Act of the Legislature, and the estate of the intestate is directed to be distributed amongst a class of persons to whom the term heirs is not strictly applicable; but for want of a more appropriate term, and to avoid the circumlocution necessary to express the idea, it is almost universally used here to designate a class. Mrs. Rochell left no issue, and her estate is, under the Act, distributable in the proportion of one-half to the husband, the complainant, and the remaining one-half to certain of her collateral relations. He is not the *haeres natus*, but the *haeres factus* of the law. *Seabrook v. Seabrook*, 1 McMul. Eq. Rep. 201.

The third question raised by the pleadings, is whether the separate estate of Mrs. Rochell is liable for debts contracted by her, or under her authority. She could not, of course, create any charge upon the property devised and bequeathed to her for life, except to the extent of her interest in that portion which reverted to her, and the property she took in the undivided portion of the testator's. She had a vested and absolute interest reserved to her separate use, and subject to her distribution under the marriage contract. In the case of *Jane Reid, by her next friend, v. Peter Lamar et al.* [1 Strob. Eq. 27] heard by me at the last June session of the Court at Abbeville. I had occasion to consider this question, under circumstances precisely analogous to these, and came to the conclusion that a married woman, having a separate estate, was capable of contracting debts, and her separate property was chargeable with them in the same manner as if she was sole. That case, it is understood, will go to the Court of Appeals, and I need not, therefore, repeat the argument on which the decree in that case is based, but shall decide in conformity with that judgment.

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*The next and only remaining question is, whether the complainant's, or more strictly his wife's estate, is liable for property bequeathed to her for life, which has been disposed of by either, or worn out or consumed in their use.

There can be no doubt about their several liability for the property disposed of by either of them respectively, and of their joint and several liability for that disposed of by them jointly. The only property to which this question is applicable, is the household furniture and a portion of the live stock specially bequeathed. And in *Robertson v. Collier*, 1st. Hill Eq. Rep. 373, the general rule laid down is, that if chattels, strictly consumable in their use, such as provisions, &c. be given specially to one for life, remainder over, the remainder over is void, as being inconsistent with the only use the tenant for life could make of them. If a similar bequest of things, wearing out in the use, such as farming utensils, &c. the remainderman must take them as they exist at the termination of the life estate. A different rule prevails, it seems, in relation to live stock, and in *Horry v. Glover*, 2 Hill Eq. 521, it is said that the tenant for life is bound to keep up the original stock of such as are capable of increase. The household furniture falls under the second rule. Those entitled in remainder, must take it as it existed at the death of Mrs. Rochell. The live stock falls under the last rule, which I think ought to be applied with some qualifications. Some live stock, mules for example, are incapable of reproduction, and fall within the qualification expressed. So of males of the horse kind necessarily, and I think it ought, under the present usage of the country, to be applied to that species of animal generally. Planters do not generally breed their horses or mules. They depend, for the most part, on the animals supplied from the west, and whether wisely or not is irrelevant to the question. My own opinion is that they would profit by lessening the production of marketable produce to rear all their live stock; but the fashion is otherwise, and I have not been able myself to counteract it, even in my own concerns, and I know but few others who plant cotton or rice for market, who are exceptions to the general usage. And when a testator, understanding this usage perfectly, gives a life estate in horses to one, with remainder to another, it cannot be supposed that he intended that the tenant for life should depart from the usage in the management of it. He speaks in reference to the general usage of the country, and must be understood in reference to it. If departing from the general usage, there be an actual reproduction, the remainderman will be

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entitled to it. The usage *is otherwise in regard to cattle, hogs and sheep. These are usually reproduced on the plantations, and although not in number, particularly of hogs, equal to the demand, yet there is always an effort to supply a portion by this means; and on the principle of this rule, the tenant for life must be bound to keep up the stock to the same extent.

The defendant, James Tompkins, submits in his answer, that if Mrs. Rochell was entitled to any share of the reverted estates, his co-defendant, Ferguson, her administrator, and not the complainant, is entitled to an account of the personalty. That, in strictness, is correct, and the joinder of matters concerning the estates of Samuel Tompkins and Mrs. Rochell, which have no necessary connection with each other, was very irregular, and has tended very much to confuse the case, but as no objection has been made to it, and as the accounting parties are before the court, the rule may be remedied by a mutual accounting, which I propose to order.

It is therefore adjudged and decreed, that the complainant is entitled to the one-fourth part of the estates, real and personal, devised and bequeathed by Samuel Tompkins to his wife, the late Mrs. Rochell, and which, upon her death, reverted to his estate. Her brothers and sisters, the child or children of a deceased brother or sister representing the deceased parent, and taking the share the parent would have taken, if living, are entitled to one other fourth part; and the brothers and sisters of the testator, the child or children of a deceased brother or sister representing the parent in like manner, are entitled to the remaining one-half. That the complainant is entitled to one-half of all the other estates, to which Mrs. Rochell was entitled, and her brothers and sisters in like manner representing the parent, to the remaining one-half thereof.

And it is ordered and decreed, that the defendant, James Tompkins, do account with his co-defendant, Thomas Ferguson, for the interest of Mrs. Rochell in the reverted personal estate of his testator, and with the other distributees, on the principles of this decree; and that the said Thomas Ferguson do account with his said co-defendant, James Tompkins, for any waste she may have committed, having reference to the principles before laid down, in the personal estate bequeathed to her for life. That he do also account with the complainant and other distributees of his intestate's estate for the whole of her personal estate; and it is also ordered and decreed, that the complainant do account with the defendant, James Tompkins, for the personal estate bequeathed to his wife, and for which he may be liable on the

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principles of this decree, and *for any rents he may have derived from the real estate, since the death of his wife.

It is also ordered and decreed, that a writ of partition do issue, to divide the tract of land described in the pleadings, amongst the parties, in the proportions hereinbefore indicated.

I observe it is stated in the answer of James Tompkins, that the children of Francis Tompkins, a deceased brother of the testator, are not made parties to the bill. That

I suppose has been supplied. If not, it ought to be done forthwith. In other respects, I have heard no objection as to parties, and I suppose their names and the relation in which they stand to the testator and the intestate are strictly stated in the bill, and the writ of partition must follow it in describing the premises. In stating the accounts between these parties, as hereinbefore ordered, the Commissioner will take into consideration any other matters involved in the pleadings, which are necessary to a final adjustment of the accounts, and report any special matter that he may judge necessary to attain that object.

The debts of Mrs. Rochell, if she left any unpaid, must be provided for out of her separate estate, and that is provided for in the bill. The complainant will not be himself entitled to the money, but he is entitled to be indemnified against any for which he is also liable. Her administrator is also interested in providing for their payment before the funds are distributed.

It is, therefore, further ordered, that the Commissioner do call in the creditors, to prove their demands, determining her liability by the rule hereinbefore laid down on that subject.

George Holloway and Wife et al. v. John Rochell et al.

The bill in this case is exhibited by George Holloway and his wife, Rebecca, a sister of Elizabeth Rochell, and by her brother, Wm. H. Adams, against the other brothers and sisters of Mrs. Rochell, the children of her deceased brothers and sisters, her administrator, Thomas Furguson, and her husband, John Rochell, to have partition made of her lands other than those devised to her for life by the will of her first husband, Samuel Tompkins.

This case and the case of John Rochell v. Samuel Tompkins and others, was tried by Chancellor Johnson together. His decree in this case was as follows:

Johnson, Ch. In the decree pronounced in the case of John Rochell v. Samuel Tompkins and Others, I decided that the defendant, John Rochell, was entitled, upon the

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death *of his wife, Elizabeth, to one moiety of her estate; and that under the marriage settlement between her and the said John Rochell, her estate was chargeable with debts of a certain description, and with a view of ascertaining whether there were any such debts, a reference to the Commissioner was ordered. There can be no order for partition until the demands chargeable upon the estate shall have been first ascertained and satisfied, but meanwhile there is no objection to an account being taken between the said John Rochell and his co-tenants, as to the rents and profits alleged in the bill, and admitted in his answer, to have been received by him since the death of his said wife.

It is therefore ordered and decreed, that it be referred to the Commissioner to take an account between the said John Rochell and his co-tenants, of the rents and profits of the lands of his deceased wife, Elizabeth, that have been received by him since her death, all equities being reserved. It is further adjudged and decreed, that upon the death of the said Elizabeth Rochell, the defendant, John Rochell, as one of her "right heirs and representatives," became entitled to one moiety of all her lands, and that the other moiety became distributable between the surviving brothers and sisters, and the children of the pre-deceased brothers and sisters, of the said Elizabeth, mentioned in the bill, the children of each pre-deceased brother or sister taking the share to which their deceased parent would have been entitled if alive.

And it is further ordered and decreed, that after satisfaction of the debts chargeable upon the estate of the said Elizabeth Rochell, according to the said decree in the case of John Rochell against James Tompkins and others, if any such debts appear, the personality of the said estate being first appropriated to the payment of the same, the lands of the said Elizabeth Rochell, described in the bill, be parted and divided in the proportions above mentioned, between the parties entitled thereto, and if necessary for that purpose, that a writ of partition do issue out of this Court in the usual form.

The collateral relatives of Elizabeth Rochell, who are parties in the cases above stated, moved the Court of Appeals to modify the Circuit decree in each of the said cases, upon the following grounds:

1. That according to the correct construction of the deed of marriage settlement between John Rochell and his late wife, Elizabeth Rochell, he is wholly excluded from any participation in the distribution of her estate, she having died without exercising the power of disposition secured to her by said

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*deed, and he not being embraced in the description of the persons to whom her estate is in that contingency limited over.

2. That under the said deed of marriage settlement, Elizabeth Rochell had not the power of a feme sole, in rendering her separate estate responsible for her debts and it is respectfully submitted, that no debts incurred by her, after her coverture, impose any charge upon her estate, except such as were manifestly proper and necessary to be incurred.

The collateral relatives of Samuel Tompkins, deceased, parties defendant in the case first above mentioned, appealed from the Circuit decree in that case, and moved that the same be modified, upon the ground:

That all the interest of Elizabeth Rochell in the lands and personality devised and bequeathed to her for life by the will of Samuel

Tompkins, ceased and determined at her death.

Carroll and Griffin, for the motion.
Bauskett, contra.

DUNKIN, Ch., delivered the opinion of the Court.

In reference to the first ground of appeal taken by the collateral relations of Elizabeth Rochell, deceased, and the appeal taken by the collateral relations of Samuel Tompkins, deceased, the Court concur in the judgment of the Chancellor, and do not deem it necessary to add to the reasoning of the decree.

In Reid v. Lamar, this Court have just determined that the power of a married woman over her separate estate, was derived from the deed or instrument creating such estate, and that she had no other capacity to contract but as authorized or empowered by the settlement.

It is provided, however, by this deed, that the estate, real and personal, and the profits thereof, should be for the sole and separate use of the said Elizabeth Rochell, notwithstanding her coverture, and not subject to the debts, contracts, or engagements of the said John Rochell, her said intended husband, "except so far as the management of the said estate, real and personal, may be committed to the said John Rochell, as the agent and appointee of the said Elizabeth, and for her special use and benefit."

The allegation of the complainant is that he managed the trust estate as the agent of his wife, and that it was increased and improved under his judicious management, and that the debts, for which he claims indemnity, were necessarily incurred in the course of such management, and solely for the

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*benefit of the estate. Upon this point it is proposed to express no opinion until the facts have been ascertained, and the report of the Commissioner heard.

The decree of the Circuit Court is reformed, and the order of reference modified according to the principles of this decree.

HARPER, Ch. and JOINSTON, Ch. concurred.

Decree reformed.

1 Strob. Eq. 122

J. C. YOUNGBLOOD et al. v. WILLIAM NORTON et ux. et al.

(Columbia. Nov. and Dec. Term, 1846.)

[Descent and Distribution 112.]

The true intention of the Statute of 1791 is, that the estate of an intestate ancestor, including advancements, is to be considered as a common fund, out of which each child is to draw, at the intestate's death, an equal portion; in ascertaining which, that part which has been given, or advanced, is to be estimated at what

it is worth at the intestate's death, relation being had to its situation at the time of the gift.—Vide McCaw v. Blewit, 2 McC. Eq. R. 90.

[Ed. Note.—Cited in Wilson v. Kelly, 21 S. C. 538.

For other cases, see Descent and Distribution, Cent. Dig. § 421; Dec. Dig. 112.]

[Wills 1.]

In the absence of a testamentary disposition, the Statute controls the distribution, as intestate property; and it is not competent for a party to give any other direction than the Statute gives, unless, by a will, he deprives the property itself of the character of intestacy, in virtue of which the Statute assumes the disposal of it.

[Ed. Note.—Cited in Cooner v. May, 3 Strob. Eq. 191; Seabrook v. Seabrook, 10 Rich. Eq. 513; Rees v. Rees, 11 Rich. Eq. 108; Betsill v. Betsill, 30 S. C. 517, 9 S. E. 652; Heyward v. Middleton, 65 S. C. 498, 43 S. E. 956.

For other cases, see Wills, Cent. Dig. § 1; Dec. Dig. 1.]

[Descent and Distribution 98.]

What are, or are not, advancements, must always depend very much on the condition in life of the parties, and may be absolutely fixed by their intentions at the time, if they can be ascertained.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 402; Dec. Dig. 98.]

Before Dunkin, Ch. at York, June, 1845.

In this bill, to marshal assets, the following orders were taken, to wit: "On motion of Williams and Alston, complainants' solicitors, ordered, that W. J. Clawson, Esq. Commissioner of this court, be appointed the guardian ad litem of John Williams, an infant defendant in the above case.

June 18, 1844.

J. Johnston."

Also, "On motion of Williams and Alston, complainants' solicitors, ordered, that it be referred to the Commissioner to take an account of the estate of William Youngblood, deceased, in the hands of the complainants; also, to ascertain how many, and which, of the heirs and distributees of the said William Youngblood were advanced by him, in his lifetime; how many, and which, of the said distributees elect to throw their advancements into hotch-pot, and come in for general distribution; and the amounts respectively advanced to those claiming a share of the

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estate in complainants' hands. *In taking an account of the advancements to the distributees of the estate, the Commissioner is directed to estimate the advancements at what the property was worth at the death of intestate, having reference to the condition of the property at the time it was advanced, without regarding any stipulations between the intestate and advanced distributees, as to the value of the advancements. It is also ordered, that the Commissioner do inquire and report what will be a suitable settlement to be made of the interest or share to which Eliz. Wilder may be entitled, out of the intestate's estate.

June 18, 1844.

J. Johnston."

Under the decretal order, the Commissioner made his report. Exceptions were taken by all the parties, the substance of which will be found contained in the following, of Norton and wife, viz:

1. Because the Commissioner has charged them for a negro boy, called Jim, as an advancement; said boy having been purchased and paid for in full, by defendants, as appears by bill of sale of intestate—uncontradicted by any competent testimony.

2. Because, if the defendants are in any wise chargeable for any portion of the value of said boy, as an advancement, the Commissioner has placed a higher valuation on him than the testimony warrants, entirely disregarding the valuation of the numerous witnesses for defendants.

3. Because the Commissioner has charged interest on said supposed advancement.

4. Because the Commissioner should have charged Jane Wood with the value of a negro woman, named Fan, proved to have been advanced to her husband, W. S. Wood, by intestate, and worth \$400 or \$500.

5. Because the Commissioner should have charged John W. Youngblood for his own board, and his apprentices', and feeding a horse for ten or twelve years, after John became of age.

6. Because the Commissioner has allowed Emily Thomasson to come in as a distributee, after her appearing before the Commissioner, on the first reference, and formally electing not to come in for distribution, and was permitted to give evidence against defendants.

7. Because the Commissioner is in error in stating in his report, that defendants' solicitor consented that any incompetent testimony should be taken.

And the 4th of Suggs and wife et al. viz:

Because the Commissioner has charged J. H. Suggs with a bed and furniture, cow and

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calf; Jane Wood and Emily *Thomasson, each with the like articles; and J. W. Youngblood with a bed and furniture, as advancements to them, when it is submitted that they are not properly chargeable therewith.

Circuit Decree.

Dunkin, Ch. The Commissioner's report is prepared with great care, under a decretal order of reference heretofore made.

The cause was heard on exceptions to that report, which will be considered in order.

The first, second and third exceptions on the part of Norton and wife, are in relation to the same subject matter. The first, second and third exceptions on the part of Suggs and wife, and all the exceptions of Jesse Williams and others, refer to the same transaction as that embraced in those exceptions of Norton and wife.

On the 26th February, 1839, the intestate, William Youngblood, sold to his son-in-law,

William Norton, a negro, named Jim, for one thousand dollars. J. C. Thomasson was one of the witnesses to the bill of sale. He proved that he was privy to the arrangement, and drew the bill of sale. It was agreed that the purchase money should be paid in this manner, viz: Norton was to give his bond to pay four hundred dollars to the children of William Williams, deceased, (who had married the daughter of intestate,) and the remaining six hundred dollars was to be regarded as so much advanced to Norton on account of his share of the intestate's estate, and was to be so accounted for by him, in the distribution of the estate. The testimony of the witness is full and distinct, and leaves no doubt as to the true nature of the transaction. The bond for the four hundred dollars, to be paid to the children of Williams, was executed at the same time, and witnessed by Thomasson. The intestate said he did not take a receipt from Norton for the six hundred dollars, because he intended to make his will and charge him with it, and, (as he expressed it,) "fix it all."

Objection was made to Thomasson's testimony, on the ground that it was in contradiction of the bill of sale. But this is not perceived; so far as it proves the transaction to have been a sale, it is in strict accordance with the deed. But it is urged that the bill of sale is an acknowledgment, under seal, that the intestate had received the consideration money. The testimony of Thomasson does not invalidate this conclusion. It cannot be meant to say, that no testimony is admissible to shew the mode in which the consideration was paid, whether in specie, bank bills, or the bond or promissory note of

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the purchaser, or by discount. If Thomasson had proved that Norton gave his bond for four hundred dollars, and paid the intestate, in cash, six hundred dollars, this testimony could scarcely be obnoxious to exception. But this is, substantially, what he does prove; superadded to which, he says that the intestate delivered back the six hundred dollars to Norton, by way of advancement, and that Norton agreed so to receive it and account for it; for this is the effect of what he proves. The rule is very fully discussed in *Blakely v. Hampton*, 3 McCord, 469. Norton and wife are chargeable, then, with the six hundred dollars, and the children of Williams with four hundred, with interest on the respective sums from the death of intestate, according to the principle declared in *McDougald v. King*, Bail. Eq. n. 155.

The fourth exception of Norton and wife is in regard to the girl Fan. The testimony is not perfectly satisfactory. But it is to be remarked, that none of the other parties have excepted on this ground, and it is very doubtful if Norton and wife are concerned in the result. But the girl was certainly returned

to the intestate, and died in his possession, and the testimony of James Bryan might well warrant the conclusion, that the intestate had ultimately acquiesced in receiving her, and supplying his daughter with another in her place. The exception is overruled. The fifth and sixth exceptions are overruled.

All the exceptions on the part of the children of Williams, and all the exceptions on the part of Suggs and wife and others, except the fourth, have been disposed of by what has been heretofore said.

The fourth exception is, because Suggs and wife, Jane Woods, Emily Thomasson and J. W. Youngblood, have been charged with some articles, as advancements, which ought not to be so charged. It is not doubted that they received the articles from the intestate, but the argument was, that they were not in the nature of advancements. The first observation to be made is that, according to the testimony submitted by the Commissioner, all these parties, except Emily Thomasson, appeared before him in person or by affidavit, admitted the receipt of these articles as advancements, and desired that they should be brought into hotchpot. What are, or are not, advancements, must always depend very much on the condition in life of the parties, and may be absolutely fixed by their intentions at the time, if they can be ascertained. The Court sees no testimony to warrant the conclusion that the articles given to Emily Thomasson were to be placed on a different footing from that on which the same or similar articles were given to the other children. The intestate seems to have been anxious to

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preserve equality between them, and the report carries out the intention. The exception is overruled.

It is ordered and decreed that the account be reformed, according to the principles of this decree, and that the Commissioner recommend a fit and proper person to act as trustee for Mrs. Wilder.

Defendants, William Norton and wife and William Wilder and wife, appealed from the decree of Chancellor Dunkin in this case, on the following grounds.

1. Because William S. Wood, Samuel C. Youngblood, Emily C. Thomasson, and other distributees who were examined, were incompetent witnesses.

2. Because the answer of William Norton and wife ought not to have been ordered to be taken off the file, as the same had been filed on the 23d of April, 1845, and copy furnished to the complainants' solicitor, and no exceptions filed to that answer, and the same was acted on by all parties as regular, and used in evidence before the Commissioner.

3. Because the Chancellor should have granted further time to William Norton and wife to perfect their answer, if the same was not then perfect, as they were defendants

resident out of the State; which was moved for and refused.

4. Because the decree of Chancellor Dunkin contravenes the principles laid down by Chancellor Johnston's order, under which the reference was held.

5. Because the decree of Chancellor Dunkin directs Norton and wife to be charged with six hundred dollars, as an advancement, being part of the price of negro Jim, referred to in the report.

6. Because the report of the Commissioner ought to have been confirmed as to the \$280. an advancement charged on account of the boy Jim.

7. Because the decree of Chancellor Dunkin is founded on a case not made by the complainants' bill, inasmuch as the decree is against William Norton and wife, as debtors, when there is no such charge in the complainants' bill.

8. Because the decree of Chancellor Dunkin directs a trustee to be appointed for Mrs. Wilder, when she is not demanding such appointment.

9. Because William Norton and wife should not have been charged any thing as an advancement, on account of the negro boy Jim, or if any thing, not even to the extent of the Commissioner's report, much less to the amount directed by Chancellor Dunkin's decree.

Thompson and Smith, for the motion.
Williams, contra.

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*JOHNSTON, Ch., delivered the opinion of the Court.

The first ground of appeal, which excepts to the competency of certain witnesses, seems to be obviated by the consideration, that the decree does not depend on the testimony objected to.

The second and third grounds, in relation to the answer of Norton and wife, involve matters within the discretion of the Chancellor; in the exercise of which we do not perceive any evidence of mistake on his part.

The remaining point pressed in argument, relates to the advancement made by the intestate to his daughter, Mrs. Norton.

By the order of reference the Commissioner was directed to estimate the advancements by the worth of the property at the intestate's death, having reference to its condition when given, without regard to stipulations between the intestate and the advanced distributees, intended to fix a different value upon it.

In the instance before us, it appears that the intestate made a bill of sale to his son-in-law, Norton, for a slave, named Jim, estimated in the deed at the value of \$1000—of which sum Norton paid \$400 to the children of Mrs. Williams, by the direction of the intestate, as an advancement to them; and it was agreed that the negro, as to the remain-

ing \$600. should constitute an advancement to his wife.

By the evidence before the Commissioner, it appeared that this slave, in the condition in which he was thus received, was worth \$700, at the death of the intestate; and the Commissioner, in making up the accounts, charged the children of Mrs. Williams, as an advancement, with \$480, (being the sum of \$400, paid them, with interest thereon;) and, deducting that sum from the value of the negro, charged the balance, (\$220,) to Mrs. Norton, as an advancement to her.

When the report of the Commissioner came before the Chancellor, the directions, contained in the order of reference, were overlooked; and he decreed that the advancement of Mrs. Norton should be charged at \$600, and ordered that the report be corrected accordingly.

It appears to the Court, that the direction given in the order of reference was correct, and that the report should be conformed to it.

The true intention of the Statute of 1791, as expounded in *McCaw v. Blewit*, (2 McC. Eq. R. 90,) is, "that the estate of an intestate ancestor," (including advancements,) "is to be considered as a common fund, out of which each child is to draw, at the intestate's

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death, an equal portion"—in ascertaining which, "that part which has been given," or advanced, "is to be estimated at what it is worth at the intestate's death, relation being had to its situation at the time of the gift."

The valuation of advancements has a material influence in the distribution of the property remaining in the hands of the in-

testate, at the time of his death: because the proportions in which the respective distributees are to participate in the latter, must depend on the higher or lower value to be put on the former. This needs no illustration.

The question, then, is, whether a mere direction by the intestate, as to the valuation of his advancements, can take the property, of which he dies possessed, out of the operation of the law of intestacy—or modify its distribution under that law; and we are of opinion it cannot. Any act by which a decedent exercises a control in the disposition or distribution of property belonging to him at his death, is, essentially, a testamentary act, and requires the formalities of a will. In the absence of a testamentary disposition, the Statute controls the distribution of the property, as intestate property; and it is not competent for a party to give any other direction than the statute gives, unless, by a will, he deprives the property, itself, of the character of intestacy, in virtue of which the Statute assumes the disposal of it. (See *Young v. Lorick*, Columbia Eq. MS. D. p. 193; and *Sheppard v. Sheppard*, Id. 197, where the same doctrine is held.)

It follows from these views, that the Chancellor should have ordered that the report be corrected, by charging the advancement of the children of Mrs. Williams at \$400, instead of \$480; and that of Mrs. Norton, at \$300, instead of \$220. And it is ordered that the decree and the report of the Commissioner be so modified.

In all other respects the decree is affirmed.

HARPER, Ch., concurred.

Decree modified.

CASES IN EQUITY.

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA—JANUARY AND
FEBRUARY TERM, 1847.

CHANCELLORS PRESENT.

HON. WILLIAM HARPER,
“ JOB JOHNSTON,
“ B. F. DUNKIN,
“ J. J. CALDWELL.

I Strob. Eq. *129

*F. L. ROUX, trustee, v. T. B. CHAPLIN et al.
T. B. CHAPLIN et al. v. F. L. ROUX et al.

R. L. BAKER v. T. B. CHAPLIN.
F. L. ROUX v. T. B. CHAPLIN et al.

(Charleston. Jan. and Feb. Term, 1847.)

[*Husband and Wife* ⇨31.]

In contemplation of marriage, the intended wife first conveyed her whole estate to trustees, in trust, to permit the intended husband to receive the profits of the same, for the joint use "of himself and wife during their joint lives;" and by a second clause in the deed of settlement, reserved to herself the power to dispose of any portion of the said premises, in any manner whatsoever, either by deed, from time to time, during her life, or by her last will and testament. Upon a bill being filed to restrain

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the wife from appointing the whole *estate to other uses, (under this power,) the Court *held* the first clause of the deed of settlement to be a grant of a life estate—and the second as giving the wife power to make any disposition of the property, subject to the joint estate for life, and to take effect after its termination: thus constituting a vested remainder, expectant on that termination.

[Ed. Note.—Cited in Chaplin v. Roux, 7 Rich. Eq. 387, 389.

For other cases, see Husband and Wife, Cent. Dig. §§ 179, 181; Dec. Dig. ⇨31.]

[*Remainders* ⇨14.]

A vested remainder may be transferred by deed conveying the present legal title, though not the present right of possession.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. ⇨14.]

[*Trusts* ⇨153.]

The power of appointment, whether by deed or will, most commonly contemplates a disposition to take effect in futuro.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 198; Dec. Dig. ⇨153.]

[*Costs* ⇨99.]

Where one became a party to a supplementary bill, which was a continuation of a suit originally instituted for his benefit, and adopted and insisted on all the grounds originally taken, the Court *held* him liable for the costs of the whole suit.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 388; Dec. Dig. ⇨99.]

Before Johnston, Ch. at Gillisonville, February, 1846.

Johnston, Ch. These cases were heard together; and though a very long statement is necessary to arrive at them, the points to be decided are very few, and not difficult.

On the 8th day of June, 1843, in contemplation of a marriage between Isabella C. Field, a wealthy widow, about fifty years of age, and Robert L. Baker, who was much younger, but bankrupt, which marriage shortly afterwards took place, the said Isabella, by a deed to which the said Robert L. Baker was a party, conveyed to certain trustees therein named, a plantation on Combahee river, in Colleton District, called the Point or Laurel Bower, together with two parcels of land commonly used therewith, and known as Fire Brass and Buzard's Island; also, a plantation on Chyhaw river, in Colleton District, called Walnut Hill; a plantation on Ashepoo river, Colleton District, called Dunham; a plantation in Saint Helena, Beaufort District, called River-side, (formerly Jenkin's); and three portions of land in Greenville District, known as Chesnut Hill; together with all her negro slaves, amounting to about two hundred; the stock, utensils, and implements on the said plantations, and the furniture in

the different mansion houses; and whatever other property, real or personal, might belong to the said Isabella. And she also assigned to said trustees all her choses in action of whatever description. Which conveyance and assignment were declared by said deed to be in trust, after the marriage, to permit said Baker to receive the rents, income and profits, for the joint maintenance of himself and his said wife, during their joint lives, but not subject to his debts; and in case any of his creditors should attempt to charge the income and profits with any of his debts, then the said income and profits to be received by the wife to her own separate use and behoof.

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*Then follow certain clauses, which it is important to bear in mind, viz:

"And it is hereby expressly declared, that in case the said Isabella C. Field shall be minded to dispose of any portion of the said premises, in any manner whatever, then the said trustees shall hold, convey, order and assign the same to and for such person or persons, upon such uses, and subject to such limitations and conditions, as the said Isabella C. Field shall, from time to time, in her lifetime, by any deed or other instrument in writing, executed by her in the presence of two or more witnesses, or by her last will or testament, duly executed, order, direct, limit, or appoint. And in default of such order, direction, or limitation, then in case the said Isabella C. Field shall survive the said Robert L. Baker, in trust to reconvey all and singular the said premises to her, the said Isabella C. Field, her executors," &c., "freed and discharged from all further trusts. And in case the said Robert L. Baker shall survive the said Isabella C. Field, and in default of said order, limitation, or appointment by the said Isabella C. Field, either by deed or will, as aforesaid, then, as to all and singular the said property of every kind herein mentioned and intended to be conveyed, and not otherwise disposed of by the said Isabella C. Field, by deed or will, as aforesaid, in trust, that the trustees, the survivor of them," &c., "shall, immediately upon the decease of the said Isabella C. Field, cause the trust property, as it shall have stood at the date of her decease, to be valued, and one clear third thereof in value, after paying all debts of the trust estate, to be delivered to the said Robert L. Baker, to be used and enjoyed by him during the term of his natural life, and the rents, income and profits thereof to be applied to his own use, and to be disposed of at his own free will and pleasure, during his said natural life; the capital, however, to be in no wise subject to his debts, contracts, or engagements; and from and after the decease of the said Robert L. Baker, then in trust, to hold and apply the said capital to and for the same estates, and upon the same trusts, as are

hereinafter declared as to the remaining two-thirds of the said trust property." And as to the remaining two-thirds of the said trust property, in case no disposition thereof be made as aforesaid, by the said Isabella C. Field, in trust to divide and apportion the same equally between the children of Thomas Benjamin Chaplin and Saxby Chaplin,¹ who may be living at the time of the decease of

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the said Isabella C. Field, per stirpes, and so that the children of the said Thomas B. and Saxby, respectively, shall take among them one-half of the said two-thirds. And if there be but one grand child of the said Isabella C. Field living at the time of her decease, or the child or children of only one of them, the said Thomas B. and Saxby, then in trust for such grand child or grand children of her, the said Isabella C. Field, absolutely and forever." Then the said Baker covenanted with the trustees for executing all necessary instruments for conveying and assigning to said trustees, all property, rights and claims which might thereafter descend or come to the said Isabella C. Field, upon similar trusts. "And further, that he, the said Robert L. Baker, shall permit and suffer the said Isabella C. Field at all times to make and execute any deed, will, or disposition, as is herein before mentioned; and shall and will carry into execution and effect the same, to all intents and purposes."

Then follows a power to the said Isabella C. and Robert L. to substitute other trustees, &c.

The settlement was duly registered the 17th of June, 1843, nine days after its execution.

On the . . . of September, 1844, the said Robert L. Baker and Isabella C. Field substituted Francis L. Roux and Daniel Jenkins in place of the trustees originally named in the marriage settlement.

Owing to disagreements between Baker and wife, the origin and nature of which were not explained by evidence, and appear to be immaterial in these accounts, Mrs. Baker withdrew from the society of her husband, and went to reside first by herself and afterwards with Thomas B. Chaplin, one of her two children by a former marriage, and executed certain deeds, which will be more particularly noticed hereafter, by which she appointed portions of the settled property to her sons, Thomas B. and Saxby Chaplin, the latter of whom is a minor. Thus originated this series of suits.

On the 7th of August, 1845, the bill in the first of these cases was filed by Roux, one of the trustees, against Mrs. Baker, her two sons, Thomas and Saxby Chaplin, and the co-trustee, Jenkins. As this bill opens the field of controversy, it may be useful to note its

¹ The said Thomas B. and Saxby Chaplin are sons of Mrs. Field by a former marriage.

contents with some particularity. It will be noted on examining the record that Baker was not made a party defendant, although it affects to be a bill of interpleader. Neither was the usual oath in the case of bills of interpleader taken by Roux, the plaintiff. Throughout the bill he manifests a disposition to maintain the rights of Baker, instead of calling Baker before the Court to speak for himself; and there is a considerable want

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of that impartiality between *the parties which becomes him who brings a bill of interpleader before the Court.

His bill states that on the 8th of June, 1843, Mrs. Field, a widow of about 54 years of age, owning several plantations and several hundred negroes, and other property, became engaged to Baker, a gentleman much younger than herself, who, by misfortune in business, had become incumbered with debts beyond his ability to pay.

That the estate of Mrs. Field consisted of lands and negroes, requiring her intended husband should devote his time to their management. That, in this state of things, a settlement of the estates became an act of prudence and justice, and was suggested by Baker, who called on a gentleman of the law who had been his former adviser, and requested him to wait on Mrs. Field and take her instructions; she having already agreed that her intended husband, by the proposed settlement, should receive the income of the estate for their mutual support during their joint lives, but not subject to his former debts; and, if he survived her, he was to receive the income of one-third of the estate, certainly, and in case she so desired, so much of the other two-thirds as she should appoint; so she explained her intentions; and so the said Baker believed the settlement was drawn.

That Mrs. Field had two sons by a former marriage, who were men, and provided for, and living on their own estates; and (as the plaintiff had been informed,) they and their advisers contrived to get Mrs. Field to insert a clause in her marriage settlement, after having provided that her intended husband should receive the whole income during their joint lives, in these words. [Here the clause which I have extracted at length is inserted.]

That the residue of the settlement were in the form understood and agreed upon.

That the said Baker contends that when he executed the settlement, on the eve of the nuptial ceremony, he omitted to scrutinize the clause above recited; and, presuming that his intended wife had acted in good faith, he signed it. "They were married, and it was all well for a time," until he discovered that his wife was involved in debt for her sons and on her own account, and that she was devoting the property so settled to the payment of such debts. This produc-

ed some remonstrance; and Mrs. Baker, (as her husband contends,) without his consent, and for no sufficient cause, left his dwelling on one of the settled plantations, and lived by herself, under the influence and persuasions of her sons, who used every means to excite her against her husband.

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*The plaintiff states, that on the withdrawal or refusal to serve, of one of the trustees named in the settlement, he (the plaintiff) was duly constituted trustee, at the suggestion and request of Baker, and took upon himself the execution of the trusts of the settlement, in conjunction with Daniel Jenkins, who was made trustee at the instance and on behalf of Mrs. Baker; and that in undertaking this office, he (the plaintiff) did not intend or expect to incur any liabilities, or encounter any difficulties "beyond the quiet and harmonious discharge of a gratuitous act of friendship to the husband, Mr. Baker," and accordingly permitted the husband and wife to hold quiet possession of the trust [property] and manage the same for their mutual support, as he presumed was the intention of all parties. But, contrary to his expectations, he has understood that Mrs. Baker, under some vague promises from her sons, and, (as the husband avers,) from erroneous statements to her in relation to her husband, has been induced to desert him, and withdraw herself from his protection, his bed and board, notwithstanding his strong remonstrances and earnest solicitations to return and share with him the proceeds of the settled estate.

That this fact, in itself, has very much embarrassed the plaintiff in the discharge of his duties as trustee—as both husband and wife demanded the income. But, to render the difficulties insurmountable without the aid of the Court, he has lately been informed by Thomas B. Chaplin, one of Mrs. Baker's sons, that his mother has conveyed the greater part of the lands and negroes contained in the marriage settlement to her two sons, Thomas B. and Saxby Chaplin, with remainder to their children, by a deed of which he exhibits a copy, B. (The copy exhibited is dated the 16th of April, 1845.)

That plaintiff received from the said Thomas B. Chaplin, a notice, of which he exhibits a copy, C. (The copy exhibited is dated the 16th of June, 184—) requiring him to account for the rents and profits of the settled estate to him; whereas he, (the plaintiff, Roux,) had heretofore placed the property in the hands of Baker, to receive the income, for the joint use of himself and his wife, and he (Baker) denies the validity and legality of the deeds so executed by his wife, and demands to hold the said lands and negroes by virtue of the settlement, and thus leaves the plaintiff in danger of litigation and loss between the contending parties, and also of holding the trust appointment, not

for the purposes for which he consented to be substituted, to wit: to serve the interests of Baker and his wife, but for persons who are strangers to him, and in whose affairs he has no interest.

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*That Baker, who is now in possession of the plantations and negroes, and has proceeded to plant a crop, and incur the expenses of procuring provisions, clothing, and the services of proper overseers, refuses to yield possession to Thomas B. Chaplin and Saxby Chaplin, and claims the right peaceably to occupy, and take the rents, issues and profits, for the joint use of himself and his wife, whom he avers he has always treated kindly and affectionately, and repeatedly invited to return and live with him in harmony, but who, he supposes, has been induced by the interested statements and suggestions of her sons to withdraw herself from her husband, whom she professed to regard with the utmost affection. That he (Baker) denies that, under the laws of this State, a wife can legally withdraw from the advice and protection of her husband, and execute deeds, especially such improvident and unconscionable ones; and that he avers and maintains that by the true interpretation of the marriage settlement, the first part of the deed must prevail; and that the settlement of the rents, income and profits of the property, during the joint lives of the married couple, is irrevocably fixed, and cannot be defeated by a subsequent power of appointment, conflicting with the chief object of the settlement, but must be taken to be subservient to that chief object, for which the obligations, responsibilities and restrictions of marriage formed a full and valuable consideration,—so that, in fact, any appointment, to be valid, must take effect only after the chief purpose of the settlement is accomplished.

That, he also contends, there is nothing on the face of the deeds of conveyance to exonerate him from any of the liabilities of a husband; and the deed on its face is unequal, without consideration, the result of undue influence, and ought to be set aside. That it is the act of a married woman, calculated to impair the marital right of her husband, against public policy, and void. That, having planted the crop, he is entitled, under the laws and usages of this State, to reap it. And that he has refused to assent to any other disposition of the settled property.

That, on the other hand, the plaintiff, Roux, has been informed, and believes, that Thomas B. and Saxby Chaplin, and their co-adjutors, are using illegal and forcible means to entice the slaves so settled to leave their work, and have actually come upon the plantations, or some of them, entered the buildings, and attempted to dispossess him (Roux) and his agents placed in possession

thereof for the purposes of the settlement, and thus threaten to destroy the growing crop, and bring him (the said Roux) into great jeopardy.

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*That he has applied to Thomas B. and Saxby Chaplin, and to Baker, to come to some friendly arrangement, and thus prevent the insubordination to be apprehended, when slaves are persuaded to quit their work, and when overseers are interrupted in their management; above all, that Thomas B. and Saxby Chaplin would abstain from forcible or other means to obtain possession of the settled property, and implead the two trustees and Baker, in this Court, setting forth their claims, so as to ascertain the rights of all parties peaceably and legally; "and if your orator has no further means of serving his friend Dr. R. L. Baker, then, that he may be discharged from his trust, and have his reasonable expenses paid."

The prayer of the bill is, that Baker and his wife, T. B. and Saxby Chaplin, and the co-trustee, Jenkins, may answer; that the "said deed" to T. B. and Saxby Chaplin be set aside, cancelled or modified, according as it may be adjudged wholly or partially void; that after a full hearing, such order may be made as will enable the plaintiff, Roux, to execute his duties as trustee, without hazard of unusual responsibility; or, if it be adjudged that Baker has no further interest in this estate, that he, Roux, may be allowed to surrender his trust, on receiving payment of his costs and charges.

The writ of injunction is prayed against T. B. Chaplin and Saxby Chaplin, to restrain them from eloining or interfering with the slaves and other personables, and from disturbing the plaintiff's possession of the real estates.

Also that a receiver be appointed, if requisite, until the rights and interests of the parties shall be ascertained and declared.

Also for general relief.

The prayer for subpoena is only as to T. B. and Saxby Chaplin, Mrs. Baker, and the co-trustee, Jenkins; nor was Baker made a party.

And the jurates is in the common form of jurates to answers, and not in the form required in bills of interpleader.

I have been compelled to copy almost the whole of this bill, by the objections taken to it at the hearing, the validity of which could not have been made to appear so clearly in any other way. But it is manifest that this is no bill of interpleader, unless it be a bill of interpleader for the stake holder, instead of impartially stating the conflict from which his danger arises, and calling in the adverse parties to state and support their own cause, as he should do, to leave one of them out, assume his place, and undertake to state and maintain his cause for him.

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*Mrs. Baker answers the bill. Admits the

marriage and the settlement, and the substitution of trustees. States that when Baker proposed to her, she was disposed to believe, from his pecuniary condition, and the disparity in their ages, that her property was his main object, and would have rejected him, had he not repeatedly assured her that her right "to do as she should be minded," from time to time, and always, with every part of her property, after marriage, should be carefully reserved to her, and should always be acknowledged and held sacred by him. So, therefore, she is unwilling, little cause as she has to think well of him, to believe that Baker has ever been so reckless as to tell the plaintiff, Roux, that the clause in the deed now objected to, was inserted by the contrivance of herself and her two sons, without his knowledge. She is not only prepared to prove his professions before marriage, as she has stated them, but his deliberate, written admission, made nearly eighteen months after the marriage, and strengthened by his oath, that this very deed of settlement, as it now stands, in all respects, was submitted to him for examination before the marriage, approved and willingly accepted by him, and afterwards, without any alteration or addition, executed by him.

It had always been her determination to retain the control and disposition of her own property, whether she should marry or not. The circumstances connected with the proposal of Baker, already stated, confirmed her in her determination, as it suggested at least one means of attaching her intended husband to her, and of securing, to some extent, his consideration and respect. She only listened to his proposal, because it was distinctly stated and agreed between them, that precisely such a settlement as was executed, should be executed; and if the powers reserved to her under this settlement are illegal and contrary to public policy, then she has been grossly deceived, abused and defrauded by Baker and his lawyer, who drew the settlement for him.

It is true she has abandoned him, but not by persuasion of her sons or of any other person, but for causes which she states. But whatever the grounds of her withdrawal, she conceives they do not affect the power secured to her, as a purchaser for valuable consideration, under the marriage settlement, and are no excuse of the plaintiff's for refusing to perform his trusts confided to him, by giving effect to the deeds of appointment she has made.

She executed these deeds freely, without persuasion or advice on the part of her sons or any one else, and without the knowledge of Saxby, who is a minor.

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*She could readily answer and refute every objection to the deeds, stated to have been made by Baker to the plaintiff—if he did make them, or if Baker were a party in court,

or if the plaintiff had sworn to the bill in the usual manner in cases of interpleader; but, as the case now stands, she insists she has the right to suspect and charge combination between the plaintiff and Baker, &c.

Saxby Chaplin answers by guardian. Is a stranger to all the matters stated in the bill, except that he has heard that his mother has duly executed certain deeds, by which she appointed certain property, real and personal, to be held by Roux and Jenkins, in trust, for himself and his brother, Thomas B. Chaplin, and that the appointment was made in virtue of powers reserved to his mother in her marriage settlement. Submits his rights to the court, &c.

Thomas B. Chaplin answers. Admits the marriage of Baker and his mother, and the execution of the marriage settlement, &c. The substitution of the trustees. His mother executed not only the deed of appointment exhibited with the bill, but several others, both before and after that one, appointing nearly the whole of the settled estate to be held in trust by the substituted trustees, for the use of himself and his brother, Saxby, of all which the plaintiff was duly notified, as he expects to prove.

He claims that the property covered by these deeds be held according to their effect, and that Baker be excluded from interfering with it.

Cannot believe that Baker makes the objections imputed to him, or, if he does, that they constrain the plaintiff to appeal to this court by this bill; or that the claims of himself and his brother embarrass him in his duty. He could easily decide upon the opposite claims, were it not, as defendant expects to prove, that he combines with Baker, and under his name, and as of his authority, brings forward charges which, if he had brought Baker into court, he would not have ventured to answer to.

It is untrue that the reservation of power to his mother was inserted in the settlement by contrivance of herself and this defendant and his brother. He is prepared to prove that he was not within seventy miles of Charleston (where the deed was executed) either at the time of its execution or of the marriage, and did not see the settlement for several months after it was executed. And he is prepared, at any time, to produce Baker's own written declaration, subscribed and sworn to by him, the 19th of February, 1845, that the terms of this settlement, now at-

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tempted to be impeached, *were submitted to him, assented to by him without alteration, and executed by him.

It is also untrue that he and his brother persuaded his mother to abandon Baker, &c. Equally untrue that, by undue influence, they forced her to execute the deeds of appointment. Their execution was her own volun-

tary act, decided upon without consultation with defendant.

If Roux is truly desirous to have the objections, which he attributes to Baker, (and bearing on the validity of the power reserved to his mother and exercised by her in the deeds of appointment) tested and settled, his bill should have brought in Baker to interplead; and he should have annexed to it an affidavit "that he doth not, in any respect, collude with either of the defendants, touching any of the matters in question in the suit, nor is any way indemnified by either of them, nor doth exhibit his bill at the request of either of them, but merely of his own free will, and to avoid being doubly vexed." &c.

Is willing that Roux be removed from the trust, and prays that he may account, &c.

Jenkins answers, and admits that he and Roux were appointed as substitutes for the original trustees to the settlement.

Has had notice of several deeds of appointment from Mrs. Baker to her sons, and being advised she had power under the settlement to execute them, is willing to recognize and give effect to them, and has made some exertions with that view, but, owing to difficulties interposed by his colleague and Baker, and never himself having been in the actual possession of any part of the appointed property, he has been unsuccessful. Is willing to perform his duties as trustee, and abide by whatever deed, &c.

It appearing to the parties, I suppose, that nothing effectual could result from that bill, Thomas B. and Saxby Chaplin, on the 7th of October following, (1845,) filed another against Roux, Baker and Jenkins. This is the second of the cases.

This bill states the execution of the marriage settlement, with the power reserved to Mrs. Field, the subsequent marriage and the substitution of trustees.

1st Deed. That on the 17th of June, 1844, before the substitution, Mrs. Baker, in virtue of the power reserved to her, by deed duly executed according to the power, directed the trustees to hold and stand seized as to nine slaves therein named, and their increase, part of the settled estate, for the use of said Thomas B. Chaplin; and as to six other slaves therein named, and their increase, also part of the settled estate, for the use of the said Saxby Chaplin, during

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their respective lives; remainder to the respective children living at the time of their deaths, with a further limitation in case of the death of either of them without children, for the use of the survivor.

2d Deed. That on the — of September, in the same year, but after the substitution of trustees, the said Mrs. Baker in like manner executed another deed, by which she directed the substituted trustees to stand seized and possessed of certain other parts of the settled estate, namely, two tracts of land

in Greenville, thirty-one negroes, with their increase, and household furniture, in said deed described, in trust to sell the same, and apply the proceeds to pay certain creditors therein named, to whom she was indebted then and before her marriage with Baker.

3d Deed. That about the 20th June, 1845, she, by a similar deed, appointed certain other negroes and their increase, parcel of the settled estate, and in said deed named, in trust, if necessary, to sell and pay such part of the debts enumerated in the foregoing deed, as the property therein appointed should be insufficient to extinguish; otherwise to hold the said property, or the overplus, if any, for the equal use of Thos. B. and Saxby Chaplin, with such limitations as are mentioned in a certain other deed of appointment, executed by her on the same day, and hereafter described.

4th and 5th Deed. That on the 16th of April, and about the 26th of June, 1845, she, under and by virtue of the power reserved, &c. executed two other deeds of appointment, one on each day aforesaid, by which she appointed and directed the said Roux and Jenkins, trustees as aforesaid, to stand seized and possessed of the tract of land in Colleton, called the Point Plantation, and the small island contiguous thereto, called Buzzard's Island, and the plantation on Ashepoo, called Dunham, and a large number of negroes set forth in the bill, four horses also named, and one half of all the cows, hogs, poultry, provisions, plantation tools, boats, flats, carpenter's tools, carts, wagons and harness, belonging to Point Plantation and Walnut Hill, or either of them, to the use of Jenkins alone, in trust for Thomas B. Chaplin; remainder to such of his children as might survive him; and in default of such issue, remainder to Saxby Chaplin. And thereby also directed the said Roux and Jenkins to stand seized and possessed of the plantations called Walnut Hill, Fire Brass and River-side, and a piece of pine barren adjacent to the latter, on the same Island, (St. Helena,) and a tract of pine barren on Hilton Head, attached to and used with the River-side plantation, and a number of ne-

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groes, in bill mentioned, *four horses, also named in the bill, and the other half of all the cows, &c. as aforesaid, to the use of the said Jenkins alone, in trust for Saxby Chaplin, for life; remainder to such of his children as should survive him; and in default of issue, remainder to Thomas B. Chaplin.

Which said several tracts of land, negroes, &c. constituted, the bill states, the whole remaining part of the settled estate, with the exception of a family of about — negroes.

Of all which deeds, (copies exhibited,) the bill charges, Roux, Jenkins and Baker were duly notified shortly after the execution respectively.

That Jenkins has always readily acknowledged the power of Mrs. Baker to make such appointments, and has been willing to hold the several portions of property appointed upon the trusts declared and expressed in these deeds, but has been hindered from performing his duty as trustee, by the threats and interference of his co-trustee, Roux, and by Baker.

That Roux, so far from showing a disposition to give effect to the marriage settlement, of which he is trustee, has colluded and combined with Baker, to exclude these plaintiffs, (the Chaplins,) from the possession and enjoyment of the property appointed to them, and has lately filed a bill, wherein, as if authorized by Baker, but really of his own accord, and in contradiction to the sworn declaration of Baker, he has charged that so much of the deed of settlement as reserves the power to Mrs. Baker, &c. was put in by the fraud and contrivance of your orators, without Baker's knowledge, thereby endeavoring to invalidate the instrument, which, as trustee, he was bound in good faith to preserve and defend.

That Baker, with the knowledge and consent of Roux, and by his contrivance and collusion, is now in possession and enjoyment of the greater part of the property appointed to the plaintiffs, and they believe he, (Baker,) will be allowed by Roux, fraudulently, and notwithstanding the notice Roux has had, not only to receive the profits of that property, but in other respects "to do as he pleases" with the property itself, and Roux being unable to make good the loss, and the plaintiffs apprehending the actual removal of the property, as well as the consumption of the income, &c.

The bill prays an answer, that Baker be enjoined from receiving the rents, &c. of the property, and from interfering with the property or the possession of it, and from removing or attempting to remove, &c. and that Roux be restrained from paying over to him, or to his order, any part of the income, or putting him in possession, &c. That Roux

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be removed from his trust, and Jenkins declared the sole trustee; that a receiver be appointed ad interim, &c.

Subpœna prayed against all three defendants, &c.

Roux, in his answer, admits that he filed a bill to protect himself, &c. but denies collusion, &c.

Says that when he undertook the trust, he was informed that the substance of the marriage settlement, (divested of technical terms, which he could not understand,) was that the property was to be held for the joint benefit of Baker and wife, during their joint lives; remainder to Baker, in case he survived, in one-third, while the other two-thirds were limited in remainder to the two Chaplins, or to their families; and though

he had frequent conversations with Baker and the lawyer who prepared the deed, on the subject of the trust, never heard or suspected that any power, such as is now claimed, was reserved to Mrs. Baker.

Totally ignorant of the technical construction of deeds, surprised by the claim of powers for Mrs. Baker, of which he had never heard, and served with notices of the most opposite character from all parties, he had no course left but to apply to this Court, and in so doing he deemed it his duty to inform the Court of the impressions under which he assumed the trust, and all of the views he still retained in relation to it.

But has no personal interest, and is only desirous the Court will settle the conflicting claims, and instruct him in his duty, &c.

I do not find any answer of Jenkins in this case.

Baker's answer admits the execution of the deed of settlement, of which the copy exhibited is a true transcript. But utterly denies that he ever agreed to the terms of the said deed, or was aware, when he signed it, of what is now contended for, as its legal effect.

The terms to which he agreed were: that the property of his intended wife was to be settled upon trustees, to apply the annual income to the joint use of himself and wife, for their joint lives, with remainder in one-third to him, (Baker,) should he survive; and in two-thirds to the children of Mrs. Baker by a former marriage, or their families; and that the clause giving Mrs. Baker the power of disposing otherwise of her said property, was inserted without his knowledge or consent; and, as he has since heard, by the interference and advice of a third person, in no way connected with either of the parties.

True, he was informed afterwards an additional clause had been inserted; but was told its effect was to give Mrs. Baker the power of revoking, should she will, the limi-

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tations in favor of her sons, as to the two-thirds; but was distinctly informed that it in no way affected his interests, as settled, according to the original agreement.

And he never doubted that this was the legal effect of the deed, until recently, (public sittings of this Court, 1845,) when his counsel informed him that the words of the clause, in their natural sense, and unexplained, did give Mrs. Baker full power to dispose of the whole estate, upon the determination of the joint life estate of himself and his said wife, but could not control the previous clause, which secured the joint life estate.

That he lived in harmony and happiness, &c. until very shortly before the execution of the first of the deeds of appointment, except so far as the continued opposition of her sons to the marriage was a source of pain, &c.

But about that time, for causes unknown to him, his wife absented herself from his bed and board, and, notwithstanding his urgent and affectionate invitations, &c. she still continues absent. Is willing to receive her, &c.

Denies the right of his wife to execute the deeds of appointment, so far as they affect the income of the joint life estate; or one-third of the capital, in case of his surviving.

It appears by the deeds set up in the bill, that his wife has attempted to divest herself of the entire estate, leaving herself not the smallest means of support—an evidence of such imbecility and undue influence, as, supposing her possessed of the power reserved in its fullest extent, should prevent these deeds from standing, &c.

Then comes the third bill.

This is a bill filed 18th December, 1845, by Baker, against his wife, Thos. B. and Saxby Chaplin, Jenkins, and Richard De Treville, (a new party altogether,) and states:

That in the course of the marriage treaty between himself and his wife, by mutual consent, application was made to a lawyer to prepare for their execution a marriage settlement for his intended wife's property, and the said lawyer was, with the full assent of both parties, instructed to prepare such a deed as would

"Secure to your orator the whole income of the estate, for the joint benefit of himself and his said intended wife, during the coverture;

And, after her death, in the event of his survivorship, to secure to your orator an absolute estate in one-third of the property.

The other two-thirds to pass to the chil-

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dren of Thomas B. *and Saxby Chaplin, children of his intended wife by a former marriage."

The deed was so drawn; but before the execution thereof, his said intended wife, on the very day fixed for their marriage, had it re-engrossed by the lawyer, and an additional clause inserted, without the knowledge or consent of him, (Baker,) but before its execution she informed him that the said clause was designed to give her the power of revoking the limitation in favor of the families of the two Chaplins, who were then behaving very undutifully, &c. but that it was in no way to apply to the annual income, or the one-third limited to himself, in case of his survivorship.

And he joined in its execution, believing the legal effect of the additional clause to be such as she represented; and remained of that belief until very recently, when the execution of similar deeds induced him to seek professional advice, and he was told by counsel, that the legal effect of the words, uncontrolled by the previous clauses, or evidence of fraud, would support the right of

his wife wholly to set aside the settlement, and dispose of the estate, as if sole.

That he lived happily with his wife, until some time in 1844, when she was induced by the Chaplins, without his privity or consent, to make the first deed in favor of creditors, at the very time that he himself was in treaty with the trustees, for a sale of property to be selected by him, (a privilege he thinks belonging to him,) for the same purpose. He resisted this deed, as an invasion of his power of selection, and as a fraud upon him, because executed without his knowledge; all the while not perceiving the construction which might be put on the additional clause in the settlement; for the deed was cunningly framed, so as to refer partly to another clause, provided for the payment of debts, and only in part to this (the additional) clause. And he never understood the insidious character of the deed, until other deeds followed. The creditors named in that deed filed their bill to enforce it, which is yet pending.

About the time he discovered the execution of the deed referred to, his wife withdrew from him, and notwithstanding his repeated solicitations, &c. And has since, under the influence of the Chaplins and their confederates, among whom is Jenkins, one of the trustees, executed several other deeds, disposing, in presenti, of the whole estate to the Chaplins, Jenkins and De Treville, and depriving him, (Baker,) of the income, during coverture, secured by a clause previous to that reserving power to Mrs. Baker, &c.

That the Chaplins and Jenkins, pretending

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to claim under *these objectionable deeds, instead of coming to this Court for relief, if they had ground for relief, have pursued a system of annoying and embarrassing the operations of the settled estate.

That Jenkins, since his appointment as trustee, has tampered with Mrs. Baker, one of the cestui que trusts, and confederated against Baker, the other, to defeat the main objects of the deed, and to divert a portion of the trust estate to his own use.

Referring to the bill filed by Roux, the 7th August, he says: "in obedience to the subpoena under the said bill, your orator now answers by this bill of complaint, and prays leave to refer your honor to the said bill and its exhibits, for a full statement of the case, and copies of all the deeds."

He prays an answer from Treville, Jenkins and the two Chaplins; that they be enjoined from intermeddling with the trust estate, during the coverture of Mrs. Baker by him, and be perpetually enjoined from meddling with one-third of it; that the additional clause described be restricted to the two-thirds, as originally intended, or totally set aside.

Subpoena is prayed to these parties above named and to Mrs. Baker.

It is remarkable that, of all the answers in all of these cases, there is not one, the date of the filing of which I can discover by the copies furnished me, a very great inconvenience in some cases, though it may not be in these. I take up first, De Treville's answer.

He admits that, on the 25th of June, 1845, Mrs. Baker executed a deed, by which she, after appointing certain portions of her settled estate to be sold by her trustees for paying whatever balance may remain due to certain of her creditors, for whom she had provided by a similar deed of appointment, made in September, 1844, (so that it appears that my copy of T. B. and Saxby Chaplin's bill is incorrect,) directed them to pay to this defendant \$485, the amount of his bill for professional services, rendered to her since her marriage; but he knows nothing of the circumstances attending the execution of the deed, nor by whom she was influenced to make it.

That some time in June, 1845, he was informed by Thomas B. Chaplin that his mother, who, this defendant believes, then lived with him on St. Helena, desired him, (defendant) to prepare certain deeds of appointment, of which the above mentioned deed was one, for her to execute, and left written memorandums for his instruction. He prepared them accordingly, but in the deed in which his demand is provided for, he left a blank open to

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be filled with the amount of his bill, *which had been before rendered to Mrs. Baker for her examination. This is all he knows of the matter. Mrs. Baker lived twelve miles from him. He did not see her nor get any instructions from her directly before he prepared the deeds; and has never seen her since. Shortly after he prepared and sent the deeds to her, and before he knew or heard of their execution, he went to the North, and returned about the middle of August; and, some considerable time afterwards, two of the original deeds were handed to him to get them recorded, when, for the first time, he saw that the blank had been filled in the handwriting of Mrs. Baker herself, with the amount of his bill. The \$485 were for professional services rendered to Mrs. Baker, from the beginning of 1844 to the 26th of June, 1845, including a charge for drawing an instrument in the nature of a last will, of great length and difficulty, appointing the uses of the whole estates, real and personal. But he submits, that his bill having been examined and approved by Mrs. Baker, and allowed by her, without alteration, no other person has a right to question its correctness; especially as its payment is provided for out of property over which Mrs. Baker had secured to herself, for valuable consideration, the absolute right of disposition. But, if she desires it, he is perfectly willing to leave his bill to the judgment of any tribunal whatever, and to abandon his right under the deed of appointment. He has never urged his claim

under the deed, and has never derived any benefit from it; and has always been willing to abide the decree of the court in the cases pending on the deeds of Mrs. Baker, in which cases the nature and extent of her power were distinctly put in issue; and he is now willing, not only to abide the decree, but to say that if sufficient evidence be produced to satisfy this court that Mrs. Baker was unduly influenced by any person to execute the deed in question, he will at once forego all the benefit he might otherwise claim under it.

Jenkins' answer. States that he consented to accept the trust at the solicitation of Mrs. Baker, and as her friend; and as far as Baker and Roux would permit him, he endeavored to perform his official duties.

By the deed of 28th June, 1845, Mrs. Baker directed the trustees to hold seven of the settled slaves to his (Jenkins') use; but he never exercised the least influence or persuasion, directly or indirectly, with her in reference to that or any other of her deeds. Never knew of her intention to make any disposition in his favor till some time after the execution of the deed, and has never derived any

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benefit from it, and *has never been in the actual possession of the negroes named in the deed, even as trustee, and has never attempted to get the possession.

Is advised Mrs. Baker had the power to appoint; and as she has never, to his knowledge, expressed dissatisfaction with her voluntary act, he is now disposed to claim the benefit of the deed.

Recapitulates and denies all the charges against him, &c.

Saxby Chaplin answers by guardian. Has heard of the marriage settlement, the power reserved by his mother, and the deeds appointing portions of the settled property to his benefit, and claims the benefit of them.

The charges of confederating with his brother to influence his mother to execute the deeds are untrue, and the fact that he resided mostly, and always from the beginning of 1843, at Walterborough, while his mother executed some of the deeds in Greenville, and the rest on St. Helena, (being known to Baker,) should have preserved him from the imputation.

Submits his rights, &c.

Thomas B. Chaplin's answer. He lived at the time on St. Helena, 80 miles from Charleston, where his mother married Baker; knows nothing of the circumstances preceding or attending the execution of the settlement; and knew nothing of the intended marriage till he saw it announced in the newspapers.

The charge of misleading his mother to execute the deeds is incorrect. The first deed, in favor of respondent, was executed in Greenville, while the husband and wife were living together at the time, and respondent was on St. Helena. The deed in favor of creditors, particularly alluded to in the bill,

was one in which respondent could have no personal interest; and besides, was executed in Greenville, while respondent was on St. Helena.

Admits, that after the deed of 28th June, 1845, in favor of defendant and his brother, and their children, his counsel advised him the trustees could, under no valid pretence, refuse to recognize him as the equitable owner of the property included in that and "the preceding deed described and mentioned," and were bound by Mrs. Baker's appointment; and, thereupon, he did go upon one of the plantations, so appointed for his use, and exercise "certain acts of ownership," for which Baker has brought an action of trespass, and Roux, upon his bill, has obtained an injunction. Beyond this single act, the charge of his pursuing a system of annoyance to the estate's property, &c., has not the slightest foundation.

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*Knows nothing of Mrs. Baker's reasons for leaving Baker, except upon her statement.

Repeats his denial that he ever attempted to influence her in her conduct either towards himself or Baker; and that he has, or ever had, influence to induce her to execute any deed, unless she had resolved before-hand to do it.

Argues again, the sufficiency of the power reserved in the settlement to sustain the appointments made; that he takes by assignment from Mrs. Baker, a purchase, under the settlement, and is therefore, himself, to be ranked as a purchaser, &c.

Mrs. Baker, by her answer, denies that she ever instructed, or that Baker, with her knowledge or consent, ever instructed the lawyer to draw the settlement as stated. The deed never was so drawn; nor did she, on the day of marriage, cause it to be re-engrossed, with an additional clause, with or without Baker's knowledge; and, therefore, the charge that she informed Baker, before the execution of the deed, that that clause was designed to give her power to revoke the limitations in favor of the family of the Chaplins, but no way applied to the annual income, or the one-third limited to Baker, as stated, is utterly untrue in every particular.

Baker discovered, before the marriage, that she was resolved to enjoy the right to control her large property, from time to time, as she pleased, whether she married or not; voluntarily proposed to her to have a settlement, and one conforming, in its terms, to her views; and advised her to take counsel of a solicitor, and make her views known to him, and assured her he would carry them out to the full extent of his ability. She accordingly retained and conferred with counsel, gave directions for the settlement, and had it drawn according to her own pleasure, without any interference of Baker; and when its terms were communicated to him, he assented

to them, without alteration, and duly executed the settlement which was drawn up.

Her counsel's first instructions were to draw up a settlement, by which, in case of her dying before Baker, he was to have an estate for life in the whole of whatever remained of the settled estates not disposed of by her appointments, but in other respects like this settlement; but afterwards, by the advice of a friend, the only one near her at the time, she directed the lawyer to alter the draft, so as to give to Baker, in case he survived, one-third, for his life, of so much of the settled property as should remain, at her death, unappointed. Even this change was communicated to Baker, before the deed was prepared, and he assented to it. And in all

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her instructions to the lawyer, her reservation of perfect control over the property, just as if she were to continue a feme sole, was regarded as indispensable to the settlement; and without it she would never have married Baker.

She abandoned him, &c. but was not influenced by T. B. or Saxby Chaplin, or any other person; but was compelled by threats of violence, &c.

Submits, that whatever the cause of her abandoning him, it cannot diminish the power reserved, &c. as in her former answer.

Admits the execution of the deeds of appointment, but denies the influence, &c. charged. They were prepared by her own direction, and of her own will, &c. and she is satisfied with them.

That of September, 1845, was made in virtue of the only power she had, and refers to no other power than that reserved in the clause objected to. Baker never had the right of selecting the property for payment of creditors he contends for, and never proposed before marriage, any thing so absurd as that his assent to the exercise of her reserved power should be first obtained, in such a case. If he intended to question her reservation of power, his time to do it was when he was called to answer the bill filed by the creditors, whose claim depended entirely on the validity of the settlement; whereas she understands the only objection he then made, was that the power did not extend to making provisions for her debts as surety.

Lastly, among the pleadings, comes the fourth case. When the bills or answers were filed, does not appear by my copies. I must repeat my constant complaint of the imperfection of copies furnished to the Court.

This is a bill filed by Roux, and refers to his former bill, which it incorrectly asserts made a party of Baker among the defendants.

It states that since the filing of that bill, he, (Roux,) has been served with copies of two additional deeds of appointment, (of which copies A and B, both dated 28th June,

1845, are exhibited and included in them. (already noticed.)

That De Treville, being a claimant under one of them, should be made a party to his former bill: of which he prays that this may be regarded as a supplement, and prays subpoena to De Treville, Baker, Mrs. Baker, T. B. and Saxby Chaplin, and Jenkins.

De Treville answers as before. So does Saxby Chaplin. T. B. Chaplin refers to

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his former answer to Roux's bill, and *as to the two additional deeds, denies influence, &c. and reasserts the power of Mrs. Baker, &c.

Jenkins answers: refers to his former answer to Roux's bill, and as to the rest, answers as he did in the other cases.

I rejoice unfeignedly that I have got through this long statement, which, if it had been made at the hearing, would have enabled me to decide the few points, (to be picked, here and there, out of the mass,) before I left the court. But the delay ever since has been inevitable. The other causes which I brought from the circuit on which these cases were tried, (many of them nearly as voluminous as this, and all more difficult,) occupied my whole time till the meeting of the Appeal Court in May. Then commenced the summer circuit, which again gave me business, (hardly to be constantly attended to, in my state of exhaustion,) during the heat of summer. But as much as I could do has been done, from that time till this. And of what I had to do, let these cases be a specimen. If all these things be considered, this will serve to correct the idea, so prevalent, that this Bench is not overtasked; and, at least, to abate, in some degree, the clamors against the delays in this Court. It is hard that that which arises from labors so intense as should beget compassion, instead of drawing attention to the fidelity and application evinced in the discharge of these labors, is converted into a ground of complaint against the laborer. But this I say, with satisfaction to myself, that no part of my public conduct, whatever other infirmities it may display, bears, in my own view, any trace of shrinking from labor, however severe. I do what I can, and must be content, if others do not appreciate my exertion. It is not often that causes are delayed long in my hands, and I cannot but feel it, when I am myself embraced in general denunciation, implying actual neglect, even in the public prints.

All the evidence is in writing. By a letter from Roux to T. B. Chaplin, dated July 10, 1845, it appears he had received notice of at least some of the deeds of appointment; and he says he will take steps, as his counsel may direct, to get instructions for the execution of his trust. He forbids, in the mean time, any proceeding on the part of Chaplin, to change the possession of the property, which he says will only lead to a breach of

the peace. That Baker is in lawful possession, by his permission as trustee; has an interest, and does not admit Chaplin's claim; and "if you think proper to take possession, except under warrant of some lawful tribunal, you do so at the peril of the consequences: nothing but force can change the possession entrusted to me, unless directed by law."

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*Daniel P. Jenkins says he saw the three several deeds of appointment to T. B. and Saxby Chaplin executed, as well as the one to Daniel Jenkins. Mrs. Baker's servant brought a message from her, requesting to see witness. He went to her own house, in St. Helenaville, where he met T. B. Chaplin and Mrs. Baker. Was accompanied by his brother, Dr. Jenkins, who witnessed the deeds with him. Thinks, from what he saw, that Mrs. Baker executed the deeds of her own free will. T. B. Chaplin was in the same room, ten or fifteen feet from her, when she executed them. From what he saw, he thinks there was no influence exerted upon her. The only persons present were, Mrs. Baker, T. B. Chaplin, Dr. Jenkins and himself. De Treville was not present; and witness thinks he was, at the time, in Beaufort, a distance of twelve miles. Heard Mrs. Baker say she was going to leave her sons some property. She and T. B. Chaplin lived at opposite sides of the village, half a mile apart. Daniel Jenkins was not present at the execution of the deeds. He resided twelve miles from the village where Mrs. Baker lived.

Cross examined. Is first cousin of Daniel Jenkins. Baker had been living at the village, St. Helena, about two months before the deeds were executed. Mrs. Baker was, at the time, living apart from him. He was not in St. Helena then. Witness lives near Mrs. Baker, and knows that T. B. Chaplin visited her about once a week. Witness's mother and Mrs. Benjamin Chaplin, (Mrs. Baker's cousin,) were her most constant visitors, and their visits were about once a month. She lived entirely alone, no inmate in her house. Her relatives disapproved her marriage, except witness's mother, and had cast her off. Since the execution of the deeds, her family intercourse has remained the same. She lived by herself till about the middle of November, when she removed to the house of her son, T. B. Chaplin, where she has ever since resided. Has heard T. B. Chaplin say he wished his mother had not married. T. B. and Saxby Chaplin were each worth about sixty negroes and a plantation, before these deeds were executed. Witness never heard the deeds read.

Examined in reply. Knows that Mrs. Baker went, after the summer months, to live with T. B. Chaplin, at his invitation, because she had no where else to go.

This is the only evidence upon the subject

of the influence under which it was charged the deeds were procured.

The evidence as to the circumstances under which the marriage settlement was executed, was more voluminous.

The proof introduced in support of the

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charges made by *Baker and Roux, is to be found in the examination of Mrs. Toomer, a sister of Baker.

She staid at the Charleston Hotel, where Mrs. Field and her brother, Baker, also staid, at the time of the marriage treaty, and was intimate with both. Does not know upon what terms Mrs. Field originally agreed to settle her property; but heard her say she intended to make Baker comfortable. After her instructions had been given to Mr. Memminger, who was to draw the settlement, Mr. Webb called on Mrs. Field, and after he left her she seemed troubled, and said she would send for Mr. Memminger, and get him to insert, in the deed of settlement, "a clause ~~or~~ power to Mrs. Field to dispose of her property as she might think proper, independently of the marriage settlement." She never communicated with witness further, as to the alteration of the settlement. But after the marriage, witness heard her say that "had she known that Baker's indebtedness was so small, she would not have been bothered with lawyers and marriage settlements." She seemed to be hostile to her eldest son, (T. B. Chaplin,) before her marriage. Witness remembers to have seen Saxby Chaplin and his wife with her, before the marriage. The witness cannot say whether Baker, before he executed the settlement, was informed of any alteration made in it.

On the other side, come Mr. Memminger and Mr. Jervey, and another piece of evidence included in a record hereafter to be mentioned.

Mr. Memminger says that a few days, (about a week or less,) before the intermarriage of Baker and Mrs. Field, Baker called at the office of himself and Mr. Jervey, who are partners, told him of the proposed marriage, and requested him to call and see Mrs. Field. On his inquiring whether he was to call in the character of counsellor of Baker or of Mrs. Field, Baker answered that Mrs. Field wished to take counsel in relation to a marriage settlement, and that he desired Mr. Memminger to act as her adviser; and that he did not desire to interfere, in any manner, with her wishes in the premises.

Baker, on this occasion, stated to witness that Mrs. Field desired to consult a legal adviser; that her usual adviser had been another professional gentleman; but he, (Baker,) had stated to her his preference for the witness, upon which she had sent for him. On witness's inquiring as whose lawyer he was to go, Baker stated that he wished Mrs. Field to do exactly as she pleased with her property; that witness was to see

her exclusively as her own adviser; and

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that it was *his desire that any settlement should be executed which she desired. Witness accordingly called on her, as her lawyer, and not as Baker's. Baker introduced him to her, and left them alone to confer. Mrs. Field stated to him, as her counsel, the position of all her property, and gave him an outline of her family concerns; and stated her desire to have a settlement prepared. The leading idea in her mind seemed to be, the preservation of power over her property, as far as was practicable. She consulted witness as to the best settlement. Witness expressed his views freely, that it was proper, in a lady who was to surrender control over her person, to give the husband a large participation in control over her property; but she yielded with reluctance to advice tending that way. Witness went no further than to state his views, and then took her instructions. He received and noted them at the time, and then retired. From these instructions he prepared a draft of the proposed settlement. It was prepared entirely from Mrs. Field's instructions, except that part which related to the creditors of Baker. He applied to him, (Baker,) to know whether he wished any estate he might take, under the settlement, to be protected from his creditors; and his instructions in this respect were embodied in the draft.

Being interrogated whether he did not read this draft to Baker, or explain to him its conditions, power and provisions, and if so, how long before the marriage, he answers, "I cannot answer this interrogatory in a manner so distinct as to constitute testimony. Mr. Baker was in my office from time to time, as the papers were progressing, and we must have conversed about them; but I have no distinct recollection of any of these conversations, except one, which was [took place] as I was leaving Mrs. Baker, at the Charleston Hotel. Mr. Baker met me in the passage, and I told him of the provision made for him, in case of his surviving her. It is but just, however, to Mr. Baker, to state that he so completely filled my mind with the belief that he had no desire to interfere with Mrs. Field's wishes, be they what they might, that I would not have considered it necessary to explain to him any of the provisions of the settlement."

He proceeds:

"I cannot say that I ever read over to Mr. Baker the draft or settlement at all. My practice was, when the draft was made, to hand it to my partner, Mr. Jervey, to be engrossed and read over to the parties. I cannot now remember how the thing was conducted in this instance.

"The first draft was engrossed, but before it was executed Mrs. Field sent for me; and

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I found that her opinions had *undergone

a material change, since I had last conferred with her. She directed a change to be made in the settlement, as to the limitation in favor of Mr. Baker, after her death, and there was so little time intervening between this change and the marriage, that I did not make an entirely new draft, but merely drafted over the parts changed.

"I annex hereto the original first draft. The settlement, as finally executed, will exhibit the precise points of difference which the new instructions produced.

"I cannot state with certainty, that I read over the changed draft to Mr. Baker. A single circumstance which remains on my memory, proves that he must have known of the change. He spoke bitterly against Mr. Thomas L. Webb, (Mrs. Field's factor,) and told me that Mr. Webb had been with Mrs. Field, and had been prejudicing her mind against him.

"The circumstance in relation to Mr. Webb induces me to believe that Mr. Baker did not like the change made in the settlement; but having decided that Mrs. Field was to settle her property as she pleased, he did not propose to interfere with the change.

"The deed of settlement which was finally executed, carried into effect, according to my judgment, the wishes of Mrs. Field, as finally expressed to me.

"I was instructed by Mrs. Field, to secure to her the control over her property, in the manner provided by the deed, and I drew such a deed as would, in my opinion, execute her wishes.

"The instructions of Mrs. Field, [referring to her original instructions—vide interrogatory 17,] could be carried out faithfully, only by making the limitations subject to her power of disposition and control. To act over her property as nearly as possible as a feme sole, was the leading wish expressed by her.

"Mr. Baker throughout declared that he desired such a settlement to be drawn as Mrs. Field desired; and that he would not interfere. I remember distinctly the impression left on my mind, that I had never seen an occasion where a man, marrying a fortune, had acted more handsomely, in waiving all interference with the lady's wishes and control over her fortune.

"Although I cannot remember particular conversations, yet, if I am to state results on my own mind, I must say that I have no doubt all the terms of the settlement were well known to Mr. Baker; whether he comprehended the effect of them I cannot undertake to say. As to the power of disposition and changing the estate, the fact that

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such a power *was to be given by the settlement, was a distinct subject of conversation with Mr. Baker. Part of his plan was to raise money to pay off Mr. Webb, and take his business from him, and to receive money for travelling with his intended wife, dur-

ing the summer, which had begun. I brought to his view that, under this power to change, the money could be raised, and recommended him to see the house of Ladson & Co. on the subject; and, in pursuance of this recommendation, an arrangement was made with this house.

"I have said that Mr. Baker's language in relation to Mr. Webb, induced me to believe that he knew Mr. Webb to be the author of the change, [in the settlement.] I had my own conviction that Mr. Webb was the person, from a conversation I had with Mr. Webb; but I did not communicate this conviction to Mr. Baker. After the marriage I was made certain of the fact, by Mr. Baker's statements, when he transferred his business from Mr. Webb."

"I read it, [the settlement] over to none of the parties, as far as I recollect. My partner, Mr. Jervy, attended to this duty.

"Mrs. Baker's instructions to me never contemplated the disposal of the whole, or even the greater part, of the property; and I certainly never contemplated any case, but the exercise, in good faith, of the power, for the proper advancement of the usual arrangements of a family. If I am permitted to answer this question, I would certainly say that the execution of such deeds, [deeds by Mrs. Baker, conveying away every cent of the property, without reserving any interest for herself or her husband—vide 5th cross interrogatory,] is a fraud upon the rights of Mr. Baker; and I ought, in any event, to say that I have no doubt, that had such been considered within the scope of this power, I would have felt bound to limit its words; as I neither would have asked Mr. Baker to sign such an instrument, nor do I think he would have signed such a one.

"I feel satisfied such an exercise of power was neither contemplated at the time by Mr. or Mrs. Baker.

"As I have said already, no man could have acted with more fairness, liberality or confidence in the integrity and justice of a lady, whom he was about to marry.

"Mr. Baker did not interfere with these conferences, (at which Mr. Memminger received his instructions from Mrs. B.) even by his presence or interruption, or in any way that I could perceive.

"I never contemplated a disposition of the whole of the settled property; and, therefore,

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never spoke of such a mat*ter to Mrs. Field. But we both contemplated dispositions of part; and the intention was to secure a power, such as a person sui juris would exercise. For instance, no one ever contemplated the giving away all his property in his lifetime; though he would certainly contemplate, (in any permanent settlement,) the probability of a sale or exchange, or the advancement or aiding of a child or friend, or borrowing money on a mortgage, or the like."

Mr. Jervey says that he engrossed the deed executed, from the final draft by his partner; and that it was not ready for execution till about 2 o'clock, P. M. of the day of marriage. He was present, and saw it executed, and read it over carefully to them, before they executed it. Does not recollect that either of them asked, or that he gave, any explanations of any portions of the deed to them, or that either of them expressed any dissatisfaction at any of its provisions.

The best piece of evidence is the answer of Baker to a bill filed by Levy et al. v. Baker, Roux and Jenkins, the 28th of December, 1844.

In order to see the bearing of the portions of the answer relied on here, it is necessary to state that that was a bill filed by two of the creditors, provided for by the deed of September, 1844, on behalf of themselves and the other creditors also provided for in the same deed, to enforce the appointment made thereby for their benefit. The bill is introduced by a statement of the marriage and marriage settlement, the principal provisions of which are briefly sketched; and resting the deed of appointment upon the power reserved by Mrs. Field, now in question, the bill sets it out briefly but substantially, and the settlement is exhibited. In after parts of the bill it is charged that Baker and the trustees refuse to give effect to it; and particularly as to Baker, it alleged that, from a disposition to obstruct the payment of his wife's debts, he gives out various surmises against the operation of the settlement, &c.

Therefore, in Baker's answer, he says that on the eve of the marriage, "this defendant, seeing that the said Isabella was entitled to a considerable estate, real and personal, and desirous to secure to her the use and enjoyment of the same, voluntarily proposed to her to have a settlement made, before their marriage; and that the terms of such settlement should entirely conform to her views. That accordingly he advised the said Isabella to consult with a solicitor, and make her views known to him; and assured her that he would carry out the same to the full extent of his ability. That accordingly, the said Isabella

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retained and conferred with counsel, *and gave her directions for the said settlement, and had the same drawn, according to her own free will, without any interference on the part of this defendant. That when the terms of the settlement were communicated to him, this defendant received and assented to them, without alteration, and duly executed the deed which was drawn up. And this defendant, further answering, saith, that the copy filed with the bill, is a true copy of the said settlement."

It would be a great injustice, however, to this party, to stop short at what I have quoted; because although it may conclude

him as to some objections he urges to the settlement here, it leaves others open, and shews that as to them, at least, he has been consistent.

He proceeds immediately to state that he had full confidence in his intended wife's sense of justice and propriety; and the residue of the answer is a series of complaints of the abuses of that confidence. He objects to the deed in that case, as taking place of better concerted and more prudent, while, at the same time, equally efficacious efforts on his part to pay his wife's debts, which to his surprise he found very considerable. He objects to some of the debts provided for in it, as not being the debts of his wife, but debts of other persons, (T. B. Chaplin,) and conceives it proper that the creditor should go against him as principal, in the first instance; or that the remedy against him should be assigned for the reimbursement of the settled estate. And he even speaks of some of the other deeds of which he says he had heard; and declares his intention to resist them, as not coming within the intention with which Mrs. Baker had reserved the power set out in the settlement.

This is as full a statement of the case as I can make; and I have taken particular pains to leave nothing out, because the amount involved is very great; and although I shall make use of very few of the ample materials before me, (the case being plain one way or the other, as I conceive,) I desire to give every opportunity to correct the very short judgment which I shall pronounce.

There is no evidence of the fraud and undue influence charged against the appointees under the several secondary deeds executed by Mrs. Baker. The execution of such instruments may be evidence of great improvidence and egregious folly on her part, of which she may have cause to repent very bitterly; but her competency to contract has not been questioned; she has made no complaint: and after full time to deliberate upon what she has done, she declares, and continues to declare, her adherence to it. We may

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suspect undue influence, but it is impossible for me to discover in the evidence before me any ground upon which I can safely rest the suspicion.

We are obliged, therefore, to come back to the marriage settlement, upon which these deeds depend. This difficulty arises altogether out of the clause in the settlement reserving power over the settled property to Mrs. Baker, notwithstanding her coverture; and whether they shall prevail or not depends upon two questions:

1. Whether that clause is rightly in the settlement; and
2. Whether the appointments fall within its limits.

There are two ways in which the clause

may be supposed to have found its way into the settlement; by fraud or mistake; and accordingly as the evidence may establish the one or the other, the settlement might be set aside or reformed.

The evidence is too clear to admit of discussion, that there was no fraud in the case. The clause was not put in surreptitiously. This unfortunate husband, from the beginning of the present cases, seems to have been casting about for some solid ground on which to rest his objections. But the most hopeless on which he could have pitched, was, that the settlement, as it now stands, was imposed upon him. It is fortunate for him that his bill, which contradicts his answer in Levy's case, is not sworn to as that was. There is a conflict of statements, which his perplexities may extenuate; but not of oaths, which nothing can excuse. But how can any man reconcile his answer to Chaplin's bill with the other answer to which I have alluded, and which was put in evidence at the hearing?

It is not necessary to go beyond that answer to shew every thing requisite to bind him. He makes no agreement, and stipulates for no terms. His agreement is that Mrs. Field shall select the terms according to her pleasure. The terms are made known to him, and he accepts them. There could be no surprise upon him, because his mind had not resolved upon any thing in which he could be disappointed. He asked nothing, and therefore could not consistently complain if he received nothing. Or, if what he had been told at one time he would get, was taken away or withheld, he could not consistently complain, because his bargain was that all might be withheld. And as to the terms, whether he understood them or not, can make no sort of difference, because he asked for none, and agreed to take any that might be proposed.—Courts do not sit to make bargains, for those, especially, who have full opportunity to make them for themselves, and neglect it; nor to reform bar-

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gains for those who cannot have *been surprised; nor to set them aside for those who it is impossible can have been defrauded.

I cannot be taking a wrong view of this answer. It is confirmed in every particular by Mr. Memminger's testimony, except in this, that in the answer we have Baker's re-assertion of his agreement nearly two years after it was made.

What more can we have than this? There is something more. The complaint is, that after another form of settlement was fixed upon, this clause was for the first time introduced. The first draft is produced by Mr. Memminger with this identical clause in it, word for word, not a syllable altered.

I will not follow a thing so plain any further.

Then as to mistake, was there any? Let

it be conceded that he claims a mistake, who, by his own understanding, was to allow every latitude that the other contracting party chose to require. Put this case upon the highest ground that can be chosen, and suppose it is a case in which the party comes to correct a mistake of law. The mistake, as we have seen, could not have been as to the words constituting the clause, but as to the legal operation. The rule is clear that when you want your legal mistakes corrected, you must prove that you were mistaken. If a man is ignorant of law, he cannot prove that. But if he is mistaken, which means misled, he can prove it. If a man goes to his lawyer and takes his advice and gets wrong advice, he can prove the advice he got by him who gave it. But Mr. Baker had no lawyer, and wanted none. He asked no counsel and was not misadvised.

If Mrs. Field had been misled she could have proved it. But Mr. Baker cannot prove a mistake, because he depended on his own judgment, and no one can explore the recesses of his mind and say whether he really was mistaken or not.

And there is another consideration. There must be mutuality in the administration of remedies. Is there any evidence which shews that if the settlement had been presented as Mr. Baker would now have it, Mrs. Field would have accepted it? If the deed were wholly set aside, her rights as a feme sole are taken away by the marriage, and instead of having a settlement as she expected, and bargained for, she is left without any; her property taken away from her by the marital rights of her husband, without an equivalent. But as the remedy is to reform, and not to annul, the instrument, by what contract will you reform the instrument in this case? Where is the proof of any other contract than the one which was made and executed? I confess I can find none.

If the instrument were to be reformed by

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the contract intended by Mrs. Field, her intention, as expressed to Mr. Memminger, was to retain the control she then had over her property, as far as practicable. Then the question is, is it legally practicable for a woman to make a settlement by which the power of the grantor may be exercised over the whole property from time to time, at her pleasure, and according to her pleasure. And will this, as an abstract proposition, be disputed? And if this can be done, is it done by this deed? If it is done by this deed, the deed conforms to Mrs. Field's views and intentions, which were to govern, and should not be reformed.

There is one consideration here which had nearly escaped me. It may be possible, not only so, but it is often the fact, that two persons unite in a contract, the operation of which is differently understood by them. In this case, there was a set form of words in

the deed; but the husband and wife may have had different ideas of their legal operation. That is not enough to annul the bargain, or to reform it. Nay, if it were still executory instead of being executed, it would be enforced; and there are very few bargains that could stand, if the law were otherwise. The law, as I lay it down, is in conformity with *Kennedy v. Lee*, (3 Meriv. 441.) and our own case of *Neufville v. Stuart*, (1 Hill Eq. 159.)

The only ground left is, that the appointments are not warranted by the clause reserving Mrs. Baker's power.

The extent of the power reserved must depend altogether upon what appears on the face of the settlement. The words of the deed are not to be explained by extrinsic evidence. It is the instrument, and the instrument alone, from which we are to learn its intentions; and this is to be inferred by a fair construction of its terms. We are not to be guided, in this branch of the discussion, by explanations given even by the draftsman. The validity of the deed being once established, it must speak for itself; and, what it says that is the contract of the parties.

It is little considered by those who object to this doctrine, to what a state of insecurity the rights of men would be reduced, if, under the pretence of explaining written instruments, evidence might be received, while the instruments might be perverted to any purpose, and effectually destroyed.

The power, according to the clause reserving it, is to be exercised at the pleasure of the grantor, "if she shall be minded to dispose it." It extends throughout the whole property, "any portion of the said premises." It is a power which is not exhausted by any single act, but may be exercised "from time to time." It may be exercised "in any man-

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ner what*ever." It authorizes the utmost latitude as to the persons in whose favor it is to be exerted, and as to the interests to be conferred on them; "such persons," "such uses," and upon "such limitations and conditions," as the said Isabella shall order and direct.

I can see no limit to this. It is said, however, that it was never intended, nor should it be so construed as to authorize appointments calculated to trench upon the main objects of the settlement. What is the real meaning of this objection? Is it that the power could not have been intended to deprive the parties interested under the other provisions of the settlement, of the interests thereby indicated? Then, the reservation of power means absolutely nothing; for any and every exercise of it tends to destroy the interest spoken of, to a greater or less extent, according to the degree in which it is exerted. And what were the main objects of the settlement? Neither party is to arrogate them to himself. The main object was the

whole settlement, with all its provisions, and the reservation of this power, whatever may be its extent, was as much an object of it as the interests of any other party. The allowance of it in its integrity is not only an express stipulation of the other party, but is as much an implied condition of the contract as any other feature in it.

Is there no limit then to the power? None that I can perceive, but the discretion of the appointee. That is the measure established by the contract of the parties; and, so far as I can see, must prevail. It is not the Court that has given, or that now gives, license to Mrs. Baker; it is Baker who does it. And if she is allowed to act capriciously, it is not by the leave of the Court, but by his. And when he comes to ask that she be restrained, he must shew some excuse on the face of the contract, for its interference. If, as is instructed in *Fronty v. Fronty*, (Baily Eq. 517) there had been any purposes indicated in the settlement, for which the power was to be exercised, (as for raising portions for the children, and the like, as put by Mr. Memminger,) the exercise of the power would be restrained to those purposes. But an unlimited power means an unlimited power, and a capricious power a capricious power, not only in common speech but in law; and it would be repugnant to law as to justice, in an enlarged sense, that he who has granted it in consideration of marriage, should be allowed to recall or question it.

Consider for a moment the difficulties in which the Court would involve itself, if it undertake to interfere in this case. Upon what ground should it proceed? If upon that suggested by counsel, that Mrs. Baker has

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proceeded to a length sub*stantially setting aside the whole settlement, then, (not to insist upon the obvious fact that the power reserved by her was to do that very thing, partially or wholly,) the question is where, at what point, has the excessive exercise of the power been manifested, and, at what limit shall the Court plant itself to arrest the transgression? The thing is impracticable, unless at the hazard of a capricious power in the Court far more dangerous and far more intolerable than that which it seeks to put down.

Is it certain that the power reserved in the settlement, in all its plenitude, was against the real intention of Baker, any more than it was against that of Mrs. Baker? Events have been against him; but who knows what hopes he may have entertained, that his kindness and assiduity might be rewarded with appointments in his favor, as liberal and as irrevocable as he could desire or the settled property afford?

Another objection is, that the reservation of a power so ample as this, by a married woman, is against public policy, by furnishing her the power to predominate over her

husband, who, by law, should be the master and not the slave of the wife.

This is a Court, and not a legislative body. As the law is, so it must be administered. Is it a new thing in law that a femme sole about to marry should reserve the entire control or enjoyment of her whole property? If I had the personal privilege of settling the law and the policy of society, it should be so in all cases by a general enactment to that effect. But as the law is, a woman may make such a contract. It is not disputed by counsel that a woman may secure the enjoyment of her whole property to herself, but the control of it is what is objected to. But is it not the familiar law of England, that the securing of a separate estate to herself by a married woman, gives her the control of it as if she were a femme sole? and was it ever surmised that the reservation was void, as against policy or morality?

Then, I must declare the deeds of appointment sustained by the marriage settlement, and direct that the trustees of the settlement do hold accordingly; and it is so decreed.

It is also decreed, that the trustee, Roux, according to his request, be removed from his trust; and that he account for his administration of it, and deliver up the trust estate in his hands, and the income and profits which have accrued since the dates of the deeds of appointment, respectively, to his co-trustee, Daniel Jenkins, to be held by him for the several persons entitled.

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*That the said Roux do pay the costs of the suit instituted by him, by his bill filed the 7th of August, 1845, and that all other costs be paid out of the funds of the settled and appointed estates, considered as a common fund.

That Roux and Baker, and their agents, be perpetually enjoined and restrained from interfering with the possession or management of the settled or appointed estates; and that the injunction heretofore granted against Thomas B. and Saxby Chaplin, and Daniel Jenkins, be dissolved.

And that the parties be at liberty to apply for any further order that may be necessary.

R. L. Baker appealed from the decree of his Honor, Chancellor Johnston, in the above cases, and moved the Court of Appeals to reverse the same, on the following grounds:

1st. That the execution of the power by the wife, in the appointment of the whole estate to other uses, ought to be set aside; because it is inconsistent with, and repugnant to, the leading clause of the deed, which provides that the husband shall receive the profits of the whole settled estate, for the joint use and maintenance of himself and wife.

2d. That the execution of the settlement with clauses not only unusual, but inconsistent with the assurances held out to the husband, was an advantage taken of his con-

fidence; and he is entitled to be relieved from so much of the said settlement, on the ground that the same was obtained by surprise.

3d. That the reservation of a power to the wife, to revoke all the uses that fell within the scope of the marriage consideration, and to declare new uses foreign from the uses of the marriage, is inconsistent with the policy of the law, and the duties that the parties, by entering into marriage, contracted with each other.

4th. That the appointment of the whole estate to other uses than the uses of the marriage, whereby the means to which the husband looked for supporting his wife, are taken away, while the duty of maintaining her remains, is a fraud upon his marital rights, and falls under the condemnation of an illegal contract.

Hutson, Colcock, Petigru, solicitors for Baker.

Thomas B. Chaplin and Saxby Chaplin appealed from the decree of his Honor Chancellor Johnston, made in the above four cases, and moved to modify it at the next sitting of the Court of Appeals, in Charleston, on the following ground:

Because the decree orders all costs, except the costs on the bill filed by the trustee,

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Roux, to be paid from the appointed *property; whereas, it is submitted that, under the circumstances, the costs ought to be paid by Baker and Roux.

Treville, appellants' solicitor.

Curia, per HARPER, Ch. This Court concurs in the decree of the Court below, so far as respects the grounds of fraud and mistake. The reasoning of the Chancellor, upon the evidence, is entirely conclusive, that the charge (that the clause in question was interpolated, in the second draft of the settlement,) was without foundation. This constituted the fraud charged.

The law in relation to the subject of mistake is very clearly and justly explained by the Chancellor. The ground of surprise, as distinguished from mistake, taken in argument, I understand to be this, that the complainant in the third case stated, consented that the settlement should be drawn according to the wishes and instructions of Mrs. Field, the intended wife, on the previous assurance that he would be properly provided for. If he had received such assurance, in these terms, it would hardly be practicable for the Court to say what would have been a proper provision, and reform the settlement so as to give it, or set it aside for the want of it. The expression testified to, by Mrs. Toomer, that "she intended to make Baker comfortable," is liable, in a higher degree, to the same objection. Nor does it appear that this expression was ever

communicated to Baker, so that he may be supposed to have executed the deed on the faith of it. The only specific representation which was made to him, appears to have been that testified to by Mr. Memminger, that he told him of the provision made for him, in case of his surviving. This representation was, of course, true; and though the expectation it may have raised may have been, in some sense, disappointed, yet he knew that it was subject to be disappointed.

The most material question relates to the construction of the deed of settlement, as suggested by Baker's first ground of appeal. I say suggested, because it seems to me that the true views, by which the case is to be decided, were not brought to the notice of the Chancellor below, nor are distinctly set forth in the grounds of appeal.

There is no question with respect to the rule contended for, that if there be different clauses in a deed, so entirely repugnant that they cannot stand together, the first clause must prevail. But if they be not so utterly irreconcilable, the Court must, if possible, make such construction as will give each its appropriate effect. And, for this purpose,

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it is prop^r to collate the various provisions of the entire instrument, for the purpose of ascertaining whether one of the conflicting clauses was not intended to have a meaning different from that which its terms more obviously import. The first clause of this instrument, as quoted in the decree, is that the trustees shall "permit Baker to receive the rents, issues and profits, for the joint maintenance of himself and wife, during their joint lives." This is the grant of a life estate, explicit and unequivocal. The second is, "that in case the said Isabella C. Field shall be minded to dispose of any portion of the said premises, in any manner whatever, then the said trustees shall hold, convey, order and assign the same to and for such person or persons, upon such uses, and subject to such limitations and conditions, as the said Isabella C. Field shall, from time to time, in her lifetime, by deed or any other instrument in writing, executed by her, in the presence of two or more witnesses, or by her last will or testament, duly executed, order, direct, limit or appoint." This also seems, on its face, sufficiently clear and unequivocal, that the wife may at any time, make any disposition of the whole or any part of the property, whether it be to take effect in *præsent* or in *futuro*. Here is an apparent repugnancy.

There appears to me to be two methods of construing these clauses, so that each may have an effect. The first is, that the life estate is given conditionally, subject to be defeated and divested at any time during its continuance, by the act of the wife. This would constitute what is called a conditional limitation or springing use, in favor of the

donees, abridging the previous estate. The other is, to regard the second clause as giving the wife power to make any disposition subject to the joint estate for life, and to take effect after its termination; thus constituting a remainder expectant on that termination.

I am of opinion that the latter construction is the true one. As observed in argument, there could be no question, if the power to dispose were only by will. This would only take effect after her death, and would be a remainder to take effect at the termination of the joint life estate, if her husband should survive her; or at her own death, if she should be the survivor. The will would be revocable, and would not interfere with the limitation to her, in fee, in the event of her surviving. But she is also empowered to dispose by deed. In general, a deed is understood to transfer the present title and right of possession; but by no means uniformly so. A deed is not revocable, and by the deeds executed in this case,

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*she has conveyed every thing which she had the power to convey, after the termination of the joint estate, whether she survived or not; and has exercised it: this makes a vested remainder. Now, it need hardly be said that a vested remainder may be transferred by deed, conveying the present legal title, though not the present right of possession. It is also well settled, that any equitable interest or contingency, whether depending on a conditional limitation, springing use, or executory devise—any thing short of a mere possibility—may be assigned, and this assignment may be by deed. The power of appointment, whether by deed or will, most commonly contemplates a disposition to take effect in *futuro*. It by no means follows, then, that the power to give by deed, under the settlement in question, necessarily implies a power to transfer the present usufructuary interest.

I infer that it was not so intended; first, from the provision of the deed, that in the event of any attempt of creditors to make the property liable for the debts of the husband, the income and profits shall be paid to the separate use of the wife. If the power of the wife, under the second clause quoted, were construed in the utmost latitude of which terms are capable, the wife might, at any time, direct the income and profits to be paid to her separate use. Or she might sell the whole or any part of the property, and dispose of the money as she thought proper. If such were her powers, the provision referred to was superfluous.

The construction contended for seems to me to be incompatible with the subsequent clause of the deed, providing "that in case the said Robert L. Baker and Isabella C. Field, during their joint lives, shall be desirous of selling or disposing of any portion

of the property herein before described, or making any change in the same, that then it shall and may be lawful for" the trustees, &c. "upon the assent of the said Robert L. Baker and Isabella C. Field being signified thereto in writing, to sell and dispose of any part of the said property," &c. provided the proceeds be vested to the uses of the settlement, on such security as the husband and wife may approve. If the consent of both husband and wife were required to sell or make any change in the property, the wife alone could not have the unqualified power of disposition contended for.

It is proper for the Court, collating all the provisions of an instrument, for the purpose of giving it construction, if there be any thing ambiguous, to make such construction as will give the whole a reasonable effect. It should incline against any construction

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which would operate in an unusual manner, harshly and injuriously to any party, and in favor of such as seems most conformable to the general purposes for which similar instruments are executed. It is also a rule, that if there should be an ambiguity, the construction must be most strongly against the grantor.

The construction contended for, on the part of the wife, would certainly operate very harshly upon the husband. It is agreed, in the pleadings, that the intended husband, who was a young man, was entirely without property; the large property settled belonged to the wife, who was advanced in years. She must be regarded as the grantor. Under such circumstances, it was reasonable to expect that some provision should be made for the support of the husband as well as the wife. The object of marriage settlements, in general, is to provide for the support of the parties, and also for children, if any there should be. But upon the construction contended for, all these purposes might be defeated. The husband might be left in utter poverty, while he would still be liable for the wife's debts and maintenance. (I speak on legal principles, and however improbable it may be that the husband, in the present instance, should be able to answer such demands, he might be harassed by them.) It puts it in the power of an indiscreet wife to leave herself without the means of subsistence; as it seems the wife in the present instance has attempted to do; and children of the marriage, (always considered possible,) might be left unprovided for.

It may be said that the husband is in no worse condition than in the common case where the property of the wife is settled to her sole and separate use. But in such case the husband knows what he has to depend upon. It is as if he had married a woman without property. He knows that he has no claim on the wife's property for his support,

and could not have been induced to enter into the marriage with that expectation. Here such expectation was held out, and it would be hard and unreasonable that it should be disappointed.

Much of the argument addressed to the Court below, on the part of the husband, was to this effect; supposing the wife to have the power to appoint so as to take effect in present, she should be restrained from the excessive execution of that power. She might make a reasonable provision for the children of her former marriage, or for other purposes; but not leave her husband and herself utterly destitute. But it is plain, that if she possesses this discretion, the Court cannot control her in the exercise of it. Who shall say what shall be a reasonable provision for

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children, according to their circumstances, or for what objects she might properly provide? This latitude of discretion would involve the Court in greater embarrassment and uncertainty than the doctrine of illusory appointments which has been so much complained of.

But the construction I have adopted will operate the natural and reasonable restraint on the wife's power of disposition, if a similar case should occur, which seems to be required. Having power to appoint after a joint life estate, the wife will, in general, take care not to leave herself penniless and dependent, in the event of her being the survivor. It will be a security, too, for a proper provision for the husband, in the event of his surviving; for as the wife may be the survivor, she cannot leave the husband destitute, without running the risk of leaving herself so. It is true she has done that very thing in the present case. But this doubtless arose from her misconstruction of the settlement. Having separated from her husband in some resentment or disgust, it is probable that she made the disposition which she did, more to annoy and injure him, than out of kindness to her children. To gratify these odia conjugalia, she may have determined to leave herself dependent on her children, trusting to their natural affection, and their gratitude for the benefit which she had conferred, to make a liberal provision for her. But it is in no degree probable that she would have made such disposition, if she had been aware that her husband would receive the income of the estate, during the continuance of her life. The children of the former marriage, it appears, were already well provided for and in good circumstances; but if they had been needy, the credit afforded them by an estate secured on a future, and, probably, not distant event, would have availed for their present necessities. There are other considerations which would incline us to the conclusion we have adopted, but it is not necessary to consider them in detail.

The construction we have given to the

clauses in question, seems to us to be the more obvious and reasonable one. But if they are capable of such construction, we are bound to make it. As I have said, the first construction suggested, that which is contended for on the part of the wife, would constitute a conditional limitation or raise a springing use. It is hardly necessary to refer to authority for law so familiar as that which has been so emphatically laid down with regard to executory devises—that if there ever existed a rule respecting executory devises which had uniformly prevailed, without any exception to the contrary, it was that

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*laid down by Lord Hale in *Purejoy v. Rogers*, 2 Saund. 380, that where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed an executory devise, but a contingent remainder only, and not otherwise; still more if it can be construed a vested remainder. It is equally familiar, that conditional limitations and springing uses are to be governed by the rules which apply to executory devises. *Fearne, Ex. Dec. & Cont. Rem.* 440, and *Butler's note to Fearne*, 382, n. a 3. The case of *Carwardine v. Carwardine*, *Fearne*, 388, was one in which a springing use under a deed of marriage settlement was contended for, and the case was decided upon the rules applicable to executory devises.

The general reason is, that the remainder was good at common law; but executory devises and springing uses, allowed as an indulgence to men's last wills or the exigencies of a family, were in derogation of the common law, and not to be allowed but in cases of necessity.

From the view which the court has taken, the circumstances do not arise under which the trustee, Roux, asks to be discharged from his trust, and the order for his discharge is rescinded.

The court is also of opinion that the costs of the suit of Roux, directed by the Chancellor to be paid by him, should be paid by defendant, Baker, out of the profits of the trust estate. As he was not a party to the first suit of Roux, it might seem irregular to direct him to pay these costs; but he was a party to the supplementary bill, which was a continuation of the same suit, and adopts and insists upon all the grounds which Roux had taken on his behalf.

It is directed accordingly.

It is also ordered and decreed, that the trustees to the settlement pay to the said Robert L. Baker the income and profits of the trust estate, during the joint lives of himself and his wife; and that the said Thomas B. and Saxby Chaplin, mentioned in the proceedings, be enjoined from interfering with the possession or management of the estate, during the continuance of the

said joint lives. In other respects, the decree of the Chancellor is affirmed.

Decree reformed.

I Strob. Eq. *170

*L. P. HEXT et al. v. MARY PORCHER,
Adm'x of James Porcher.

(Charleston. Jan. and Feb. Term, 1847.)

[*Trusts* ⇨171.]

The liability of a trustee is not measured by the abstract rule of his duty. The universal test of his liability, or exemption from liability, is this: is there, or is there not, in this case, evidence of faithful endeavors to fulfil it?

[Ed. Note.—Cited in *Boggs v. Adger*, 4 Rich. Eq. 411.

For other cases, see *Trusts*, Cent. Dig. § 226; Dec. Dig. ⇨171.]

[*Trusts* ⇨234.]

To take advantage of a mistake, committed in an evidently honest endeavor, by the trustee, to perform his duty, and to make him liable for the consequences, would neither square with the dictates of justice, nor promote the true policy of the Court, or the interest of its sanctions.

[Ed. Note.—Cited in *Sollee v. Croft*, 7 Rich. Eq. 46; *Pope v. Mathews*, 18 S. C. 448, 453.

For other cases, see *Trusts*, Cent. Dig. § 340-342; Dec. Dig. ⇨234.]

[*Trusts* ⇨179.]

[Cited in *Nance v. Nance*, 1 S. C. 224, to the point that where a trustee, by a mistake honestly made, had a deed recorded in the wrong office of registration, it was held that this was not sufficient to render him liable.]

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 233; Dec. Dig. ⇨179.]

Before Johnston, Ch., at Gillisonville, February, 1846.

The facts of the case are stated in the following circuit decree.

Johnston, Ch. This is a bill claiming redress for the alleged negligence of a trustee, by which the trust property has been lost to the cestui que trust.

On the 15th of December, 1806, Sarah C. Porcher, the mother, and Lawrence Hext, the father of the plaintiffs, on the eve of their intermarriage, which shortly afterwards took place, entered into a deed of indenture with James Porcher, the intestate of the defendant, whereby the said Sarah C. conveyed all her individual interest in the estate of her deceased father, Peter Porcher, and of her deceased uncle, William Young, to the said James Porcher, in trust, after the marriage, for the joint use of herself and her intended husband, during their joint lives, and to the survivor of them, with remainders in fee, to the issue of the said Sarah C. by that or any subsequent marriage.

The trustee, James Porcher, caused the deed to be registered in the registry of Mesne Conveyance for Beaufort District, thirteen or fourteen days after its execution, but it was never registered in the Secretary of State's office, and the original is now in the defend-

ant's possession, as administratrix of the said trustee.

After the intermarriage of Lawrence Hext and wife, her shares in said estates were partitioned off to her, and there came into the possession of the husband a number of slaves, who, with their increase, now number some seventeen or eighteen.

All these slaves were sold to bona fide purchasers, (without notice either by Lawrence Hext himself or by the Sheriff,) for his debts, with the exception of two, as to which no relief is sought against the defendant. Lawrence Hext and his wife are now both dead, and the plaintiffs, who are the issue of the marriage, claim an account of the value of the slaves lost to them by the negligence of

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their trustee to re*register the deed in the proper office, so as to charge the purchasers of the trust property with notice, and enable the plaintiffs to recover it from them. It appears, from an examination of the Registry of Mesne Conveyance for Beaufort District, from 1787 to 1812, inclusive, that forty-six marriage settlements were recorded in that office, of which twenty-three were settlements of real and personal property, eighteen of personal property, and the remaining five of property the character of which is undefined.

This is the case stated by the counsel, for the consideration of the Court; and the question is, whether, under these circumstances, the trustee was liable for the losses sustained by his omission to record the deed in the Secretary of State's office.

My impressions of this case have materially changed, since the hearing; and I cannot now say, as I would have said then, that the conduct of the trustee was and is to charge him. I do not doubt that it was his duty, after accepting the trust, to perform any act necessary for the preservation of the property, and for securing the interests of his cestui que trusts, and to record the deed, as one means of attaining these ends.

Nor is it any longer a question, that the proper office for the registration of marriage settlements, under the Act of 1785, was that of the Secretary of State; although that seems to have been doubted, up to the decision of *Boatright v. Wingate*, 2 Treadway, 522, which was long after this deed was recorded, and it will appear, by the opinion of the Judges in that case, that one of them, who, at the registration of this deed, was the leading counsel in Beaufort, and had the principal direction and control of the business there, was strenuously of opinion that such a registration as was made, in this case, was effectual and valid. My own opinion, while at the bar, was, and is still, that under the Act of 1785, settlements of personalty were to be recorded in the Secretary's office, and that as to settlements of realty, they were subject to a double registration: one in the Secretary's office, as settlements

under the Act in question, and the other in the Registry of Mesne Conveyance, as deeds for conveying lands, under the Act upon that subject. The trustee, therefore, did not comply with the law, by the registration which he caused to be made in this case, and his cestui que trusts, the preservation of whose interest was the very end of his appointment, have suffered loss by his omission.

But the liability of trustees is not measured by the abstract rule of their duty. The universal test of their liability, or exemption from liability, is this: is there, or is there

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not, in this *case, evidence of faithful endeavors to fulfil it? The office of trustee is one essential to every important interest in society, and so far from those interests being promoted, they would be deeply prejudiced, if any rule more rigorous than this—any rule calculated to deter prudent and honest men, of ordinary capacity, from accepting the appointment—were laid down, or insisted on. The partial effect of that rule would be to confine the office to the crafty and dishonest, who might accept with the hope of eluding liability, and securing profit by fraud and dexterity. The test of liability, as I have laid it down, is to be gathered from all the cases upon the subject, and I shall not trouble myself with an analysis of them. There may be strong expressions to the contrary effect, but the broad leading principle of all the cases is as I have stated it. It has sometimes been said, as I have laid it down in *Cooper v. Day*, 1 Richardson's Eq. 26, that if the act done by a trustee, be such as a prudent man would not have done in his own affairs, or if that which the trustee has omitted, be what a prudent man would not have omitted in matters of personal interest, the trustee shall be liable. But this rule is manifestly subsidiary. It is used as a test of unfaithfulness, which, after all, is the fundamental ground of liability. If a trustee does, or omits, what a prudent man would not do or omit, in his own concerns, and there is no more in the case than that, it may be set down as presumptive evidence of indifference to his duty. And in the case I have mentioned there were circumstances, (if their aid had been required,) to give a tinge to the conduct of the trustee, and to strengthen the presumption arising from his unexplained omission to record the deed. But here the omission does not stand alone. There are circumstances which might refute the presumption that might arise from it, and to show that the trustee was honest and diligent, but mistaken. The fault is not an omission to record, but a mistake in the office where it was done. The registration, though erroneous, is proof of a faithful intention to perform the duty required by law, which intention is none the less meritorious on account of the mistake. The mistake appears also to have arisen naturally from the

general custom of the times, in which prudent men, trustees and others deeply interested, indulged; and it appears to have been grounded upon very high authority.

I do not conceive, that to take advantage of a mistake, committed in an evidently honest endeavor by the trustee to perform his duty, and to make him liable for the consequences, would either square with the dictates of justice, or promote the true policy of the Court or the interest of its sanctions, and it is ordered that the bill be dismissed.

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*The complainants moved to reverse the decree of his Honor, Chancellor Johnston, in the case above stated, on the following grounds:

1. Because it was made clearly to appear, by the bill, answers, exhibits and evidence, that the property to which complainants were entitled, had been lost in consequence of the negligence or omission of the trustee, James Porcher, to cause the trust deed to be registered in the proper office, and therefore the estate of the said James Porcher should have been held liable for the loss so sustained.

2. Because it is conceded, by the very terms of the decree, that the trustee, James Porcher, was bound to cause the trust deed to be recorded; and it is respectfully submitted, that the fact that the trust deed was recorded in the wrong office, is not any proof of diligence, prudence or skill, nor is it any excuse.

3. Because the decree is contrary to law, equity, and evidence.

W. F. Hutson, E. Bellinger, Jr. and J. M. Hutson, for the motion.

Colcock, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

This Court concurs in the decree of the Chancellor, and it is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

HARPER, Ch., absent at the hearing.
Appeal dismissed.

I Strob. Eq. 173

BANK OF HAMBURG v. HOWARD & GARMANY.

(Charleston. Jan. and Feb. Term, 1847.)

[Injunction ⚡26.]

A party indebted to the Bank of Hamburg mortgaged his real estate to secure the payment, and afterwards sold certain negroes to the defendants—he then confessed a judgment to the Bank for the debt secured by the mortgage of the real estate, under which it was sold by the Sheriff and purchased by the Bank. It was subsequently discovered that there was a judgment in the office against the mortgagor, older than

that under which the real estate had been sold; the Bank then ordered the negroes to be sold to satisfy this judgment—defendants then, to protect their purchase, executed a forthcoming bond to the Sheriff, obtained an assignment of the judgment, and instituted a suit at law and obtained a judgment against the Sheriff for so much of the amount of the sales of the real estate as would satisfy the said older judgment. The Court ordered and decreed, that the defendants be perpetually enjoined from prosecuting their judgment at law against the Sheriff, and that they pay the cost of these proceedings.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. ⚡26.]

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[Judgment ⚡793.]

*If one against whom there is a judgment, sell a portion of his property, and afterwards sell his remaining property, the property last sold is first chargeable, in equity, with the payment of the judgment debt.

[Ed. Note.—Cited in Warren v. Raymond, 17 S. C. 206; Moore v. Trimmer, 32 S. C. 523, 11 S. E. 548, 552; Watson v. Neal, 38 S. C. 99, 16 S. E. 833.]

For other cases, see Judgment, Cent. Dig. § 1286; Dec. Dig. ⚡793.]

Before Dunkin, Ch., at Edgefield, September, 1846.

Dunkin, Ch. The material facts of this case are detailed in the pleadings. The argument of the complainants is, that they are entitled, under the circumstances, to have the case considered as if the execution of C. M. Furman, Cashier, was still in full force—that the negroes, purchased by Howard & Garmany from their co-defendant, or his vendee, Holmes, in the Spring of 1840, were subject to the lien of Furman's execution, but that they were not subject to the lien of the complainants' execution, entered in October, 1840,—that Furman's execution having a lien on the negroes as well as on Sullivan's real estate, and the complainants' judgment having a lien on the latter fund only, the complainants have an equity to require that Furman's execution should be satisfied from the negroes. The general principle is fully considered and recognized in Aldrich v. Cooper, 8 Ves. 382. But the Court is not aware that it has been enforced to the prejudice of third persons, who were bona fide purchasers. In Averall v. Wade, 10 Eng. C. C. R. 498, Sir Edward Sugden declined to throw the prior judgments on a settled estate for the benefit of judgments subsequent to the settlement.

But there is another ground on which the complainants' claim to the interposition of this Court must be considered. The execution of Furman was lodged in November, 1837.—Prior to October, 1839, H. W. Sullivan conveyed his real estate to the complainants, for valuable consideration, by way of mortgage. In the Spring or Summer of 1840, he sold the negroes now in possession of the defendants.

In Clowes v. Dickenson, 5 J. C. R. 235, the relative rights of successive purchasers from an embarrassed vendor were much con-

sidered by Chancellor Kent. From the principles established in Sir William Harbut's case, (3d Coke, 116,) he deduces these conclusions, viz: "If there be a judgment against a person owning at the time three acres of land, and he sells one acre to A, the two remaining acres are first chargeable in equity with the payment of the judgment debt. If he sells another acre to B, the remaining acre is then chargeable, in the first instance, with the debt; and, if it should prove insufficient, then the acre sold to B ought to supply the deficiency, in preference to the acre sold to A: because when B purchased, he took his land chargeable

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with the debt, in *the hands of the debtor, in preference to the land already sold to A." He says further that "it cannot be in the power of the debtor, by the act of selling his remaining land, to throw the burden of the judgment, or a rateable part of it, back upon A." In that case, too, the junior purchaser had become the owner of the judgment, and had, under it, caused the land of the elder vendee to be sold. On this transaction the Chancellor remarks, "But the purchasers under that sale have since acquired the ownership of Kimberly's judgment, and wielded it with a very inequitable hand. They have, by execution under it, sold the lots of the plaintiff, and purchased them in for their common benefit. As owners of Kimberly's judgment they have sold the plaintiff's lots in part satisfaction of it, whereas it ought, in justice and equity, to have been entirely and exclusively satisfied out of the residue of the property of U, of which the defendants were themselves the subsequent purchasers."

In principle, the Court is unable to distinguish this case from *Clowes v. Dickenson*. When the defendants purchased the negroes, they took them, in the language of Chancellor Kent, chargeable with the payment of the execution "in preference to the land already sold to the complainants."—Their subsequent proceeding in purchasing the judgment of Furman cannot change or extinguish this equity of the complainants. The defendants were clearly entitled to their judgment at law against the Sheriff. The relief of the complainants is of peculiarly equitable cognizance, and depends on the application of principles proper to this tribunal.

It was suggested that the complainants had not exhausted the real estate specifically mortgaged to them—that there were still fifteen acres of pine land which had not been sold.

The facts in relation to this matter seem to be as follows: The fifteen acres are a piece of pine land at a short distance from Hamburg. It was part of the land mortgaged to the complainants—and was also, as the Court understood, included in a mortgage from Sullivan to Fair & Covington, dat-

ed 10th February, 1839, which latter mortgage was either the property of the Bank, or they had paid the debt to secure which it had been executed. On the 19th June, 1840, Sullivan, with the consent of the complainants, sold the fifteen acres of pine land to Hiram Hutchinson, for one hundred dollars. The conveyance from Sullivan to Hutchinson was adduced in evidence.

Afterwards, and after the Sheriff's sales, to wit: on the 12th August, 1842, the Bank of Hamburg, reciting the premises, that the sale had been made to Hutchinson, with the

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know*ledge and consent of the Bank, and that they had received the purchase money, and also, that they had bought the whole property at Sheriff's sale, on 5th January, 1842, released all their interest, or claim, in the said fifteen acres to the said H. Hutchinson. It was said that so much of the recital was erroneous, as stated that these fifteen acres were sold by the Sheriff to the Bank. It is not perceived that this would alter the result. Hutchinson paid the Bank a fair price for the land in the condition in which he bought from Sullivan, and the money was applied to his debt to the Bank—making this and all other deductions, the balance due on the debt of Sullivan to the complainants is about fourteen hundred dollars, with interest from 1842. If the defendants are permitted to enforce their judgment, it would increase the loss of the complainants by the amount thus recovered.

It is ordered and decreed, that the defendants, John Howard and G. W. Garmany, be perpetually enjoined from prosecuting their judgment at law, against the said Simeon Christie, the late Sheriff; and that they pay the cost of these proceedings.

The defendants appealed from the decree in this case, and moved the Court of Appeals to reverse the same, on the following grounds:

1. Because all the rights and claims of the complainants asserted in their bill were barred by the Statute of Limitations.

2. Because the complainants have no equitable right to insist that the negroes purchased by the defendants of Holmes and the Sheriff, and which they held for more than four years before the filing of this bill, are liable to the satisfaction of Furman's execution, at all, and especially so until the real estate embraced in the mortgage to the complainants, including the improvements of H. Hutchinson, which were put up after the sale of the negroes, by Sullivan to Holmes, and by him to the defendants, and with full knowledge of such sale, has been sold and applied to the satisfaction of their claims.

3. Because, in the most favorable aspect of the case for the complainants, the equities of the parties were no more than equal, and for that reason, and upon the pleadings and proof, the bill should have been dismissed.

Griffin & Wardlaw, for motion.
Bauskett, contra.

DUNKIN, Ch., delivered the opinion of the Court.

In order to understand the judgment of the Court, it is necessary to state that H. W. Sulli-

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van was a merchant of the town of Hamburg. Being indebted to the Bank of Hamburg in about the sum of ten thousand dollars, he, on the 6th June, 1839, mortgaged to them his real estate, consisting of four lots in the town of Hamburg, and two pine tracts in the neighborhood. In May or June, 1840, Sullivan sold to William Holmes the woman Mary and her two children, and in June Holmes sold them to the defendants, Howard & Garmany.—The defendants boarded with Sullivan, and the negroes remained as they had been previous to the sale.

On the 1st October, 1840, Sullivan confessed judgment to the Bank for ten thousand nine hundred and sixty-nine dollars, which was duly entered, and execution lodged on the same day. Under this execution, the Sheriff levied on the real estate, and sold it, on the 5th January, 1842, for eight thousand seven hundred and ninety four dollars. The Bank of Hamburg were the purchasers, who gave a receipt to the Sheriff, and credited their execution with that amount.

It was soon afterwards ascertained that there was in the Sheriff's office an execution against H. W. Sullivan, of an elder date than that of the Bank, to wit: of the 2d November, 1837, in favor of C. M. Furman, Cashier of the Bank of the State, for about six hundred and fifty dollars, and which had been overlooked in the settlement between the Sheriff and the Bank of Hamburg. With the consent of the attorney of C. M. Furman, the Bank of Hamburg, on the 7th April, 1842, caused Furman's execution to be levied on the negroes in the defendants' possession. The defendants executed to the Sheriff a forthcoming bond. They then, to wit: on the 20th August, 1842, paid Furman the amount of his execution, stayed all further proceedings in the case, and instituted a suit at law against the Sheriff for the amount of so much of the sales of the real estate as would pay the amount of Furman's execution, and have obtained judgment against the Sheriff, which they are about to enforce.

On this state of facts the decree of the Circuit Court was pronounced. The defendants occupy a double character.—They are the assignees of Furman's execution, and they are the purchasers of the negroes from H. W. Sullivan. It is not questioned that as between Furman, or his assignees, and the Bank of Hamburg, the equity is plain, and that, prior to the sale of the real estate in January, 1842, the Bank could have required Furman, having a general lien on the estate of the debtor, to resort to his other property

before interfering with their specific lien. But the defendants are purchasers, although of a subsequent date to the mortgage of the Bank, and it is insisted that there is no such

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principle as that *indicated in the decree, and that the doctrine of *Clowes v. Dickenson* is law only in New York, and has not been sanctioned by any decision in this State. This seems a misapprehension. The general principle was applied in *Stoney v. Shultz*, 1 Hill Eq. R. 465 [27 Am. Dec. 429]. But in *Gist v. Pressley*, 2 Hill Eq. R. 318, the doctrine is elaborately examined and affirmed both at the Circuit and in the Court of Appeals.—The complainants held the eldest mortgage against their debtor on two negroes. The defendants held a junior mortgage of certain real estate. But there was an execution elder than both. Defendants, to save the property mortgaged to them, purchased the execution, and under it, sold the negroes mortgaged to the complainants—Chancellor Johnston held that the complainants were entitled to reimbursement out of the proceeds of the real estate mortgaged to the defendants. Chancellor Harper, in delivering the judgment of the Appeal Court, says "the principles of the Chancellor's decision are perhaps less distinctly seen, because the defendants, Allston and Hodges, sustain the characters both of senior execution creditors and junior mortgage creditors of the deceased John B. Pressly. If the execution creditors were different persons, and were now seeking to enforce their executions against the slaves in question, the plaintiff would have a clear equity to restrain them, and to compel them to resort to the property mortgaged to the defendants"—"and if the executions had been enforced against this property, the defendants would have had no redress or claim for contribution against the plaintiff." "The principle," says he, "is fully explained by Chancellor Kent in *Gill v. Lyou*, 1 J. C. R. 407, and *Clowes v. Dickenson*, 5 J. C. R. 235. When the intestate mortgaged (that is, conditionally sold), the slaves to plaintiff, his execution creditors were bound, on equitable principles, to exhaust the property which remained in his hands, before pursuing that to which plaintiff had acquired a title. Among this property was the land and mill and house and lot in question. When the intestate, afterwards, conveyed these to defendants, he could only convey them subject to the equitable burthen to which they were liable in his own hands." In the language of Chancellor Kent, "they sit in the seat of their grantor. The burden is that the property must be liable to the execution creditors in preference to that conveyed to plaintiff." The Court then proceed to determine that if the plaintiff omitted to restrain the execution creditor, but permitted his property to be sold, he was entitled to

maintain his bill for reimbursement against the defendants.

It is urged, however, that the defendants,
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Howard & Gar*many, have held more than four years adverse possession prior to the filing of this bill. It would be very difficult, under the circumstances detailed in the evidence, to infer a title by adverse possession alone in the defendants as against the execution creditors of Sullivan. But in the view which the Court takes, this is not a material inquiry. The defendants purchased in June, 1840. On the 7th April, 1842, less than two years afterwards, the execution of Furman was levied on the negroes in their possession, and they executed a bond to the Sheriff for their forthcoming, and then obtained the assignment and instituted their suit at law against the Sheriff, who is one of the parties complainant. It could hardly be said that their possession was adverse to the execution creditor, whose claim they thenceforth represented. But on the principles heretofore announced, as between the Bank of Hamburg and themselves, they did no more in August, 1842, than they were bound to do, by paying off Furman's execution in order to protect their own purchase. The equity of the Bank did not arise until, in the language of Chancellor Kent, "the defendants attempted to wield this execution with a very inequitable hand," by (substantially) enforcing payment out of the property mortgaged to them. Four years had not elapsed since that time, and in no view could the complainants be barred.

If the slaves, Mary and her children, were not of value sufficient to satisfy Furman's execution in April, 1842, it might be necessary to modify the decree, and limit the responsibility of the defendants in that way. But on this point it seemed to be conceded that there was no doubt, and that a reference would only serve to protract the litigation. It is, therefore, ordered and decreed, that the decree of the Circuit Court be affirmed, and the appeal dismissed.

JOHNSTON, Ch., and HARPER, Ch., concurred.

Decree affirmed.

I Strob. Eq. *180

*SAMUEL LEWIS et al. v. SAMUEL MEW.
(Charleston. Jan. and Feb. Term, 1847.)

[Limitation of Actions ⇨45.]

Four years' possession of negroes, under a bona fide purchase, for valuable consideration, without notice, will confer a good title on the purchaser, although a considerable part of that time may have elapsed between the removal of one trustee, by the Court, and the substitution of another, who seeks to recover them, as part of the trust estate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 239; Dec. Dig. ⇨45.]

[Lis Pendens ⇨9.]

For a lis pendens to affect a purchaser, there must be something in the pleadings, at the date of the purchase, to point his attention to the property purchased, as the identical property, or parcel of the identical property, in litigation.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 20; Dec. Dig. ⇨9.]

[Lis Pendens ⇨1.]

The principle of lis pendens is, that the specific property must be so pointed out by the proceedings, as to warn the whole world that they meddle with it at their peril.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 1; Dec. Dig. ⇨1.]

Before Johnston, Ch., at Gillisonville, February, 1848.

Johnston, Ch. This is a bill brought by the trustee and cestui que trust of certain slaves, against the purchaser of said slaves, for a specific delivery; and the circumstances are somewhat singular; though, upon the whole, I think the law of the case is reasonably clear.

On the 1st of March, 1841, two slaves, Nanny and Sabina, mother and child, then in the possession of one Zachariah Z. Searson, were sold as his property, by the sheriff of Beaufort District, under an execution of one Macconatty, and bought by the defendant, (Mew,) at the fair price of \$632. It is admitted that the defendant, at the time he bought and paid for these slaves, was entirely ignorant of any incumbrance or claim on them; and that he has been in the possession of them ever since, during which time the slave Nanny has had another child, called Paddy.

He says in his answer, that the first intimation he ever had that his right to the slaves was questioned, was in the Spring of 1844, when the slaves were demanded of him. The slave Nanny, (of whom the other two are the after increase,) was, among several others, included in a deed of gift, executed by the plaintiff, Lewis, the 27th of February, 1836, by which he conveyed the slaves therein mentioned to Thomas E. Searson, in trust, to permit the said Zachariah Z. Searson, who had married his (Lewis's) daughter, to have the possession of said slaves, and to receive the income and profits, for the joint benefit of himself and wife, during their joint lives; and if said wife should die during the life of her said husband, then, in trust, to permit the latter to continue his possession, and to receive and apply the profits exclusively to the maintenance and education of such children as might be born of the marriage,

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until some one of the chil*dren should attain majority, or marry; in which events the trust property should be delivered to said children, in equal shares, freed and discharged from all trusts.

The wife died during the life of the husband, leaving the plaintiff, Emily Searson, her only surviving child, who is still an in-

faunt, and sues by her grandfather and co-plaintiff, Lewis.

After the execution of the deed, and during his daughter's life, Lewis, with the consent of Thomas E. Searson, the trustee, had sold two of the trust slaves, George and Sancho, the former for \$500 and the latter for \$400, and purchased, in place of George, a woman, called Rosetta, at the same price at which George was sold, and delivered her to his son-in-law, Zachariah Z. Searson, as a substitute for him. He also placed \$400 in his hands, to enable him to purchase another slave, in place of Sancho.

After the death of his wife, to wit, 1838, Zachariah Z. Searson refunded to Lewis \$300 out of the \$400 thus placed in his hands, but declined to return the remaining \$100; repudiating the deed, which he pretended was executed without his knowledge; and after the trust slaves came to his possession, refused to include Rosetta in the trusts for which she was destined, and sold her beyond the limits of the State, and threatened to sell others of the slaves. The trustee, Thomas E. Searson, also declined to accept Rosetta, or any other slaves, in lieu of those sold, and indirectly supported the objections set up by Zachariah, (who was his brother,) to the trust deed.

Early in 1840, a bill was drawn up by Lewis and his granddaughter, against the two Searsons, in which the matters I have just mentioned were stated, to compel Zachariah to restore Rosetta, or her value, as parcel of the trust property, in lieu of George; and to refund the \$100 of the proceeds of Sancho, remaining in his hands, so as to enable Lewis to substitute another slave for Sancho, and to enjoin said Zachariah from selling or wasting any more of the trust negroes; and also to compel Thomas, the trustee, to accept the substitutes proposed by Lewis, for the slaves sold by him. Before the bill was actually filed, or even engrossed, the case being very urgent, the rough draft was laid before my brother Johnson, who, on the 10th of February, 1840, granted an order for an injunction to restrain Zachariah from "selling or otherwise disposing of the slaves mentioned in the bill, and now in his possession, and from removing them without the limits of this State, without the leave of the Court;" but the writ of injunction was not lodged till the

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13th, nor served till *the 20th March, 1841, which was after the defendant's purchase of Nanny and her child. The engrossed bill, owing to some attempts to compromise, was not filed till the 17th of August, 1840. On the 1st of March, 1841, as I have stated, the sheriff sold Nanny and her child to the defendant, for Zachariah's debt; and Thomas Searson, the trustee, is stated to have been present. On the 2d of April, 1841, the two Searsons put in their answers; and Zach-

ariah, in his answer, stated the sale of Nanny and her child by the sheriff, and admitted that he himself had, besides Rosetta, sold two others of the trust negroes, (Nanny and her child, Edward,) since the filing of the bill, and since the injunction had been served on him: whereupon Chancellor Harper, at May sittings of that year, granted an attachment against him, which was lodged the 28th of May, 1841, and executed in September following.

The case came on to be heard the 18th of May, 1842, and a decree was delivered the 30th December following, that a receiver be appointed, until a trustee should be substituted in place of Thomas E. Searson; that upon the appointment of said receiver, the said Thomas E. be removed from his trust, and account for his administration; and that Zachariah deliver Rosetta, or her value, to the receiver, together with all the slaves included in the trust deed, except George and Sancho. The plaintiff, Lewis, was appointed receiver, the 7th of January, 1843, and was substituted as trustee, in place of Thomas Searson, the 26th of February, 1844. And he, with his granddaughter and cestui que trust, filed this bill the 9th of February, 1846, asking that Mew, the purchaser of Nanny and Sabina, may be compelled to deliver them, with the issue of the former, born since his purchase. The statement of the case is more troublesome than its decision.

The defences are, innocent purchase, and the Statute of Limitations. The former is not contested; but the legal title of the trustee would prevail over the title acquired by the purchaser, which was that of Zachariah Searson, who had no title, legal or equitable. But, putting aside the *lis pendens* of the suit between those plaintiffs and the Searsons, the defendant has acquired a good title by the Statute of Limitations. His possession began to run against Thomas Searson, the former trustee, from the date of his purchase, and having obtained currency, completed its effect before this bill was filed. However, if the former suit was properly *lis pendens* as to these slaves, neither the statute, nor any other defence, can be set up, by one who comes in under the parties to be affected by the decree. The decree will be

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executed over the in*truder's head. Were it allowed to any third person to come in and take the specific property, which is the subject of litigation, from a litigating party, without taking his place, and thus to arrest a claimant, and turn him round to a new litigation, suits would be interminable. In such a case as that, the Statute would only begin to run from the decree, and here the bill was filed within sufficient time.

But the difficulty of the plaintiffs is that, in my conception, the former suit was not such a *lis pendens* as to affect this purchaser. The object of the bill was not the re-

removal of the trustee, nor the transfer of the property. In the progress of the suit, the court became satisfied of the abuses of the trust, and of its own motion made the decree to that effect. There was nothing in the pleadings in that case, at the date of this purchase, to point the defendant's attention to the negroes he purchased as the identical negroes, or parcel of the identical negroes, in litigation. They were not named in the bill, nor was the deed, in which Nanny was named, exhibited. The principle of *lis pendens* is, that the specific property must be so pointed out by the proceedings, as to warn the whole world that they meddle with it at their peril. This is necessary to justice: for as liberty is very much, though necessarily, invaded, by executing a decree over a party's head, without allowing him even a hearing, it is but fair to grant him the means of informing himself, when he is in a likely way of getting into such a danger.

It is ordered that the bill be dismissed.

From the foregoing decree the complainants appealed, and moved the Court of Appeals to reverse the same, on the following grounds:

1st. Because it is respectfully submitted that his Honor, the Chancellor, is mistaken in saying that the original suit of *Lewis v. Searson* did not identify the negroes purchased by the defendant, (Mew,) and did not seek any relief as to them; and that there was nothing in the pleadings in that suit, at the date of the defendant's purchase, to point his attention to the negroes he purchased, as the identical negroes in litigation. Whereas, it is submitted that the original suit of *Lewis v. Searson* did expressly seek the aid of the Court, to prevent the defendant, Z. Z. Searson, from wasting the negroes conveyed by the complainant, Lewis, to his daughter, which were named in a deed, to the defendant, Thomas E. Searson, the trustee, which deed, the bill alleged, the said trustee would not record, and prayed that he might be decreed to do so. And furthermore, the injunc-

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tion granted by his Honor, Chan*cellor David Johnson, in terms prohibited the defendant, Z. Z. Searson, from selling or otherwise disposing of the slaves mentioned in the bill, and then in his possession, which injunction was granted more than twelve months before the present defendant, (Mew,) purchased, and all of which proceedings were sufficient notice of the subject matter of the suit.

2d. Because, it is submitted that the former suit of *Lewis v. Searson* was such a *lis pendens* as affects the present defendant, (Mew,) and prevents his acquiring a title against any of the parties thereto.

3d. Because, it is respectfully submitted that the Chancellor has erred, in deciding that, putting aside *lis pendens*, the defendant, (Mew,) has acquired a good title under the

Statute of Limitations. Whereas, it is submitted that the time between the removal of the former trustee, Thomas E. Searson, by the Court, and the appointment of a new trustee, ought to be deducted in computing the Statute, inasmuch as that was the act of the Court, which ought not to prejudice a party any more than the act of the law.

4th. Because his Honor is mistaken in saying that Thomas E. Searson, the trustee, was present at the sale when the defendant, (Mew,) bought, there being no such proof offered at the hearing.

5th. Because the decree is, in other respects, contrary to law and equity.

Colcock, for the motion.

JOHNSTON, Ch., delivered the opinion of the Court.

This Court concurs in the decree, and it is ordered that it be affirmed, and the appeal dismissed.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

HARPER, Ch., absent.

I Strob. Eq. *185

*JOHN CLARK, Adm'r de Bonis Non, v. E. A. WEST, Adm'x of H. R. WEST.

(Charleston. Jan. and Feb. Term, 1847.)

[*Appeal and Error* ⚭557.]

The Act of 1839 requires expressly that the Ordinary shall furnish to the party appealing, not only a copy of his judgment or decree, but "of the evidence taken by him in such proceeding."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2481; Dec. Dig. ⚭557.]

[*Executors and Administrators* ⚭510.]

The Court will not sustain a decree of the Ordinary charging the estate of an administrator with an amount due the estate of his intestate, which had been lost by the insolvency of the party owing it, unless sufficient evidence of neglect, on the part of the administrator, be reported by the Ordinary to warrant his decree.

[Ed. Note.—Cited in *Pope v. Mathews*, 18 S. C. 448.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2253; Dec. Dig. ⚭510.]

Before Johnston, Ch., at Walterborough, February, 1846.

The Ordinary, after examining the accounts of H. R. West, the appellant's intestate, who had been the administrator of James Bowers, deceased, decreed as follows:

Ordinary's Office, Colleton District, }
December 2d, 1842. }

I certify that I have examined the accounts of H. R. West, administrator of James Bowers, deceased, and find that there is a balance due the estate of James Bowers, of one thousand three hundred and twenty-nine dollars and sixty cents, and I so decree.

L. W. McCants, Ord. Col. Dis.

Mr. Carn, attorney for Mrs. E. A. West, administratrix of H. R. West, appealed from the decree of the Ordinary, on the following grounds:

1st. Because the Ordinary erred, in charging the estate of H. R. West with the payment of the note signed by W. W. Williams & Co., dated September 4th, 1839, and payable to James Bowers, for four hundred dollars, inasmuch as there was not sufficient evidence of negligence on the part of H. R. West, to justify the decree of the Ordinary.

2d. Because E. A. West, as administratrix of H. R. West, was not liable to account for the amount of said note to the said John Clark, as administrator de bonis non of James Bowers.

3d. Because the decree of the Ordinary was, in other respects, contrary to law and evidence.

Ordinary's Report.

The Ordinary reports, that on the day the account was taken, Mrs. E. A. West, as administratrix of H. R. West, was represented by Mr. Carn; and John Clark, administrator de bonis non of James Bowers, by

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Mr. Henderson. That there *was no evidence before him, and therefore no good cause shewn, why the item, complained of by the appellant, should be excluded from the account and decree.

L. W. McCants, Ord. Col. Dis.

Circuit Decree.

Johnston, Ch. On hearing the appeal and argument in this case, it is ordered, that the grounds of appeal from the decree of the Ordinary be overruled; and that the decree be confirmed, and execution issue thereon.

The defendant, E. A. West, as administratrix of H. R. West, appealed from the decretal order of his Honor Chancellor Johnston, made in the above case, and submitted, as grounds of appeal, those relied on before the Chancellor.

M. C. Carn, for the motion.

D. S. Henderson, contra.

DUNKIN, Ch. By the 13th clause of the Act of 1839, "concerning the office and duties of Ordinary," it is prescribed that appeals may be taken from the judgment of the Ordinary to the Court of Common Pleas or Equity, by filing notice with the Ordinary, who shall thereupon make out and furnish to the party appealing, a copy of such judgment, &c., and of the evidence taken by him in such proceeding. If the appeal shall be on matters of account, the appellant shall docket the case in the Court of Equity for hearing at its next term; and if the Court should approve of said decree, the party, in whose favor it may be, shall be entitled to a writ of fieri facias to enforce the said decree; if the Court should modify the said decree, it may order the Commissioner to

restate the accounts, and upon his report made and confirmed, the party in whose favor it may be, shall be entitled to a writ of fieri facias to enforce the decree. It is further provided, that either party shall have the right of appeal to the Court of Appeals in Law or Equity, as the case may be.

The appellant's intestate, H. R. West, was the administrator of James Bowers, deceased. On the death of H. R. West, letters of administration de bonis non of Bowers' estate were granted to John Clark, the appellee. He caused the appellant to be cited before the Ordinary of Colleton to account for the administration of her intestate on Bowers' estate. The parties appeared by their counsel, and a decree was rendered against the appellant for \$1329.60. An appeal was taken, because the Ordinary had charged the estate of West with the amount of a note of W. W. Williams & Co. to the intestate, Bowers, for \$400, when there was no such evi-

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dence of *negligence as rendered West liable. The report of the Ordinary states simply that "there was no evidence before him, and therefore no good cause shewn, why the item, complained of by the appellant, should be excluded from the account and decree." The judgment of the Ordinary was affirmed, and an appeal thereupon taken to this Court.

The Act of 1839 requires expressly that the Ordinary should furnish to the party appealing, not only a copy of his judgment or decree, but "of the evidence taken by him in such proceeding." If the report of the Ordinary be taken literally that "there was no evidence before him," the decree against the appellant was certainly without authority. But if it be meant that there was evidence before him, which was sufficient, *prima facie*, to charge the administrator, and that there was no evidence to repel this inference, then it was the duty of the Ordinary to have reported the testimony which created the *prima facie* inference, in order that this Court might judge of its sufficiency or insufficiency. But by the admission of the parties, the Court is placed in possession of the testimony which is reported in a case between the same parties, 2 Rich. R. 314. Under a misapprehension, an appeal had been taken to the Court of Common Pleas, and the jury returned a verdict in favor of the administratrix. The case was subsequently dismissed for want of jurisdiction. But from the report of the presiding judge, it appears that Bowers (the first intestate) died in July, 1841. In March, 1842, administration was granted to H. R. West, (appellant's intestate.) West died in May of the same year, and in August, 1842, John Clark, the appellee, became administrator de bonis non of Bowers. At the accounting before the Ordinary, 2d December, 1842, the appellant produced the note of W. W. Williams & Co., but it was insisted, and so ruled

by the Ordinary, that the estate of West was liable for the amount.—The note was dated 4th September, 1839, and had been taken by Bowers himself. The makers became insolvent in the Spring of 1843, about twelve months after the death of the first administrator.

The only ground on which to charge the administrator, West, is his possession of the note from March, when he became administrator, until his death in May following. He might have instituted a suit, but it would have abated by his death. The makers of the note did not become insolvent until the Spring of the year following. After the death of West, in May, 1842, no one but the administrator de bonis non was authorized to institute proceedings for the recovery of the note. The Court can perceive no evidence

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of such negligence on the part of West as would warrant the Ordinary in charging his estate with the amount of the note of W. W. Williams & Co.

It is ordered and decreed, that the defendant's first ground of appeal be sustained, and that it be referred to the Commissioner to re-state the account accordingly. Costs, since the decree of the Ordinary, to be paid out of the assets of the intestate, James Bowers, deceased.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

Decree reversed.

I Strob. Eq. 188

GABRIEL L. ELLIS v. J. M. COMMANDER.
(Charleston. Jan. and Feb. Term, 1847.)

[Partnership 3118.]

Where the bill alleged, that since the proceedings were instituted, the defendant had sold several negroes claimed as partnership property, and that the complainant had good reasons to believe that defendant intended to sell or remove, beyond the jurisdiction of the court, the remaining negroes, and the answer admitted the sale, and did not deny the intention to sell the residue—the court held, that a writ of injunction had been properly granted, and an order made, by the commissioner, to restrain the defendant from selling or removing, and to compel him to give a bond for the forthcoming of the said property, to abide the final order of the court.

[Ed. Note.—Cited in *Norris v. Cobb*, 8 Rich. 67; *Aldrich v. Kirkland*, Id. 353; *Fant v. Martin*, 10 Rich. 431; *Hutson v. Townsend*, 6 Rich. Eq. 254.

For other cases, see *Partnership*, Cent. Dig. § 181; Dec. Dig. 3118.]

[Injunction 35.]

It has long been settled that a bill well lies for the specific delivery of slaves generally; therefore, when a plaintiff alleges property in himself, and that the slaves are withheld by another, he states a case giving jurisdiction to the

court of Equity, and the court will administer justice by the adoption of its ordinary practice in analogous cases.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 4; Dec. Dig. 35.]

[Injunction 339.]

It has been laid down as a general rule in equity, that where the plaintiff is entitled to relief, if that relief consists in restraining the commission, or continuance, of some act of the defendant, the court administers it by means of a writ of injunction; and there is no doubt of its power to restrain the alienation of specific chattels, and to prevent the wasting of assets.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 91, 93, 94; Dec. Dig. 339.]

[Partnership 3324.]

Although an injunction will not be granted merely on the dissolution of a copartnership; it will be granted where there is a violation of duty in the partner, or a breach of contract.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 755; Dec. Dig. 3324.]

[Injunction 335.]

The Act of 1840 is remedial, and imposes no restriction on the commissioner, in the exercise of a sound discretion, in granting a specific injunction, which continues of force until dissolved by order of a Chancellor.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 304; Dec. Dig. 335.]

[Appeal and Error 954.]

Before the adoption of the Act of 1840, it had been decided, that on the coming in of an answer, the Chancellor may grant a new injunction, or may make such other order on the bill and answer as they may require, and this court will not attempt to control his discretion, but upon plain and obvious mistake.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3818–3821; Dec. Dig. 954.]

Before Dunkin, Ch., at Georgetown.

Upon the allegation of the amended bill,

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that since the proceedings were instituted, the defendant had sold three negroes of property claimed as partnership property, and that the complainant had good reason to believe that he intended to sell the residue, or remove them beyond the jurisdiction of the court, the Commissioner made the following order:

Copy of the Order made by the Commissioner.

Upon hearing the bill and answer in the above case, and after hearing the complainant's and defendant's Solicitors, it is ordered that a writ of Injunction do issue, to restrain the defendant from selling or removing the negroes mentioned in the complainant's bill, pursuant to the prayer thereof. It is further ordered that the defendant do give a bond for the forthcoming of the said property, to abide the final order of the Court.

Signed, J. W. Coachman.

On a motion to vacate this order, the following circuit decree was pronounced by

Dunkin, Ch. This is a motion to dissolve an injunction, granted by the Commissioner of Georgetown District, and to rescind an order

requiring the defendant to enter into bond with security.

The injunction was granted by the commissioner after the answer was filed and after hearing the counsel for the parties. It should only be rescinded when the Court is satisfied that the commissioner has erred in judgment. It is substantially admitted by the answer that the original agreement was for a partnership, and that, under that agreement or understanding, the complainant became jointly bound with the defendant, for the purchase of the slaves mentioned in the pleadings. There is a difference as to the terms of the association, but there is no dispute, or doubt, that by the original understanding, there was to be a joint ownership, either on equal or unequal terms. The answer relies on facts, from which an abandonment of this agreement is inferred, or which would render it inequitable in complainant to insist on the original agreement. This may or may not be so. The commissioner has supposed that it was premature to pass on the merits of this defence until a plenary hearing. The Court cannot say this was error, when the answer admits the original equities of the plaintiff, but insists on facts, or circumstances, in avoidance, the existence of which facts and circumstances do not depend on the answer, but are to be established aliunde.—The Court does not understand that this is such “a denial of all the circumstances upon which the equity is founded,” as would require the Court to dissolve the injunction.

The injunction was granted, and the order

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for the bond *made, upon the allegation of the amended bill that, since the proceedings was instituted, the defendant had sold three of the negroes, and that the complainant had good reason to believe that he intended to sell, or remove beyond the jurisdiction of the Court, the remaining negroes. The answer admits the sale of the three negroes, and the intention to sell is not denied. The order of the commissioner requires the defendant to give bond and security for the forthcoming of the property to abide the decree of the Court.

It is insisted that neither a Chancellor nor commissioner has any such authority at this stage of the proceedings.—Under the act authorizing the commissioner to grant an injunction, I suppose he has the same power as the Chancellor would possess at chambers under the like circumstances.

Injunctions are either common or special—By the former, a party is restrained from proceeding in a court of law—By the latter, he is prevented from inflicting an injury upon the property of another. In England the ordinary use of the special injunction is to prevent waste on real estate, although it is frequently applied in other cases, as to restrain the negotiation of bills of exchange, &c.

The practice of Westminster Hall certainly does not warrant the demand of security—contempt of the injunction is punished by attachment, and if complainant can swear to the intention of the defendant to leave the kingdom, he may have a writ of Ne exeat. It is conceded that the practice of South Carolina has been different, when the property in slaves was the subject of controversy. Many cases may be found in the books of reports in which the defendant has been required to give security to abide the order of injunction for the forthcoming of the property. But it is said that the recently adjudicated case of *Ramsay v. Joyce, McMull.* Eq. p. 236 [37 Am. Dec. 550], while it recognises the existence of the practice, declares its irregularity.

The point was neither argued nor decided in that case; although I think the language used by the Chancellor had the sanction of all the court, and may very well warrant the inference deduced from it. But there are considerations which seem to me to render it expedient that the practice should not be abrogated without a deliberate adjudication on the subject.

The peculiar condition of slave property has rendered it necessary to introduce new modes of proceeding for ascertaining and securing the rights of the owners.

As early as 1749, in *Peame v. Lisle, Amb.* 75, Lord Hardwicke held that a bill would not lie for the specific delivery of a slave, any more than for any other chattel. Such was held to be the rule in South Carolina.

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as late as *Rees v. Parish* * & *Fairly*, 1 McC. Eq. R. 56. But in 1841, it was finally settled by the Court of Errors in *Young v. Burton*, McM. Eq. 256, that a bill well lies for the specific delivery of slaves generally, and then when a plaintiff alleges property in himself, and that the slaves are withheld by another, he states a case giving jurisdiction to the Court of Chancery. Previous to that time, the practice had been to apply to the ordinary tribunals by an action of trover, and the verdict was frequently the alternative for the value of the negroes, or their delivery to the plaintiff—but, at the commencement of the suit, the plaintiff could only hold the defendant to bail, and the bond was satisfied by the surrender of his person. To remedy this, and to secure to the plaintiff the forthcoming of the property, if his right should be established, the Legislature, in 1827, passed an Act authorizing any Judge, or the Clerk of the Court of Common Pleas, upon affidavits of property, made by the plaintiff, and that the chattel had been converted by the defendant, to make an order requiring the defendant to enter into bond, with sufficient security, for the production of the chattel sued for, to satisfy the plaintiff's judgment—and such specified chattel is thereby declared liable to satisfy the plaintiff's

judgment, to the exclusion of all other creditors.

Until the case of *Young v. Burton*, the jurisdiction of the Court in relation to the property of slaves had been usually confined to the cases of life tenants and other trustees, under which circumstances security for the forthcoming of the property might be required, and was frequently ordered. When this Court affirmed its general jurisdiction in all cases where the right to slaves was in issue, its general authority to preserve property pending litigation, might very well be exercised in the same manner. As was said by Judge Nott, in *Robertson v. Bingley* [1 McCord Eq. 333], it is not the introduction of a new principle of practice, but the application of a familiar principle to a new class of cases.

If no remedy of this kind can be afforded to a complainant, he is in a worse situation than a plaintiff in trover prior to the Act of 1827. He is not entitled to a writ of ne exeat, (sometimes called equitable bail,) unless he can swear to the intention of the defendant to leave the State. As in the present case the complainant can, conscientiously, make no such affidavit, he would be entitled to no security whatever, although the defendant admits that he has sold a portion of the negroes claimed by the plaintiff, and does not deny his intention to sell the residue. Assuming the general jurisdiction which a Court of Law exercises in actions of trover, I am not prepared to say that this Court

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should not conform as *closely as may be to the practice of that Court, provided it may be effected by the adoption of the ordinary practice of this Court in analogous cases.

I have said this much in order to have the question submitted to the judgment of the Appeal Court, and the question settled.

It is ordered, that the motion to reverse the judgment of Mr. Commissioner Coachman, be dismissed.

Grounds of Appeal.

1. Because the defendant has, in his answer, denied all the material facts or allegations, set forth in complainant's bill, necessary to support an application for an injunction.

2. Because the order of the Commissioner, granting the injunction and requiring security to prevent the removal of the negroes, is contrary to the practice and rules of procedure in this Court, and without warrant of Law.

Wherefore the appellant moves that the said order be vacated.

Mitchell, for motion.

CALDWELL, Ch., delivered the opinion of the Court.

It would be difficult, if not impossible, to enumerate all the instances in which special

injunctions may be granted. The distinction between the writ of injunction, strictly so called, and an order in the nature of an injunction, has been disregarded in practice, and such orders, although not enforced by writ of injunction, have long since indiscriminately obtained the name of injunctions. It has been laid down as a general rule, in equity, that where the plaintiff is entitled to relief, if that relief consists in restraining the commission or continuance of some act of the defendant, the Court administers it by means of a writ of injunction. (2 Story E. J. p. 190, 191, 225, 193, 200.) There can be no doubt of its power to restrain the alienation of specific chattels, and to prevent the wasting of assets, or other property, pending litigation. A partner will frequently be restrained from intermeddling with the partnership effects, from accepting or negotiating bills in the partnership name, and if there be a necessity for it, a receiver will be appointed. (*Harding v. Glover*, 18 Ves. 281; *Charleton v. Poulteur*, 19 Ves. 146.) Although an injunction will not be granted merely on the ground of the dissolution of the partnership, it will be granted where there is a violation of duty in the partner, or a breach of contract. The principle on which the Court acts is, to wind up the business of the partnership, adjust the accounts, and divide the profits.

In the present case there appears to have been a peculiar propriety in the application of the remedy: the plaintiff could

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*not take out a decree of ne exeat against the defendant, who had disposed of three of the slaves, since the filing of the original bill, and the answer did not deny his intention to sell the remaining slaves, alleged to belong to the partnership. We cannot perceive that the Commissioner has exceeded his power, in granting the injunction, under these circumstances.

The Act of 1840 is remedial, and imposes no restriction on his exercising a sound discretion in granting a special injunction, which continues of force until dissolved by order of a Chancellor. With such a salutary check, there is little danger of the power being abused. As to the practice, it is now too firmly established to be shaken, and precedents to warrant it, may be found extending back for more than fifty years. (*Higginson et al. v. Air et al.* 1 Des. E. R. 428, 429.)

Before the adoption of the Act of 1840, the Court decided, in *Jugnot v. Hale*, 1 Hill's Eq. R. 430, that on the coming in of an answer, the Chancellor may grant a new injunction, or may make such other order on the bill and answer, as they may require, and this Court will not attempt to control his discretion, but upon plain and obvious mistake.

We can see no mistake as to the facts, and no misapplication of the law, in this case:

the decree of the Chancellor is, therefore, affirmed, and the appeal dismissed.

JOHNSTON, Ch., and DUNKIN, Ch., concurred.

HARPER, Ch., concurred in the result.
Appeal dismissed.

I Strob. Eq. 193

W. B. MURRAY and JAMES BUCHANAN v.
GEORGE WALKER.

SAME COMPLAINANTS v. W. J. WHITE,
Ex'or.

(Charleston. Jan. and Feb. Term, 1847.)

[*Deeds* ¶124.]

If a deed of personal property to several, "to them and their issue, forever," contain no limitation over, the absolute title to the property will vest in the first takers.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 349; Dec. Dig. ¶124.]

[*Deeds* ¶129.]

Issue take as purchasers, under a deed of personal property, where the property is limited over by a limitation which is not too remote; and the validity of the gift to the issue, in such cases, depends upon, and is to be tested by, the remoteness or sufficiency of the limitation.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. ¶129.]

[*Perpetuities* ¶4.]

Where a deed of personal property was to grandchildren, then alive, as also to those which might afterwards be born, with a limitation over to the survivors, of the share of either that might die, "not leaving lawful issue"—the Court held, that the issue of an afterborn grandchild could not take under the deed, the limitation being too remote.

[Ed. Note.—Cited in *Mendenhall v. Mower*, 16 S. C. 314.

For other cases, see *Perpetuities*, Cent. Dig. §§ 4-44; Dec. Dig. ¶4.]

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*Before Johnston, Ch., at Walterborough, February, 1846.

Johnston, Ch. These are separate bills for the delivery of slaves, and depend upon the following facts.

On the 26th of December, 1784, one Margaret Jeffreys, whose daughter, Mary, had intermarried with Hans McCullough, by whom she had then borne four children, namely, William, David, Jean and Mary, executed an instrument of writing, purporting to be a deed, attested by two witnesses, whereby, "in consideration of the love and affection which she bore to her grandchildren, the issue of her said daughter, she gave, granted and confirmed unto her beloved grandchildren, viz: William, David, Jean and Mary McCullough, as also those children she, (her daughter,) may bear to or by the said Hans McCullough, one-half part of a negro woman, Myrtilla, (and also one-half part of the issue and increase of the said negro

woman, Myrtilla,) to them and their issue, forever; but in case either should die not leaving lawful issue, in that case, the deceased's part to be equally divided between the survivors, share and share alike: on the proviso and condition, that the said negro woman, Myrtilla, and all her issue and increase, be and remain in the custody and possession of the said Margaret Jeffreys, and under her lawful control, during her natural life, for her support." "And she thereby nominated and appointed Hans McCullough, and her daughter, Mary, his wife, trustees of said deed, to carry into effect every clause and article therein contained, according to the true intent and meaning of the same, in behalf of her above written grandchildren." This instrument was proved the 13th of May, 1795, and registered in the office of Secretary of State, the 8th of June following.

On the 5th of May, 1795, the said Margaret Jeffreys, by another instrument, purporting to be a deed, executed in the presence of three witnesses, "in consideration of the love and affection which she bore to her grandson, Andrew, son of her daughter, Jean, and Andrew McCullough, Sen. gave, granted and confirmed to the said Andrew McCullough, Sen. in trust, for the use and benefit of her said grandson, Andrew, until he should arrive at twenty-one years, the other half of the said negro woman Myrtilla, and also the other half of her issue and increase, unto her above mentioned grandson, Andrew, and the lawful issue of his body, after (his) decease; or, in case he dies without issue, to his, the said grandson, Andrew's father, for their proper benefit and behoof, during the term of their natural lives—at the expiration of which, to be equally divided be-

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tween her (Mrs. Jeffreys's) grand*children, the lawful issue of her daughter, Mary, wife of Hans McCullough." To which was added the proviso, that Myrtilla and all her issue should remain in the possession and under the control of the said donor, during her life, for her support, as in the case of the other deed.

This instrument was proved the 9th, and registered by the Secretary of State, the 11th of May, 1795.

It is not known when the donor, Mrs. Jeffreys, died. But it is proved that after her death Myrtilla and her issue were divided into two shares, one of which was taken possession of by Andrew McCullough, the elder, for his son Andrew—the other by Hans and wife, for their children. In this latter share was included Binah, a daughter of Myrtilla, who, with her issue, were held by Hans and his wife, until the death of Hans, the date of which is not stated in the testimony.

After the death of Hans, and before the

year 1824, Mary, the surviving trustee, being still alive, a division was made between his four children, named in the deed of 1784, and another child, Margaret, whom she had borne in the mean time; in which division Binah, and four of her children, Hannah, Gabe, Doll and Minda, were allotted to Margaret. Margaret married one Buchanan, and these five slaves, descendants of the stock slave, Myrtilla, went with her into the possession of her husband. On the 3d of May, 1824, Minda, one of the five, was sold by the Sheriff, by virtue of executions against the husband, Buchanan, and purchased by Wm. R. White, the testator of the defendant in the second of these suits, at the sum of \$203. It was proved that the purchaser was present at the division under which the five slaves were allotted to Margaret.

Buchanan, the husband, died, and on the 2d of April, 1827, Edward North, by virtue of an order from the Ordinary, sold and conveyed the four other slaves, Binah, Hannah, Gabe and Doll, to George Walker, the defendant in the first of these suits, at the price of \$650.

Margaret, the wife of Buchanan, died between 1834 and 1836, and the plaintiffs, who are her sons, and only issue, claim the negroes thus purchased by the defendants, under the deeds of the great grandmother, Mrs. Jeffreys. One of the plaintiffs was born in 1822, and the other in 1824.

It is not necessary to inquire into the provisions of the deed of 1795, in favor of Andrew McCullough, Jr. By the first partition the slaves in question were set apart as that portion of the property which was to be controlled by the deed of 1784, given to the children of Hans and Mary.

By the second partition, they were allotted

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to Margaret, the *post nata granddaughter, and I am of opinion she took an absolute interest, which vested in her husband, and were well disposed of to the defendants.

If the words of this deed (of 1784) contained no limitation over, there can be no doubt that the gift to the first takers, (assuming that Margaret is to be included among them,) to them and their issue forever, would have vested them with an absolute title to the property.

But the property is limited over to the survivors, in case either of them should die, not leaving lawful issue. It was held, in *Ferril v. Talbot*, and other cases, (Riley's Chancery Cases, 247,) that the issue take as purchasers, when the property is limited over by limitation, which is not too remote; and that the validity of the gift to the issue, in such cases, depends upon, and is to be tested by, the remoteness or sufficiency of the limitation.

Tested by this rule, the plaintiffs cannot take as purchasers. The limitation is upon

the death of Margaret, a person not in esse at the date of the gift—a period to which the policy of the law will not allow a bounty of this character to be carried. The issue indicated by the instrument are to take, according to the cases I have mentioned, at the time that the limitation would, but for this intervention, take effect; and as the latter is too remote the other cannot claim.

It is ordered that the bill be dismissed.

The complainants appealed from the decree of his Honor, Chancellor Johnston, in the above cases, for the following reasons:

1. Because his Honor erred, in deciding that the limitations were too remote; and the appellants submit that on the death of Margaret, their mother, they were entitled, as purchasers, to the slaves in controversy.

2. Because his Honor's construction of the deed is contrary to the meaning and intention of the donor.

3. Because the decree is, in other respects, contrary to law.

Henderson, for the motion.

Carn, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

This Court concurs in the decree of the Chancellor, which is hereby affirmed; and it is ordered that the appeal be dismissed.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

HARPER, Ch., absent at the hearing.

Appeal dismissed.

I Strob. Eq. *197

*VESTRY & WARDENS OF THE EPISCOPAL CHURCH OF CHRIST CHURCH PARISH v. THOMAS BARKSDALE.

THOMAS BARKSDALE & WILLIAM MATTHEWS v. THE VESTRY & WARDENS OF THE EPISCOPAL CHURCH OF CHRIST CHURCH PARISH.

(Charleston. Jan. and Feb. Term, 1847.)

[*Religious Societies* ⇨9.]

Where there is no agreement or understanding of the parties, the right to commissions for services rendered, must depend on the usage in like cases.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. §§ 47-74; Dec. Dig. ⇨9.]

[*Religious Societies* ⇨9.]

Where the Secretary and Treasurer of the Vestry and Wardens of a Church, had not only never made any charge of commissions, but it further appeared from the journals, kept by himself, that the thanks of the Vestry had been voted to him, for his gratuitous and able management of the church funds, the Court refused to allow him afterwards to charge commissions.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. § 59; Dec. Dig. ⇨9.]

[*Gifts* ¶41.]

It is a well settled rule, that what a party intended as a gift, he shall not afterwards be permitted to convert into a charge.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 20; Dec. Dig. ¶41.]

[*Religious Societies* ¶9.]

The Court has no authority to interfere with or control the discretion of the Vestry and Wardens of a church, in their management of its funds, unless they transgress the limits of their charter. However unwisely they may exercise their power, they are responsible only to their constituents, in whose hands a complete remedy exists through the quiet operation of the ballot box.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. § 67; Dec. Dig. ¶9.]

These two cases were argued before Dunkin, Ch., at Charleston, February, 1845, and on appeal were considered together by this Court.

The facts are sufficiently set forth in the following circuit decrees:

Dunkin, Ch. The object of these proceedings is to obtain an account of the funds belonging to the Episcopal Church of Christ Church Parish. It appears, from the answer of the defendant, as well as from the evidence, that he held the office of Secretary and Treasurer of the Vestry and Wardens of this Church, from 1822, until the annual meeting on Easter Monday, in 1844, when Mr. John Hamlin was elected to the office.

The defendant, in his answer, says, that the funds of the Church now exceed in amount the sum of eleven thousand dollars, and, with the exception of four hundred and eleven dollars, cash in the Bank, they have been invested in the mode set forth in the exhibit, filed with his answer. He admits that he has been called on to deliver to his successor in office "the funds and papers of the Church, and that, being thus called on, he was ready to comply on being paid his ordinary and well-earned commissions, for disbursements and reinvesting the funds, which he claims as his reasonable and customary due. But as the Corporation declined to receive the funds with this deduction,

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the defendant has not yet come *to any settlement with them; but that he has been, at all times, ready to do so, and to account fully for his acts and doings," &c. The defendant files with his answer the specifications of his claims for commissions, since June, 1822, amounting to about the sum of four thousand dollars.

The only question which properly arises under the pleading is, as to the defendant's right to commissions. Where there is no agreement or understanding of the parties, this must depend on the usage in like cases. No evidence was offered as to the usage, and it is not intended by the Court to intimate any opinion on the subject. Nor was any evidence given of any positive agreement between the parties. But it is not doubted that

the defendant was at liberty to render his services gratuitously; and it is a well settled rule that what a party intended as a gift, he shall not afterwards be permitted to convert into a charge.

At the period of the defendant's election to the office of Secretary and Treasurer, he was also one of the Vestry of the Church. His accounts as Treasurer of the Church were submitted to the Vestry and Wardens at their regular annual meeting on Easter Monday, or at such other time as they assembled. The account was referred to a committee, and, after their examination and approval, was ordered to be entered by the defendant, as Secretary, in the books of the Church. Several annual accounts of the defendant, thus certified and approved by the Vestry and Wardens, were adduced in evidence, in which no charge of commissions was entered, nor was any account produced in which such charge appeared.—But it further appears, from the journals of the Church, kept by the defendant, that on the 15th May, 1830, the thanks of the Vestry were voted to the defendant for his gratuitous and able management of the Church funds; and on the 15th August, 1840, a meeting of the Vestry and Wardens was held at the house of the Chairman, at Moultrieville, Sullivan's Island, at which meeting the defendant was present, as Secretary and Treasurer. After the usual transaction of business it was, "on motion, resolved, unanimously, that the thanks of the Vestry be voted to Thomas Barksdale, Treasurer, for his gratuitous care and attention, improvement and addition to the Church funds." While nothing can be more creditable to the defendant than these testimonials of his fidelity, it is scarcely necessary to add that they are conclusive as to the terms on which his services had been rendered. The claim of commissions must be disallowed.

The defendant's zeal, good judgment and fidelity in the discharge of his trust, is not

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only cheerfully conceded on the *part of the complainants, but abundantly manifested by the improved condition of the fund while under his management. He has been mistaken on the subject of commissions; as the Court thinks, clearly mistaken. But after more than twenty years of faithful and successful devotion to the discharge of a gratuitous trust, it would be too severe justice to mulct him in the cost of the litigation.

It is ordered and decreed, that the defendant pay over to the Treasurer of the complainants the balance of cash as appears by his exhibits, with interest from the 22d April, 1844, and that he also assign, transfer and deliver to the said Treasurer the bonds, certificates of stock, and other securities belonging to the Vestry and Wardens of the Episcopal Church of Christ Church

Parish, or which have come to his hands as Treasurer of the same. Finally, it is ordered that each party pay their own costs.

Decree on the Cross Bill.

Dunkin, Ch. The facts of this case will be fully understood from the pleadings. It may be proper, however, to state that the Parish Church is about six miles distant from the ferry at Haddrill's Point. For many years the Church has not been opened during the summer months, as the climate is unhealthy, and the planters are absent from the neighborhood. A considerable portion of the worshippers at the Church remove, during the summer, to the village called Mount Pleasant, at Haddrill's Point. In 1833, they erected a building for public worship, according to the forms of the Episcopal Church, and made titles for the same to the Vestry and Wardens of the Episcopal Church of Christ Church Parish. The building was consecrated by the Bishop in 1835. During the summer months, the clergyman of the Parish Church performs divine service, by direction of the Vestry, at the Chapel, at Haddrill's Point. There was no proof on the subject, but it is reasonable to suppose that the salary of the minister is fixed in reference as well to his services during the winter months at the Parish Church, as to his services at the Chapel during the summer. The complainant, Thomas Barksdale, has been, for many years, anterior to April, 1844, Treasurer of the Church, and in possession of the funds, amounting to about eleven thousand dollars. He declined to pay an order, which the defendants drew on him in favor of the minister, on the ground (among other reasons) that the fund could only be applied "to sustain the Parish Church, and to supply the pulpit during that portion of the year when the parishioners and their families reside on their plan-

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tations, and not *to pay for services, rendered in a different place from the Parish Church, to a part of the congregation, who settled in the village for the summer season."

At the election in April, 1844, the complainant, Thomas Barksdale, was suspended by the choice of the defendant, John Hamlin, as Treasurer. The object of this bill is to restrain the defendants from appropriating any part of their funds to the payment of services rendered by the clergyman, at the chapel or church in the village, on the ground that it is not warranted by the act of incorporation, and is a misappropriation of the fund entrusted to their charge.

This church was incorporated in 1787, and it may aid in the determination of the question to ascertain what had been the previous usage in the church. The worship of the Church of England was established by law in the Province of South Carolina, in 1706. All the American Colonies formed part of the diocese of the Bishop of London. In

1707, the General Assembly passed an Act, providing for the maintenance of the clergy, and appropriating a certain amount for that purpose. From this period, until the revolution, churches were erected, and the salaries of the clergy of the established church paid, either in whole or in part, from the public treasury. By the Act of 1708 (2 Stat. 323) the boundaries of several of the parishes were defined, and among others, Christ Church Parish, which is described as "on the south-east of Wando river."—From a very early period, it was the custom of the General Assembly, where the boundaries of the parish were large, and the convenience of the parishioners required it, to establish other places of worship, besides the parish church. These were called chapels of ease; and the Acts establishing them required the Rector of the Parish Church, at stated periods, to celebrate divine service, and to perform other sacred and ministerial offices, in the chapel of ease. An instance of this is found as early as 1714, in the establishment of the chapel at Ehaw, in the Parish of St. James, Santee, (2 Stat. 618).—In 1731, this law was repealed, and two chapels were established in the same parish, the Rector of the parish being thereby required to perform all ecclesiastical duties in the said parish, one Sunday at the parish Church, the next Sunday at the lower chapel, and the third Sunday at the upper chapel, alternately. Provision was also made for defraying the expense of building the chapels out of the public treasury. (3 Stat. 304.) So in 1725, the chapel at Strawberry Ferry was established, on the petition of many of the inhabitants of St. John's, Berkley, who by reason of the distance of their residence from Biggin Church,

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were prevented from attending *public worship. The Act required the "rector or minister of the parish, to repair to the chapel and celebrate divine service every fourth Sunday throughout the year, and not oftener." Many other instances occur in the statute book. After the revolution, Church and State became separate. In 1785, the Vestry and Wardens of the Episcopal Churches in the parishes of St. Philip and St. Michael, called and known by the name of the "Church of England," petitioned the General Assembly, setting forth that since the adoption of the constitution of the State, the support which was formerly provided by the Legislature for the clergy and other officers of that church was withdrawn, and that many well-disposed persons had contributed a fund for the maintenance of ministers, repairs of the church, &c.; and prayed that the Vestry and Wardens might be incorporated, in order that these intentions might be carried into effect. An Act was accordingly passed in conformity with the prayer of the petition, providing, however, "that in case any of the sums to be subscribed, or gifts or bequests

made, for the purposes aforesaid, should be appropriated to any other use than the payment of ministers of the said churches, performing divine service therein, or of any other churches or chapels, of the principles and tenets of the Church of England, that may be hereafter built in the city of Charleston, and for the payment of the salaries of the officers of the said churches or chapels, respectively, and the repairs of the said churches and chapels and parsonage houses, it shall be lawful for the persons subscribing, giving, or bequeathing, &c., or their heirs, or executors, or administrators, to sue the said Vestry and Wardens, and recover back the said subscriptions gifts, devises, or bequests, with interest." (8 Stat. 130.) Two years later, to wit: in March, 1787, the Vestry and Wardens of the Episcopal Church in Christ Church Parish were incorporated and "vested with all the powers and authorities which were vested in any corporated or established church in this State." Their petition had recited the wanton burning down of the Church, by the British army, during their operations in this State;—and the preamble to the Act stated that "several pious and well disposed persons, by their last will and testament, as also others by voluntary subscriptions, had given divers sums of money for re-building and fitting up the said church, and for providing for the maintenance of a minister and other proper officers of the same." The Vestry and Church Wardens were authorized to re-build the church, and to assess the pews, in order to pay the costs and expenses thereof. They were also empowered "to appoint and choose proper clergymen and ministers for the said church,

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and all other *necessary officers, and, at their will and pleasure, to remove and displace such persons, and to appoint such salaries for the labor and service of such ministers and other officers in the said church, as they shall, from time to time, approve and think fit."

For the purposes aforesaid, the Vestry and Wardens were authorized to manage and dispose of the funds of the Church in such manner as they, or a majority of them, should think expedient. (8 Stat. 140.)

In 1822, when Mr. Barksdale became the Treasurer of the Church, the funds amounted to twenty-two hundred dollars. Of the origin or history of this fund the Court had no evidence. The resources of the Church, as has been stated, now amount to about eleven thousand dollars. A portion of the interest of this fund, the defendants admit, they intend to apply to the payment of the salary of the minister who officiates at the Parish Church, during the winter, and the village church or chapel during the summer months. It is quite clear, that this Court has no authority to interfere with or control the discretion of the Vestry and Wardens, unless

they transgress the limits of their charter. However unwisely they may exercise the power, they are responsible only to their constituents, in whose hands a complete remedy exists, through the quiet operation of the ballot-box. By the Act of incorporation, absolute power is vested in the defendants to appoint and remove the minister, and to fix and pay his salary; and the funds of the church are placed at their disposal, for this and other purposes. But it is said, the minister officiates at the village chapel, as well as the Parish Church, and part of his remuneration is for these latter services.—The village of Mount Pleasant is within the boundaries of Christ Church Parish. The chapel was built under the vote of the Episcopalians of the parish, for that purpose assembled, and with their means, was conveyed to the Vestry and Wardens, and afterwards dedicated, with the usual solemnities, to the service of God. For more than a century it had been the custom of the country, that the parish clergyman should officiate, at a convenient period, in the chapels, one or more, as well as in the Parish Church. Formerly, the authority to establish these chapels was in the Legislative authority, who also supported the minister as well as built the edifices. Whether this authority now rests in the people, in the Vestry and Wardens, or in the Diocesan, is immaterial for the present inquiry, as all these powers have sanctioned the establishment and dedication of this house of worship. As the Court has remark-

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ed, there was no evidence as to the *origin of the fund, or of any particular purpose to which it was to be appropriated, further than appears from the charter of incorporation. If, as was supposed by the complainants, it was the gift of pious and benevolent individuals to the corporation, they must have intended that the Vestry and Wardens should apply it as the funds had been usually appropriated, to wit, to the payment of a minister, who should not only perform divine service in the Parish Church, but also officiate in such other places of public worship, according to the Episcopal form, within the parish, as the constituted authorities might, from time to time, direct and appoint.

The only object in the establishment of these chapels, was the convenience of the parishioners. It is not for the Court to say whether the convenience of the parishioners was subserved by the establishment of the church at Mount Pleasant. That has been settled by themselves. But the complainants make no objection on this account. They do not allege that it would be proper or advisable to have service at the Parish Church during the Summer months, or that the opportunity of divine service at the village chapel is not a great convenience to the majority of the worshippers in the Parish Church. They complain only of what, in the

judgment of the Court, has, by the law, been wisely confined to the Vestry and Wardens of the church. It is ordered and decreed that the bill be dismissed.

Benj. F. Hunt, for appellant.

The bill states the leading facts of the case to be, that in 1787 the Legislature was informed, (see Stat. at Large, vol. 8, p. 140,) in a petition to them, that during the war their church was wantonly burned by the British, "and whereas several pious and well disposed persons, by their last wills and testaments, and also others, by voluntary subscriptions, have given divers sums of money, for rebuilding and fitting up the said church, and for providing for the maintenance of a minister, and the payment of the proper officers of the same; and those pious and good intentions would be more effectually carried into execution, if the prayer of the said petitioners, that the Vestry and Wardens, elected or to be elected, by said inhabitants and pewholders, were incorporated and made one body politic and incorporate, in law, and vested with all the powers, privileges and immunities which any of their sister churches enjoy—

"1. Be it enacted," &c. Then the section incorporates the Vestry and Wardens, and declares them capable to hold "all the lands, tenements and hereditaments, and the rents

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and *income thereof, which now are vested in the Vestry and Church Wardens of the said church"—giving them ample power over these funds, to increase and accumulate them.

The second section authorizes them to receive donations, &c. "for the benefit and advantage of the said Vestry and Church Wardens, for the purposes aforesaid."

The third section authorizes the Vestry and Wardens to rebuild the church, and to assess the pews; and the fourth section authorizes them to sell also.

The fifth section says, "it shall and may be lawful for the said Vestry and Church Wardens, and their successors in office, or a majority of them, to appoint and choose proper clergymen and ministers, for said church, and all other necessary officers, and, at their will and pleasure, to displace and remove such persons, and supply others in the room or stead of him or them so removed, and to appoint such salaries, perquisites and other reward, for the labor and service of such ministers and other officers of said church, as they shall, from time to time, approve and think fit."

The Vestry and Wardens thus became the trustees for these pious donors, and proceeded to execute their trust, and nothing material occurred, until ———, when funds, amounting to ———, came into the hands of Mr. Barksdale, who has succeeded in nursing them so well, that he has repaired the church, and had an accumulated fund of ———,

which was barely sufficient to supply the pulpit during the season most of the parishioners were in the parish. Some of them resort to a sand-hill, called Mount Pleasant, as a safe residence during the summer months.

On 15th October, 1833, as will appear by the books, the following proceedings were had by the Vestry:

Copies of Resolutions from the Journal of the Vestry and Wardens of the Episcopal Church of Christ Church Parish, pages 270, 271.

"Tuesday, October 15, 1833.

This day a meeting of the Vestry and Wardens of the Episcopal Church of Christ Church Parish, took place in Charleston, at the house of Dr. Read, Chairman.

Present.

William Read, Chairman.
Thomas Barksdale, Secretary,
Samuel Venning,
John Hamlin,
Nicholas Venning, Jr.

There being a quorum, proceeded to business.

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"Several gentlemen attended, and stated to the Vestry that it was contemplated to build a church at the Village, near Hadrill's Point—it was intended and wished that the Minister of the Parish should preach at the church, intended to be built, during the summer and sickly months, where most of the congregation resided at that time, and that said church should be governed by the Vestry of the Parish Church of Christ Church. In consequence of the above statement, the Vestry consented to the Minister of the Parish Church officiating at the church to be built; and also, they, the Vestry, to take charge of said church.

Then the following preamble and resolutions were adopted.

"Whereas, it is in contemplation to build an Episcopal Church in the Village, near Hadrill's Point, in Christ Church Parish, and it has been solicited that this said church be connected, in many respects, with the Episcopal Church of Christ Church Parish, (six miles from the said village) such as the same Minister that preaches at the Parish Church be, and is considered as, the Minister of the Village Church; that the same Vestry and Wardens act for both churches, &c. but

"Resolved, That it be clearly, fairly and fully understood, that the Village Church, in its connection with the aforesaid Parish Church, do not nor shall not have any thing to do with the funds of said Parish Church, 6 miles (six) from the village—that it has not, nor shall not hereafter have any claims, interest or demands whatsoever, on the said aforesaid Parish Church funds; and be it further

"Resolved, That in case any intimation or proposition of the fund of the Parish Church

being appropriated in any way, or at any time whatsoever, for the benefit of the Village Church in any manner or respect, that in such case, be it fully

"Resolved, That the said Parish Church immediately withdraw from the said Village Church and have no further connection or communication with the said Village Church.

"The foregoing certified by us the present Vestry and Wardens.

Vestry.

Wardens.

Nicho. Venning, Junr.

William Read, Chairman,

Thomas Barksdale, Treas. & Sec.

Jacob Bond Ton,

Samuel Venning,

Nicholas Venning, Sen'r.

Jno. M. Phillips,

Paul Weston,

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*At page 276.

"The Vestry and Wardens met at the Village, Mount Pleasant, at the Chapel lately built, on the 27th of August 1835. Were present J. B. Ton, Samuel Venning, Robert Venning, John Hamlin and N. Venning. The Chairman and Secretary being absent, Col. Ton was called to the chair, and Mr. Venning appointed secretary pro tem. A letter was received from Doctor Read, resigning as Chairman. J. B. Ton was appointed in his place.

"A committee appointed by the congregation of the Chapel, communicated to this meeting that they had been instructed to tender to the Vestry, the Chapel and its grounds; it was

"Resolved, That this meeting accept the same. A committee, of the Minister, the Rev. A. Fowler, R. Venning and John Hamlin, were appointed to call on the Bishop of the Diocese, informing him that the building was finished and ready for consecration, and that he appoint a day for its consecration.

Adjourned."

It thus appears, that not a Chapel of Ease, spoken of in the circuit decree, but "a village church," was contemplated, and the solicited connection with the Parish Church was expressly stipulated not to affect the funds. But the sequel shows how little confidence can be placed in mankind, even in the most sacred things, where their pecuniary interests are concerned. The Parish Church was erected, the Vestry and Wardens, as desired, aided in its consecration, and then came the full development of the scheme. Mr. Barksdale was treasurer, and a descendant, through several generations, from the ancient inhabitants of the parish; and a draft was drawn on him for the payment of the salary of the minister of the new village church, which he refused to pay, as it was a misapplication of the funds, and in violation of the plighted faith of those who sought to connect that church with the old Parish Church—and then followed the

usual manœuvre. They went to work to get a majority of those interested to strip the old church for the new, into the Board of Vestry and Wardens, and then elected another treasurer, of their own party, and thus acquired the means of violating the agreement so solemnly made. A bill was filed against Mr. Barksdale, the old treasurer, to get the books, stocks and effects, which he has nursed and increased for so many years. He resisted the delivery of the funds, unless he was allowed his commissions, as any other agent—not that he would derive any emolument from his services to the church, but solely with the view, as he saw the other funds perverted from their original destination, that he might

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save the *amount of his commissions, as a secure fund for his ancient ancestral church. He also filed a bill, in conjunction with William Matthews, another parishioner, who was connected with the family of Mr. Barksdale, and owner of a farm formerly occupied by Charles Pinckney, one of the supposed benefactors of the church, in which he charged the Vestry and Wardens with a design and the present practice of perverting their trust, by applying the funds of the Parish Church to the support of the minister of the new village church.

The Vestry admitted that they had, and intended to continue so to apply them. The circuit decree requires the delivery in the first case, of all the funds of the church to the new Vestry; and, in the second case, the decree treats the village church as a Chapel of Ease, and sustains the right of the Vestry to appropriate the funds of the Parish Church to the support of this new church, in spite of the agreement, and refers those who dislike it to the ballot-box. Thus ruling that the majority of the parish can divert or apply these funds as they please.

From both these decrees Mr. Barksdale appealed. On the first, because, as the laborer is worthy of his hire, he was entitled to his commissions; but if he succeeds in his bill to compel the Vestry, as trustees, to execute the trust, he has no object to gain, in his defence to the first bill. So that the question for the Appeal Court is, has Equity jurisdiction of the matter? And if so, are the complainants entitled to relief, on the first ground? If the Act of the Legislature affords satisfactory evidence that there was a fund, derived from wills and donations, belonging to the church—and so it says—then the Vestry and Wardens are the trustees, and the fund in Court is the trust fund. In that case the jurisdiction is sustained by the case of *McCarter v. Orphan Asylum*, 9 Cowen, 438; also 2 Story, sec. 1145 and 1187. The Stat. Eliz. also gives any one aggrieved a right to apply to Chancery.

The circuit decree rules, that the application to the uses of the village church, is substantially the same as to the original Parish

Church, and alludes to cases where the State, who, at the time, was the support of the Church, established chapels of ease in the same parish; but no instance is cited where, without any State authority, the fund of a well known church, derived from "pious individuals," was ever so disseminated.

It was urged that these gifts to corporations, like gifts to individuals, vested the en-

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tire property—to do with it as they *pleased; but where a clear charity, such as building a church and paying a minister, is contained in the gift, it would be a palpable misapplication of the fund.

It is vain to say that this application to the village church is warranted by the doctrine of "cy pres," as that is resorted to when the specified object is illegal or impracticable. It is also true that where a charity is given, it must be accepted on the terms named—it cannot be altered by a new agreement. (See Attorney General v. Platt, Cas. T. Finch, 221; 1 Vernon, 55.)

The donations to the Parish Church, a particular, well known house of worship, to keep it in repair and supply it with a minister, is a clear, distinct object, which the donors are entitled to have literally pursued. But the resolution of the Vestry shows that the village church was not to be a chapel of ease, to be supported out of the general fund; that was expressly negatived: and the reference to the ballot-box is unfortunate in a case where the law is appealed to, to protect the minority, which is its most honored function. It was, at least, treachery, to get the village church under the wing of the mother church, by false pretences, and thus, by means of a majority, accomplish what they protested they would not attempt. Charity may cover a multitude of sins, but charitably to help themselves to the funds of the Parish Church, and thus lessen its means to keep up the worship in winter, merely to save a part of the congregation the expense of paying for their own preaching in summer, as the rest of the parishioners do, requires a cloak thicker than even charity affords. If the minority are right the ballot-box cannot despoil them; and they rely upon the Act, which gives the only history of the fund, and the resolutions under which the village church was patronized, to show that this was a trust fund—a charity well defined; and that a diversion of the fund, to keep up another and different church, is a perversion of the trust, for selfish purposes, and perpetrated in eminently bad faith.

Memminger & Jervey, contra.

Per Curiam, DUNKIN, Ch. In both these cases this Court concur in the judgment of the circuit court, and the appeal is dismissed. Appeal dismissed.

1 Strob. Eq. *209

*THE EX'ORS OF HASLETT et al. v.
WOTHERSPOON et al.

(Charleston. Jan. and Feb. Term, 1847.)

[Corporations \S 30.]

Where an association becomes incorporated, and the incorporation accepts an assignment of all the property of the association, for the purpose of carrying out their object, they are primarily liable for their debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 100; Dec. Dig. \S 30.]

[Corporations \S 227, 235.]

Where the assets of a corporation are not sufficient to satisfy all its creditors, the individual corporators are individually liable to make good the deficiency, including that which may arise from the insolvency of any of the corporators, to the extent of the capital professed to be paid in, as set forth in the charter.

[Ed. Note.—Cited in South Carolina Mfg. Co. v. Bank of State of South Carolina, 6 Rich. Eq. 232.]

For other cases, see Corporations, Cent. Dig. \S 882, 898; Dec. Dig. \S 227, 235.]

[Corporations \S 227.]

Capital properly means the property which one has, clear of debt.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 875, 881, 882, 886, 892; Dec. Dig. \S 227.]

[Corporations \S 237.]

A corporation, and its corporators, individually, are liable for the interest on simple contract debts recovered against them at law, and for the costs of the suits for their recovery, provided that the aggregate sum of their liabilities (these included) shall not exceed the amount of capital which they professed to be paid in, as set forth in the charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 916; Dec. Dig. \S 237.]

[Corporations \S 10.]

If an association, formed for any purpose, afterwards becomes incorporated, there must be some act or expression on the part of the individuals of the association, to signify their acceptance of the charter, in order to charge them in the character of corporators.

This case, which came up for a final hearing in February, 1847, at Charleston, will be best understood from the following full report of the pleadings:

State of South Carolina, Charleston District.
In Chancery.

To the Honorable the Chancellors of the said State:

Humbly complaining, shew unto your Honors, your orators, John Haslett, Alexander Robinson and William Lloyd, executors of the last will and testament of John Haslett, Esq., of the city of Charleston, deceased, for and on account of themselves, and all other creditors of the Charleston New Theatre Company, who shall come in and contribute to the expense of this suit; that, heretofore, to wit, in the year 1835, a number of gentlemen in the city of Charleston, defendants in this suit, voluntarily associated themselves together as members of a Joint Stock Compa-

ny, for the purpose of building a theatre in the said city, by means of funds to be raised by themselves; and at a meeting of the subscribers to this project, held on the 10th day of March, 1835, it was resolved, that a committee of five trustees should be elected from amongst the said subscribers, to manage all matters connected with the building of the said theatre, and generally to act for the interests of all concerned in furthering the objects of their association; whereupon, the following gentlemen were duly elected trustees, to wit: Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell and William A. Carson, Esqs. who forthwith proceeded to the discharge of the various du-

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*ties devolved on them, as the managing committee of the said theatre company: that the said trustees, on behalf of themselves and their associates, having contracted to purchase a lot of land as a site for the theatre, it was resolved, at a meeting held by them, on the 12th day of March, 1835, that they would immediately proceed to procure plans, and estimates for contracts, for building the said theatre, according to a general plan then adopted by them: that in consequence of an invitation to that effect, proposals were soon after submitted to the said trustees, by Messrs. Fogartie & Sutton, bricklayers, for the brick work necessary for the building of the said theatre, for the sum of fourteen thousand dollars, and by Messrs. Ephraim Curtis and Company, carpenters, for the wood work necessary thereto, for the sum of thirteen thousand five hundred dollars; which said proposals were accepted by the said trustees, on the 17th day of February, 1837, and were afterwards embodied in the shape of written agreements between the said trustees, for and on account of themselves and their associates, of the one part, and the said contractors, Fogartie & Sutton, and Ephraim Curtis and Company, respectively, of the other part: that the said contracts for building the said theatre, were faithfully performed, to the entire satisfaction of their employers, the trustees aforesaid, who, from time to time, paid large sums of money to the said Fogartie & Sutton, and Ephraim Curtis and Company, on their building contracts aforesaid, by the hands of George W. Logan, Esq., who had been appointed by said the trustees, as the treasurer of the said Theatre Company: that on the 27th day of February, 1838, Ephraim Curtis, of the firm of Ephraim Curtis and Company, for money then due them by the said Theatre Company on their contract above mentioned, gave his draft to Francis Lance, Esq., for the sum of fifteen hundred dollars, payable thirty days after date, on George W. Logan, treasurer as aforesaid, which said draft was duly accepted by the said George W. Logan, as the treasurer of the said Theatre Company, but not paid at maturity, for want of

funds: that on the tenth day of March, 1838, Robert Wotherspoon, Esq., then Chairman of the Board of Trustees, for the purpose of paying Messrs. Fogartie & Sutton a large sum of money then due them on their contract aforesaid, gave to the said Fogartie & Sutton his draft for the sum of two thousand dollars on George W. Logan, treasurer, payable eight days after date, and chargeable to the account of the said building contract of Fogartie & Sutton, which draft was also duly accepted, but not paid at maturity, for want of funds: that the said drafts are now the

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property of your orators, as *executors of the last will of their testator, John Haslett, as part of the assets of his estate left by him at his decease.

Your orators further shew unto your Honors, that after the said contracts were entered into between the said trustees and the said contractors, Fogartie & Sutton, and Ephraim Curtis and Company, in fact, after the theatre itself had been erected, and ready for use, to wit—on the 17th day of December, 1837, the said trustees, Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell and William A. Carson, Esqs., and their associates in the said Theatre Company, were incorporated by the Legislature of South Carolina, a body corporate, for the purpose of building and conducting a theatre in the city of Charleston, by the name and style of the Charleston New Theatre Company, with a then capital of sixty thousand dollars: that the charter so granted was duly accepted at a meeting of the subscribers to the association aforesaid, held on the 28th day of February, 1838, in pursuance of a call to that effect in the several newspapers of Charleston, and that the said Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell and William A. Carson, Esqs. were continued in the managing direction of the said corporation, under their former style of trustees, and were, from time to time, elected by the said company, as the trustees or directors thereof, until the company became utterly insolvent, and ceased to meet for the transaction of any business connected with the said theatre.

Your orators further shew unto your Honors, that their testator, confiding in the solvency of the said incorporated company, which was held out to the world in their charter, with an actual and paid in capital of sixty thousand dollars at the time of their incorporation, brought an action at law against the said Charleston New Theatre Company, on the drafts aforesaid, in which action a verdict was had for the plaintiff therein, and judgment entered up against the said Theatre Company, on the first day of February, 1840, for the sum of \$4,016.95, of which sum the amount of \$1,500 was afterwards, to wit, on the 21st day of February,

1841, paid to your orators' testator, in part satisfaction of the debt due on said judgment, by George W. Logan, Esq., treasurer of the said company, by whom all previous payments had been made on the contracts aforesaid, out of which the said debt arose.

And your orators have been advised, that the confidence of their testator, that the said Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell and William A. Carson, and their associates in the said incorporated Theatre Company, possessed at the time of their incorporation an actual

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*capital of sixty thousand dollars, was well and truly founded on the plain intent and meaning of their charter, and was strengthened, also, by the fact, that the Legislature had taken no precaution to provide for the paying in of the said capital, or any part thereof, prior to and before the said individuals should be allowed to exercise their corporate privileges, nor imposed any personal responsibility of a pecuniary kind on the members of the Company, as the Legislature had taken special care to provide in the case of other associations incorporated by the same Act.

And your Orators further shew unto your Honors, that the execution which issued on the judgment aforesaid, against the goods and chattels and real estates of the Charleston New Theatre Company, has been returned by the Sheriff of Charleston District, unsatisfied; because he could find no property, real or personal, belonging to the said Company, out of which the money due on the said execution could be made.

And your Orators in fact shew unto your Honors, that the said Theatre Company is hopelessly insolvent; and that they have no visible means of paying their debts, except their building, the New Theatre, the fee simple of which, subject to the mortgages thereon, has been lately sold under an execution against the said company for a small sum of money, without paying any part of your Orators' debt; and that the said Company have ceased to hold any meetings for the transaction of business, or the election of officers for several years past, and that the said Company is, to all practical purposes, entirely dissolved by their own acts; possessing at present neither the ability nor the disposition to carry their original project into execution, and against whom a judgment in law, or a decree of this Honorable Court, would be of no more avail to your Orators in obtaining payment of their debt, than would be a judgment against any admitted pauper.

As your Orators further shew unto your Honors, that at the time the said Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell, William A. Carson, and their associates, were incorporated, the said Theatre association were actually indebted

to a large amount for the building of the said Theatre, on the contracts aforesaid, made by their managing Committee, the said Trustees, who have, since the Act of incorporation, assigned and transferred to the said incorporated Company, all the real estate which they held as Trustees of the Theatre association aforesaid.

And your Orators further shew unto your Honors, that they have been advised that no Act of incorporation could relieve the said Trustees and their associates from the pay-

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ment of *debts, which they owed for the construction of the said Theatre, on contracts made between the said Trustees and the said Fogartie and Sutton and Ephraim Curtis and Company; and least of all, that no act of the said Trustees and their associates can divest them, so far as the rights of your Orators are concerned, of a liability which attaches to all and every member of the said Theatre association on their contracts made by the said Trustees, as a committee in behalf of the said association; and although your Orators have been advised that the said Trustees are personally and individually liable on the contracts made by them for building the New Theatre, yet your Orators, actuated by a sense of justice which revolts at enforcing their claims only against those who have in good faith acted as the agents of others, who are equally liable with themselves, have been induced to forego any such remedy against the Trustees merely, and to appeal to your Honors for such relief against the said Trustees and their associates, as the nature of the case requires, in justice and good faith to all the parties concerned.

And your Orators have accordingly, both by themselves and their agents, applied to and requested the said Trustees and their associates, defendants in this cause, to pay them the several sums of money due them on the contracts made by the said Trustees with Fogartie and Sutton, and with Ephraim Curtis and Company, as above mentioned; and your Orators well hoped that such, their just and reasonable requests, would have been complied with, as in justice and equity they ought to have been; but now so it is, may it please your Honors, the said Trustees and their associates, contriving how to injure and oppress your Orators in the premises, absolutely refuse to comply with your Orators' aforesaid reasonable requests. And to countenance such their unjust conduct, they the said Trustees and their associates, pretend that they are not personally liable for any contracts or agreements made by the said Trustees, for building the said Theatre, but that their liability is restricted to the payment of their individual subscriptions, which they have already paid in to the joint fund, and beyond which payment they never agreed or expected to be bound for

any expenditures growing out of the building of the said Theatre; whereas your Orators charge the contrary to be true, and that each and every member of the said Theatre association is liable in his own private estate for the entire debts incurred by them for building the said Theatre, on contracts entered into before their incorporation: And that as to subsequent creditors who trusted the Charleston Theatre New Company on the

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faith of their charter, *your Orators charge that the Stockholders of the said Theatre Company are compellable in this Honorable Court, in favor of their creditors, to make up among themselves so much of their capital of sixty thousand dollars, as the said Company has not actually expended in building and conducting a Theatre in Charleston, and to hold the same as a fund to which the said creditors may have recourse for the payment and satisfaction of their debts against the said Company, which they had trusted on the full assurance of their possessing such an amount of capital actually paid in, before the granting and acceptance of their charter. All which actings, doings and refusals of the said Trustees and their associates, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your Orators.

In consideration whereof, and for as much as your orators are without remedy in the premises at Common Law, and cannot have adequate relief except in the Court of Equity, where matters of this sort are properly cognizable and relievable.—to the end, therefore, that the said trustees, Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell and Wm. A. Carson, and their associates in the said Theatre Company, who are impleaded in this Honorable Court, for and on account of themselves, and other members of the said association, who are not made personally parties to this suit, by reason of the delay, vexation and difficulty that would inevitably result from any attempt to bring such numerous parties before the court, may, upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance and belief, full, true, perfect and distinct answers make, to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively distinctly interrogated; and more especially, that the said trustees and their associates may, in manner aforesaid, answer and set forth whether the said Trustees did not, on or about the 27th day of February, 1837, or at some other time, enter into certain contracts with Messrs. Fogartie and Sutton, bricklayers, and Messrs. Ephraim Curtis and Company, carpenters, for the building of the New Theatre in Charleston, as your orators have hereinbe-

fore set forth; and whether the said trustees were not parties to the said contracts, for and on account of themselves and their associates, subscribers for building a Theatre in Charleston; and whether they did not, from time to time, by their Treasurer, George W. Logan, Esq. pay large sums of money to the said Fogartie and Sutton,

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and *Ephraim Curtis and Company, for and on account of the said building contracts; and whether the said drafts accepted by the said Logan, as aforesaid, were not for and on account of monies due to the said contractors for their work, labor and materials used and employed in building the said Theatre, and furnished at the request of the said trustees, and whether the said drafts have ever been paid, except partially by a payment of \$1500, made by George W. Logan, Esq. Treasurer, on account of the said debt to your complainants' testator, on the 21st day of February, 1841; and whether your orators have not, by themselves and their agents, made such application and requests as are hereinbefore in that behalf mentioned, and whether the said trustees and their associates have not, each and all of them, refused to comply therewith, and why; and that the said trustees and the rest of the members of the said Theatre association may be compelled by and under the decree and direction of this Honorable Court, to pay to your orators whatever may be found due to them on the drafts aforesaid; and that, for and on account of such parties who may hereafter come in as aforesaid, and who are only creditors of the Charleston New Theatre Company as a body corporate, the said defendants may account for the amount of capital that has been paid in by them, as stockholders thereof, and declare whether the same has been expended in building and conducting a Theatre in Charleston; and distinctly set forth what, in fact, was the amount of their capital at the time of their incorporation, and how the same has been invested; and whether any call has been made upon the stockholders, to make up among themselves, by assessment or contributions, the amount of sixty thousand dollars, or, at least, so much as, with the property of the Company, may be sufficient to pay their debts; and that the said defendants, as stockholders of the said Charleston New Theatre Company, may be directed, by and under the decree of this Honorable Court, by contributions and assessments among themselves, to make up the whole amount of their capital set forth in their charter, not expended in building and conducting a Theatre in Charleston, for the purpose of paying the debts of the said Company, and to hold the same as a trust fund for the benefit of their creditors, who have, in good faith, trusted them, on the reasonable belief that they actually had, at the time of their incorporation,

that amount of capital which their charter held them out to the world as possessing; and that your orators may have such other and further relief in the premises as to

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*your Honors shall seem meet, and the nature and justice of the case may require.

May it please your Honors to grant unto your orators a writ of subpoena, to be directed to Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell, and William A. Carson, trustees and stockholders of the Charleston New Theatre Company; and to William Aiken, Daniel Blake, Ker Boyce, Thomas A. Coffin, John Crawford, John Fraser, Joseph E. Glover, James Hamilton, Wade Hampton, Leon Herckenrath, William C. Heyward, Moses D. Hyams, Joseph Lawton, Vincent Le Seigneur, David C. Levy, George W. Logan, Thomas O. Lowndes, Charles A. Magwood, N. Russell Middleton, and Ralph J. Middleton, executors of Arthur Middleton, Henry A. Middleton, Oliver H. Middleton, Thomas Milliken, Otis Mills, Moses C. Mordecai, Reuben Moses, William Patton, James L. Petigru, James Rose, Ralph S. Izard, and Stephen D. Doar, executors of Thomas Pinckney, Robert Pringle, Lewis A. Pitray, William Ravenel, Samuel P. Ripley, Thomas J. Roger, Thaddeus Street, John Strohecker, Abraham Tobias, Elias Vanderhorst, Joshua J. Ward, Charles Warley and Aaron S. Willington, members and stockholders in the said company, commanding them, at a certain day, and under a certain penalty, therein to be limited, personally to be and appear before your Honors, in this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, perform and abide such further order, direction and decree therein, as to your Honors shall seem meet.

And your orators will ever pray, and so forth.

State of South Carolina,

Charleston District. In Chancery.

The answer of James Rose, Henry Gourdin, Richard W. Cogdell, William A. Carson, William Aiken, Daniel Blake, Thos. A. Coffin, John Crawford, Wade Hampton, Leon Herckenrath, William C. Heyward, D. C. Levy, T. O. Lowndes, Charles A. Magwood, H. A. Middleton, O. H. Middleton, Otis Mills, M. C. Mordecai, Reuben Moses, J. L. Petigru, William Ravenel, Lewis Trapman, Elias Vanderhorst and Joshua J. Ward, defendants to the bill of complaint of John Haslett, Alexander Robinson and William Lloyd, executors of the last will and testament of John Haslett, deceased.

These defendants, now and at all times hereafter, saving and reserving to themselves all and all manner of advantage and benefit of exception, to the manifold errors, uncer-

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*tainties and insufficiencies, in complainants'

said bill contained, for answer, nevertheless, thereto, or to so much thereof as they are advised is material for them to answer unto, say:—That they admit that in the year 1835 these defendants united with divers other persons, to form a company for building a Theatre, and signed a memorandum to pay the sum of 500 dollars, for the several shares opposite their several names. That the subscribers appointed a committee to manage the business of the Company, and that Robert Wotherspoon and these defendants, James Rose, Henry Gourdin, Richard W. Cogdell and William A. Carson, were named as the members of that committee, who assumed the agency committed to them, and appointed George W. Logan Treasurer and Secretary; purchased a lot for the site of a Theatre, and contracted with Fogartie & Sutton, bricklayers, and Curtis & Co. carpenters, severally, for erecting the building, as alleged in complainants' bill; and that the said R. Wotherspoon, James Rose, Henry Gourdin, R. W. Cogdell, and W. A. Carson, were authorized, as the agents of the subscribers to the Theatre to make the said contracts. That they have heard and believe that George W. Logan, as the Treasurer and Secretary of the Company, did accept a draft of Ephraim Curtis for 1500 dollars, and did also accept a draft of Robert Wotherspoon, in favor of Fogartie & Sutton, for 2,000 dollars, and that the said bills or drafts were drawn on account of moneys really due and owing to Curtis & Co. and Fogartie & Sutton, respectively, on account of the contracts made with them by the committee aforesaid. And these defendants have heard and believe that the said bills were endorsed to the late John Haslett, the complainants' testator.

These defendants admit that by an Act passed on the 20th day of December, 1837, the aforesaid Robert Wotherspoon, and these defendants, James Rose, Henry Gourdin, Richard W. Cogdell and W. A. Carson, and their associates, were incorporated by the style and title of the Charleston New Theatre Company, with a present capital of 60,000 dollars, with the privilege of increasing the same to 100,000 dollars, and the corporate franchise so granted was accepted by the subscribers to the Theatre; and that the same Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell and William A. Carson, afterwards, by the choice of the members, acted as the trustees of the corporation.

These defendants admit that the said John Haslett sued the Company, by its corporate name, and recovered a judgment against them, on the bills or drafts endorsed to him as aforesaid by Fogartie & Sutton and Curtis

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& Co. and that a *considerable sum is still due on the said judgment; and that the Charleston New Theatre Company is altogether insolvent; that the Theatre, itself, has

been sold, subject to the mortgages made for securing certain large debts of the Company, and possession is held by the purchaser; and that since the said sale the company has done no business, nor performed any corporate act.

These defendants admit that the associates in the company which was formed for building a Theatre, as hereinbefore mentioned, did not raise or contribute the sum of 60,000 dollars, to the purposes for which they were associated. But these defendants, in fact, say, that the whole amount of subscription paid by the members of the company, as they believe, was 37,315 dollars. That of the subscribers, some, to wit: the defendants, William A. Carson and William Aiken, paid, each, 1500 dollars, or the price of three shares. That others, to wit: these defendants, James Rose, Henry Gourdin, John Crawford, Reuben Moses, Daniel Blake, Thomas A. Coffin and Wade Hampton, and certain other subscribers, to wit: Thomas Pinckney, James Hamilton, Isaac E. Holmes, R. M. Allen and Joseph Edward Glover, paid, severally, the sum of 1000 dollars, or the price of two shares; and this defendant, Elias Vanderhorst, paid 750 dollars, or the price of one share and a half share; and all the other members, for one share subscribed; and of the amounts subscribed the whole was paid, as these defendants are informed and believe, except the sum of about 1,235 dollars, none of which is owing by any of these defendants.

And these defendants, in fact, say that the cost of the building, furnishing and opening the Theatre, amounted, as these defendants believe, to 70,410 dollars, leaving a large amount of debt for which no provision has been made, and which has increased by the accumulation of interest and damages.

And these defendants admit that the debts of the company, whether contracted before or since the incorporation, ought to be honestly paid, and that a part of said debts is secured by mortgages of the Theatre, those mortgages should be satisfied out of the mortgaged property, as far as the same will go, and that the residue of the debt, whether secured by mortgage, judgment, bond, or simple contract, should be raised and paid by the members rateably.

And these defendants submit to do and perform all and whatsoever this Honorable Court may order in the premises, and they deny all fraud, and pray to be hence dismissed with their reasonable costs.

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*State of South Carolina, Charleston District. In Chancery.

The answer of Ker Boyce, who has been impleaded with James Rose and others, to the bill of complaint of John Haslett and others.

This Defendant, now and at all times hereafter, saving and reserving unto himself all

advantage and benefit of exception to the many errors and uncertainties in the complainants' said bill of complaint contained, for answer, nevertheless, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, answering says: That some persons in the City of Charleston, actuated by a feeling of public enterprise, having desired to build a Theatre in the City of Charleston, applied to this defendant, and induced by the said application, he subscribed for the sum of five hundred dollars, which amount he has fully paid and satisfied.

And this defendant further answering says, that at the time when he consented to subscribe the aforesaid sum of money, and when he paid the same, he did so under and by virtue of the agreement he made to that effect, in signing his name to a certain paper in which the amount of his subscription was set down, and the purpose for which the same was intended. And this defendant further answering says, that the agreement by which the parties to the said paper respectively were bound, never was intended to have, nor could the same have, any further obligation than continued while the said sum of five hundred dollars was unpaid, and was discharged when that amount was paid to the person authorized to receive the same. That in the said paper, the amount of the liability of such subscriber who has performed his part of the contract, by the payment of the money, cannot be affected by any new liability, without manifest wrong and injury.

And this defendant further answering says, that he knows nothing of the means or purposes by or for which a charter of incorporation was obtained by an Act of the Legislature of this State, in behalf of the parties who were subscribers to the said paper containing the amounts to be paid by each individual who was a party to the same. That no charter of incorporation could in any wise modify or affect the rights of the parties whose names were so signed, without their express assent. And this defendant expressly says, that he never did in any manner assent, nor was he at any time required to assent, to any proposition which involved a change of the original agreement, or enlarged a liability on the part of this defendant, for a larger sum than he had agreed to pay.

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*And this defendant says, that he does not know that the charter of incorporation, stated to have been obtained for the purposes of those who were engaged in building the Theatre, did increase the liability of those parties whose names were signed to the paper herein before referred to; but that if it does, it could not operate on this defendant, without his acceptance of the charter, either by previous or subsequent assent. Neither of which has he ever done.

And this defendant further answering says,

that he has every reason to believe that the parties who contracted for and undertook the building of the Theatre, well knew the nature of the agreement existing between those who have engaged to contribute the certain amounts set forth in the paper herein before referred to. And that by such knowledge they were well informed that the subscribers to the said paper were bound in a certain sum respectively; and that it was not intended at the time of subscription, or at any other time, that the said parties should, by or through that agreement so made, for the payment of the said several sums of money respectively, and which have been paid, be bound or held liable for any other or further sum of money.

And this defendant further answering says, that he respectfully submits, that the parties complainants in the said bill of complaint filed in this case, have by their own act and deed, conclusively shewn that they did not expect to receive or require payment of any debt or debts that might be due or owing to them in the manner now claimed in the said bill of complaint. That according to their own statement, the parties to whom the said debt was originally due and owing, at different times, drew certain drafts, or in other cases received certain drafts drawn on George W. Logan; that the said drafts were duly accepted, and the same, in the form of negotiable paper, passed from the hands of the said parties, and were, for valuable or sufficient consideration, transferred to John Haslett, the testator of the complainants in the bill of complaint filed in this case. And this defendant submits, that in the taking and receiving of these drafts, which were by the original contractors as builders transferred to third persons, the parties holding these drafts have no remedy except against the parties who are by law bound for the payment of the drafts then given and accepted by the original contractors, and by them transferred to third persons. And this defendant says, that the debt to the said contractors was discharged by the drafts thus given, and after the parties have consented to be satisfied in this mode, subsequent holders of these drafts cannot, and are not in justice entitled to assert any privity of contract between themselves and the parties who

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originally *were bound for the payment of a specific sum of money, or who are, by virtue of the payment of their proportion agreed to be paid, and paid, members of the corporation.

And this defendant further answering says, that it is true that in the year of our Lord —, certain persons therein named were by an Act of the General Assembly, as also their associates and successors, declared a body politic for the purpose of erecting and conducting a Theatre in the City of Charleston, by the name and style of the

Charleston New Theatre Company, with a present capital of sixty thousand dollars, and the privilege of increasing the same to one hundred thousand dollars. But this defendant respectfully submits, that if it be considered that the possession of the sum of sixty thousand dollars was a condition precedent, and to be performed before the act of incorporation would benefit the parties asking for the same, then, inasmuch as the same has never been complied with, the act of incorporation has not yet had legal operation.

That this defendant then stands in the position he held before the charter so applied for, which was his agreement to pay a certain sum, with which he has complied.

And if the parties named as trustees, and the contractors, entered into hazardous speculations before a sufficient fund was paid in, this defendant should not be asked or required to make up a deficiency thus created. But if it be considered that the capital sum was not a condition precedent, but a penalty that attached upon all who were members of the New Theatre Company, then inasmuch as it is an important alteration of the original agreement to which the parties signed their names, it cannot be considered binding upon any except those who have distinctly and expressly assented to the same.

And this defendant avers, that he has never so done, nor understood that he was required or expected so to do.

And this defendant denies all and all manner of combinations, &c.

State of South Carolina, Charleston District. In Chancery.

The joint and several answer of Louis A. Pitray and Thomas J. Roger, two of the defendants to the bill of complaint of John Haslett, Alexander Robinson, and William Lloyd, executors of the last will and testament of John Haslett, deceased, complainants.

These defendants, now and at all times hereafter, saving and reserving to themselves all and all manner of advantage and benefit of exception to the manifold errors,

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uncertainties *and insufficiencies of the complainants' said bill of complaint, for answer, nevertheless, thereto, or to so much thereof as these defendants are advised that it is in anywise material or necessary for them to make answer unto, answering say: They admit that they did, sometime in or about the year of our Lord 1835, severally subscribe a paper by which they individually agreed to contribute the sum of five hundred dollars each, for the purpose of erecting a new theatre, for dramatic performances, in the city of Charleston; but they say, that they have long since paid the whole amount of their said several subscriptions, and that neither by the terms of the said agreement,

nor by any other act of their own, did these defendants, or either of them, ever agree to contribute, or authorize the said Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell and William A. Carson, in the complainants' bill mentioned, or any other person or persons whatsoever, to render them, or either of them, liable beyond the amount of their several subscriptions aforesaid, to, for, or by reason of any contract or engagement, in relation to the erection of the said theatre. In fact, these defendants had no view to profit, or an investment, in making their said subscriptions, but intended the same as a contribution for which no return was anticipated, for the purpose of erecting a public edifice. This defendant, Louis A. Pitray, being at the time of his said subscription on the eve of removal to France, where he has ever since resided, stated, when he subscribed the paper aforesaid, that his subscription was "a gift;" and this defendant, Thomas J. Roger, upon being afterwards informed that he was a shareholder, subscribed a paper by which he gave all his interest in the theatre to Mr. Abbott, who was at that time the manager thereof: and neither of these defendants ever attended any meeting of the alleged Joint Stock Company, joined in the application for or acceptance of the charter of incorporation, in the complainants' said bill mentioned, or participated, directly or indirectly, in any act or contract, either of the said Joint Stock Company, or corporation; and they deny all liability, on the part of them, or either of them, by reason of any such act or contract.

And these defendants, further answering, say, that they know nothing, of their own knowledge, of the proceedings of the said company or corporation, in complainants' bill mentioned, nor of the alleged contracts, and the judgments thereon, upon which the complainants claim relief against these defendants. These defendants presume the facts may be as stated in complainants' bill; but they deny any liability on their parts by reason of the said contracts, and are advised,

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*and respectfully submit, that if such contracts are binding on any other person, or persons, than the parties to them, they are at least wholly unauthorized as far as these defendants are concerned. And they further submit, that whatever may have been the original obligations of the said contracts, the same were merged in the judgments thereon entered up against the said corporation; and that even if these defendants were lawfully bound as members of the said corporation, yet neither by the terms of the charter, nor by the general law of the land, can they be made individually responsible for the debts of the corporation: nor have they, by any act or contract of their own, incurred such responsibility.

All which matters and things these defend-

ants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct and award; without this, that any other matter or things in the said bill contained, and not herein, or hereby, well and sufficiently answered unto, confessed and avoided, traversed or denied, is true, to the knowledge or belief of these defendants; and they humbly pray to be hence dismissed, with their reasonable costs in this behalf most wrongfully sustained.

Upon the hearing of this bill and answers, was pronounced the following circuit decree:

Johnson, Ch. The following articles of association, entered into by and between the defendants, will, themselves, sufficiently show their nature and object, viz:

"We, the subscribers, agree to unite in a company for building a theatre, to be called the New Theatre, in Charleston, and to pay for the shares placed opposite our names, at the rate of five hundred dollars per share, and to pay the same to the treasurer of the company, in such proportions and instalments as may be called for by the trustees, Robert Wotherspoon, James Rose, William A. Carson, R. W. Cogdell and Henry Gourdin, or a majority of them, or of the trustees who may be appointed to fill any vacancy in their number: Provided, that this engagement shall have no effect till forty shares are taken, and that when forty shares are taken, the said subscription shall be good for three hundred dollars per share, if so much be necessary for the purchase of the site of the theatre, and that the residue be payable as may be called for by the trustees, when seventy shares are taken." Adopted, 10th March, 1835.

It is signed by the defendants, who took amongst them something over seventy shares, amounting in all to about \$37,000, the whole of which has been paid in, and disbursed in the payment of debts.

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*The trustees named in these articles having purchased a site, whereon to erect a suitable building, on the 17th February, 1837, entered into an agreement with Fogartie & Sutton, brick-masons, to do the brick work, and with Ephriam Curtis & Co. to do the carpenters' work, of the said building; for which Fogartie & Sutton were to be paid \$14,000, and Curtis & Co. \$13,500. The work was satisfactorily finished, and accepted by the trustees, Curtis & Co., on the 27th February, 1838, gave a draft for \$1,500 to Francis Lance, on Geo. W. Logan, who had been appointed treasurer of the company. The draft was duly accepted, but was not paid at maturity, for want of funds. On the 10th of March, 1838, Robert Wotherspoon, the Chairman of the Board of Trustees, gave to Fogartie & Sutton, on account of the money due them on the building contract, a draft on Logan, the treasurer, for \$2,000, payable eight days after date; this

was also accepted by Logan, but was not paid, for want of funds, and both the drafts were purchased by the complainants' testator.

The bill is filed as well on behalf of all the other creditors of the company, who may come in and contribute to the expense, and establish their demands, as of the complainants.

And the complainants further state, that on the 20th December, 1837, after the building had been finished, and was ready for use, the Legislature passed an Act constituting the trustees named in the articles of association, and their "associates," a body politic, by the style and name of the Charleston New Theatre Company, for the purposes of conducting a theatre in Charleston, and that the said trustees were afterwards appointed directors of the said company, and continued in that office until the corporation became insolvent, and its object was abandoned.

The bill further states, that the testator, confiding in the solvency of the corporation, brought an action at law against it, to recover the amount of these drafts, and that on the 1st February, 1840, judgment was entered for him for \$4,016.95, of which \$1,500 was afterwards paid by Logan, the treasurer; that an execution sued out on that judgment has been returned nulla bona, the Sheriff being unable to find any property, real or personal, whereon it could be levied, and the complainants in fact say, that the building and lot of land was all the visible property which the company or corporation possessed; that that had been transferred by the trustees named in the articles of association to the corporation, and that it had been sold under fi. fa. against the corporation.

By the first clause of the Act of incorporation, it is enacted: "That Robert Wother-

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spoon, W. A. Carson, James Rose, *Richard W. Cogdell and Henry Gourdin, and their associates and successors, be, and they are hereby declared, a body politic, for the purpose of erecting and conducting a theatre in the city of Charleston, by the name and style of the Charleston New Theatre Company, with a present capital of \$60,000, and with the privilege of increasing the same to \$100,000." And the bill prays that the defendants may answer, whether the capital of \$60,000 was in truth paid in,—and if not, that the corporation may be compelled to contribute to pay what may be sufficient to pay the debts, or to make up the deficiency, or that the subscribers to the articles of the association, if they are other persons than the incorporators, be decreed to pay the demands of the complainants by an assessment upon themselves.

All the subscribers to the articles of association are made defendants. Robert Wotherspoon, one of them, is a certificated bank-

rupt, and pleads that in bar to the relief sought by the bill against him, and that must be allowed. James Rose, and twenty-four others, have answered jointly, and admit the justness of the complainants' demand, and the liability of the members of the association for all the debts, whether contracted before or after the act of incorporation, and they state that the theatre and lot have been mortgaged for a part of the debts, and suggest the propriety of selling them to pay the debts, as far as the proceeds will extend. The corporation was also made a party, and their answer is substantially the same as that of James Rose and others.

Ker Boyce, another of the defendants, admits in his answer that he subscribed the articles of association for \$500. He states that he paid it, and insists that he is no further answerable. 1st. Because the articles never were intended to have, nor could they have, any further obligation than to bind them to pay the sum subscribed, to the person entitled to receive the same. 2d. Because the Act of incorporation did not extend or increase the liability of the subscribers to the articles, beyond the amount subscribed, and if it could have that effect, he is not bound, because he never assented to it in any manner, before or after it was passed. 3d. Conceding the possible liability of the associates to Fogartie & Sutton and Curtis & Co., he insists that their acceptance of drafts from the corporation for the amount due, was a discharge of the liability of the associates.

The firm of Street & Boinest were also subscribers to the articles, and they put in their defence on the grounds taken in behalf of Mr. Boyce; and so of Thomas Roger, L. A.

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Pi*tray and J. E. Glover. Judgments pro confesso have been taken against the other defendants.

It appears from the journal of the corporation, that Mr. Glover was present at a meeting of the stockholders, on the 28th of February, 1838, when a resolution was adopted, accepting the Act of incorporation, and it is very clear he was mistaken, when he said, in his answer, that he had never accepted or assented to it. His solicitor, Mr. Northrop, has subsequently filed with the proceedings a correspondence between them, which very satisfactorily shows that it originated in his forgetfulness. It does not appear that Boyce, or any of the other defendants who rest on the same defence, ever attended any of the meetings of the directors or stockholders, after the Act of incorporation, and from what I can collect from the evidence, it is, I think, very clear that the management of their affairs was confided, almost exclusively, to the directors. But it is in proof that in the Winter of 1839-'40 Mr. Boyce entered into a contract with Mr. Abbott, the manager

of the Theatre, to sell him his stock, on condition that "the others" (I suppose the other stockholders) would concur—for Abbott desired to purchase all the stock. Mr. Logan, the Secretary, also testified that Street, of the firm of Street & Boinest, "would several times ask him questions in reference to the business of the company," and "spoke to him as a stockholder." There is no evidence of any act, on the part of Roger or Pitray, in relation to the affairs of the company, after the Act of incorporation. But judgments, *pro confesso*, had been taken against them, and it was not until after the argument had been gone into, that a motion to open them, and let the defendants in to answer, was made for that purpose, and granted by consent; and if it should become necessary, I think the complainants ought to be let into proof of their acceptance of the charter, if they have any to offer.

The first ground relied on by the resisting defendants, raises the question whether they are bound by any contract made by the company, beyond the amount which they subscribed to the original articles of association. The assumption that this was intended as a mere charity, is the only possible ground of this defence; and it is true that men may voluntarily contribute to the construction of a Theatre, for the public use and benefit, as well as a Church or a Hospital. But that such was not the case here is manifest, as well by the nature of the undertaking as by the articles themselves. No instance has fallen under my observation, in which a Theatre has been erected merely as a public convenience; and although, as was obviously

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the case here, public convenience might enter largely into the consideration of the undertaking, some personal benefit is contemplated. Here the capital stock is divided into shares of equal value, obviously with a view to regulate the distribution of the profits, if any were made, and to apportion the losses. In a contribution to a mere charity, it would have been wholly nugatory. It could not, therefore, have been intended as a charity, but an association of the parties to contribute a limited amount of money to a common object, for their common benefit; and whether it be called a partnership, or its character be designated by any other name, it would astonish a merchant to be told that the individuals were not liable to creditors beyond the amount of the capital sum put by them, severally, into the common fund. In other words, that having paid in their portion of the capital, they are not liable at all. The language of the Court, in 1 *Mylne & Keene*, 76, is very strong to the point.

Besides the complainants, numerous other creditors have come in to establish demands against the defendants, some of which were contracted before and some after the Act of

incorporation, and it is insisted that Boyce, and the other defendants associated with him in the defence, are not liable to contribute to the payment of the after-contracted debts.—They put this upon the ground that they never accepted the charter, and that the Act itself was a dissolution of the original association.

I should find no difficulty, if it were necessary, to deduce from the facts, that Boyce, Glover and Street, of the firm of Street & Boinest, particularly the first two, did, in effect, accept and approve the charter. It is not enough that they were merely passive, as between creditors and the association: they were bound not only expressly to disavow the charter, but to give publicity to it.

The persons named in the Act of incorporation, viz: Robert Wotherspoon, W. A. Carson, James Rose, Richard W. Cogdell and Henry Gourdin, are the same persons who are constituted trustees by the articles of association. And the objects expressed in the Act, "erecting and conducting a Theatre in Charleston," are the same, and it is these persons, "and their associates," who, by the Act, are constituted a body politic. The names subscribed to the articles, amongst which will be found the names of these defendants, show who their associates were; and there was nothing to prevent their participating in the benefits of the corporation, if they had thought proper. They were, in fact and in law, members of the corporation. The

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Act of incorporation might have been obtained without their knowledge or consent, and they may have refused to accept it; but how were the persons dealing with the corporation to know who the incorporators were, but through the Act and the articles of association? It need hardly be added here, that one who holds himself out to the world as a member of a partnership or corporation, is equally liable with him who conducts the business, although he remain perfectly passive. None of the defendants deny knowledge of the Act of incorporation, and, residing here, the reasonable presumption is that they did know of its existence; the proof is that it was known to Boyce, Glover and Street, and as between the defendants, their neglect to give notice of their dissent subjects them equally to all the liabilities incurred. They had been associated for the purpose of building and conducting a Theatre, without any limitation as to time. The charter had the same object in view, and was for the common benefit of all, as without it, each would have been severally liable for all the contracts of the company, and it cannot be supposed that one would forego such an advantage, when it could not, in the least, diminish his profits. If it had been a profitable concern, and these defendants had come in to receive their dividends, and the Treasurer

had said "you are not entitled, because you have not expressed your consent, or attended the corporation meetings," might they not have answered triumphantly, "the Act and the articles show that we are members of the corporation, and it was never yet heard that corporators forfeited their right by neglecting to attend the meetings, unless there was some express enactment either in the Act of incorporation or its by-laws." As between the parties to this suit this question is not important, but it may become so when I come to consider the liability of the corporators to contribute to make up the capital contemplated by the Act.

Another ground of defence is, that these debts are merged in the drafts drawn and accepted by Wotherspoon and Logan, and the judgments against the corporation upon them, and that this made them the debts of the corporation. This would be, indeed, "a new way of paying old debts." If this was a debt of the association, the assumption of it by the corporation certainly would not discharge it; and if even the payment of it had actually been made by the corporation, without the consent of the associates, it would have been no bar to an action against them for the same debt. If it were otherwise, worthless paper is not the sort of currency which constitutes a lawful tender in the payment of an honest debt.

The corporation having accepted an assign-

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ment or trans*fer of all the visible property of the partnership, they are, as between themselves, primarily liable for all the debts. But it is conceded, that the property of the corporation will not be sufficient to pay all the debts, and the question is, how is the deficiency to be supplied?

At the time the Act of incorporation was passed the Theatre had been built, and was ready for use, and the Act recites, and necessarily on the authority of the persons applying for it, that its capital was then "a present capital of \$60,000." And persons dealing with the corporation, and desiring to know what their means were, might well suppose that the whole sum had been paid in, and was in the hands of their Treasurer. The fact that only \$37,000 had been subscribed, or paid in, was calculated to surprise, and operated as a fraud on the creditors, for which the corporation is responsible. The case of *Hume v. The Winyah and Wando Canal Company*, Carolina Law Journal, page 217, decided by Chancellor DeSausure, whose judgment was affirmed by the Court of Appeals, strikes me as decisive of this question. There, a corporation not professing to have any fixed capital, made by-laws, by which each of the corporators was bound to contribute equally, or rateably, to all expenses incurred, and it was held that the corporators were liable to be assessed

for all the debts incurred. Now this corporation professed to have 60,000 dollars capital, and if, in the case cited, they were personally bound to the extent of all their engagements, here they are necessarily bound to contribute to the extent of the capital, on the faith of which they obtained credit.

It follows from what has been said, that under the articles of association, the associates or persons who subscribed the articles, are liable, jointly and severally, for all the debts incurred before the Act of incorporation. That the corporation, having accepted an assignment of all the property of the association, for the purpose of carrying out their object, they are primarily liable for their debts. That the funds of the corporation falling short of paying all the demands, the corporators are bound to contribute rateably to make up the capital of \$60,000, to be applied to their payment. That the debts of the corporation proper, are to be first paid out of the property and funds belonging to it, including the amount of capital to be contributed and made up by an assessment on the members, to the amount of \$60,000. If this prove insufficient, the debts of the association are to be postponed, and be paid rateably by the subscribers to the articles.

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*The case of *Goddard v. Pratt*, 16th Pickering, 412, pushes the liability still further. There, the members of an Iron Manufacturing Company, which had been in operation for some time, obtained an Act of incorporation, by the name of the Wareham Iron Company, but continued to carry on their business in the name of the old firm. The court refused, in a suit against the company, to admit evidence to shew a general reputation, that, in using the name of the firm, the name of the corporation was meant; and held, that although the Act of incorporation might operate as a dissolution of the company, yet the members were liable as partners, when dealing with persons having no notice of the dissolution. It proceeds on the principle, that if a retiring partner neglects to give notice, or suffers his name to be used, he will be liable for the debts of the new concern. If, therefore, the corporation assets should turn out insufficient to pay the debts of the corporation, and they have dealt with persons ignorant of the dissolution of the association, the members will be liable as partners.

It is therefore ordered and decreed, that an account be taken of the debts of the Theatre, whether contracted by the association or the corporate body, and of the property and funds applicable to the payment of the same—and that the Master do also inquire and ascertain, in what sum the several members should contribute to satisfy the liabilities of the association, and body cor-

porate, and what must be contributed by the solvent members to make good the deficiencies of such as are out of the jurisdiction, or are unable to pay. The plaintiffs' costs, to this time, to be paid by the defendants, Boyce, Street, Boinest, Roger, Pitray and Glover; and the other parties to pay their own costs. Subsequent costs to be paid as hereafter directed.

The defendants, Ker Boyce and Street & Boinest, appealed from the Circuit decree in this case, on the following grounds.

1st. Because the articles of agreement never were intended to have, nor could they have, any further obligation than to bind the parties who were subscribers, to pay the sum subscribed, to the person entitled to receive the same.

2d. Because the Act of incorporation cannot affect any except such as accepted of the same. And there is no proof of acceptance on the part of either of these defendants.

3d. Because, admitting any obligation on the subscribers for more than the amount they agreed to pay, it could only arise from some privity of contract. And this was not, nor could be, proved to exist in this case.

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*4th. Because the acceptance of the drafts was, even as to the contractors, an extinguishment of their claims on the subscribers: and the transfer of these drafts to a third person, could only give to such third person a personal action against the parties who were bound by the draft.

5th. Because, in a case where it is sought to charge a party as a corporator, the fact of his assent must be proved, and it is not for the defendant to prove his dissent.

6th. Because the assent of the parties to contract with the corporation, and to receive payment from the agent, was a waiver of all claim on the original subscribers under the original articles of agreement, except those who had signified their acceptance of the charter of incorporation.

A. G. & E. Magrath,
Solicitors for Ker Boyce and
Street & Boinest.

The defendants, Louis A. Pitray and Thomas J. Roger, appealed from the decree in this case, and moved that the same might, as to them, be reversed, and the bill dismissed with costs; or at least that it might be so modified as to exempt them from liability for any debts contracted after the incorporation of the company, and also from the payment of costs. And in support of their said appeal, they relied upon the following grounds:

1. That the agreement of 10th March, 1835, did not confer any authority upon the Trustees therein named, to bind the subscribers by their contracts; nor impose any other obligation upon the subscribers, than the payment of their respective subscriptions; and the said defendants having paid their respec-

tive subscriptions, are not further liable in Law or in Equity, either to the Trustees, or to those with whom the latter may have contracted.

2. That the complainants having brought their action, and recovered judgment against the corporation, have thereby elected to regard the Trustees as the agents of the corporation, and not of the subscribers to the original agreement; and are bound by their election so made, and estopped from alleging a liability on the part of the subscribers under the agreement.

3. That the complainants' original cause of action was merged in the judgment recovered against the corporation; and if it be not, then the remedy against the subscribers to the agreement was at law, and was barred by the Statute of Limitations before the filing of the bill: and it is submitted, that these defendants should be let into that defence, as the bill charges a liability under the judgment, to which the Statute could not have been pleaded.

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*4. That these defendants were never members of the corporation, and never contemplated becoming so: an Act of incorporation not being within the purview of the original agreement signed by them: nor did they join in any application for such Act, or in accepting it after it was granted; nor have they attended any of its meetings, or by word, act, or otherwise, admitted themselves members of the corporation, or claimed or exercised any rights as such. Wherefore, it is respectfully submitted, that they cannot be held to any liability to complainants, as corporators.

5. That even if these defendants had been members of the corporation, they are individually liable as such for the debts or contracts of the corporation; nor could they be called upon to contribute thereto, beyond the amount of their respective subscriptions, which have already been long since paid in full. And if accepting the charter, and acting under it, be regarded as an admission that the capital of \$60,000 had been paid in, which renders the individual corporators liable to that extent; yet, it is respectfully submitted, that such admission and liability can affect only such members as participated, or concurred, in these acts, and it is neither proved, nor pretended, but is utterly denied by these defendants, that they, in any manner, did either the one or the other.

6. That if the agreement of the 10th March, 1835, did authorize the trustees to bind the subscribers by their contracts, yet this authority terminated with the acceptance of the Act of incorporation, of December, 1837, when the trustees became the agents of the corporation, and were no longer agents of the original subscribers; wherefore, it is respectfully submitted, that these defendants cannot be individually liable for

any debts contracted by the trustees after the acceptance of the charter.

7. That there is no ground for charging these defendants with the payment of costs; and it is respectfully submitted that, in this particular, the decree should be reformed.

8. That the decree is, in other respects, contrary to law and to equity, and to good conscience.

Bailey & Brewster,
Defendants' Solicitors.

The Master made the following report:

"State of South Carolina, Charleston District. In Equity.

To the Honorable the Chancellors of the said State:

Pursuant to the order of the Court in this case, made by Chancellor David Johnson, I

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advertised in the newspa*pers for all the creditors of the Charleston New Theatre to come in before me and prove their debts, and, in consequence thereof, statements of the following demands have been filed in my office:

Executors of Haslett.

Balance of debt due them\$2,623 40
Interest thereon, from 21st February, 1840, till 1st February, 1845—4 years, 11 months and 11 days 905 68

W. J. Bennett.

Amount of judgment.... 723 45
Interest on \$547 from 29th January, 1842, till 1st Feb'y, 1845—3 years, 3 days..... 115 00

L. Hayden.

Balance of judgment.... 58 50
Interest on \$28 from 1st February, 1842, to 1st Feb. 1845—3 years... 5 88

Birnes & Ogilvie.

Amount of judgment.... 427 80
Interest on \$385.84 from 4th June, 1844, to 1st Feb. 1845—7 months, 28 days 17 74

Moffett & Calder.

Amount of judgment.... 1,008 70
Interest on \$942.75 from 4th June, 1844, till 1st Feb. 1845—7 months, 28 days 38 46

Cornelius & Co.

Amount of judgment.... 816 87
Interest on \$752.79 from 29th Jan. 1842, to 1st Feb. 1845—3 years, 3 days 158 62

Cornelius & Co.

Acceptance and protest.. 162 95
Interest on \$180.95 from 27th January, 1840, to 1st Feb. 1845—5 years, 5 days 56 45

\$7,119 40

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*Amount brought over.....\$7,119 40

Elias Thomas.

Balance of due bill..... \$181 69
Interest from 4th Dec. 1839, to 1st of Feb. 1845—6 years, 59 days 78 40

260 09

J. C. Levy, Executor.

Acceptance of draft..... 114 37
Interest on \$90.37 from 9th July, 1844, till 1st Feb. 1845—6 months, 23 days 3 56

117 93

Rail Road Bank.

Promissory note and protest 927 14
Interest on \$925 from 30th April, 1841, until 1st Feb. 1845, being 3 years, 10 months and 1 day 248 39

1,175 52

H. Gourdin.

Promissory note 1,100 00
Interest from 27th Jan. 1841, to 1st Feb. 1845 —4 years, 5 days..... 264 92

1,364 92

Bank of the State.

Amount paid for insurance 2,000 00
Interest on the several amounts paid from 1st Feb. 1841, to 1st February, 1845..... 350 00

2,350 00

Davids & Harrison..... 10 71
Lawton, J..... 100 04
McCartney & Gordon... 8 75
John S. Jones..... 125 00

244 50

Total amount of claims.....\$12,632 36

A contingent claim, for a large amount, has been filed in behalf of James Rose and others, amounting to \$19,413.84, with interest on \$15,000 from the 23d November, 1844— which debt is secured by a mortgage of the Theatre, and it is filed to cover any loss that may arise from the sale of the Theatre, in case it should not pay the debt, and in case it should not be deemed to be extinguished by the purchase of the Theatre by J. B. Campbell. In addition to the above debts, there is also one of \$6,500 due to the Bank

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of the *State, on the Fire Loan, which is secured by a mortgage of the Theatre, on which there is a considerable arrear of interest due.

These two last mentioned debts make up an aggregate, without the interest, of about \$26,000 and if they are both chargeable on the theatre, the building if sold would not perhaps pay more than \$16,000 of the mortgage debt, leaving a deficiency of \$10,000, besides interest, to be made up by the stockholders of the company; and this supposed deficiency added to the actual amount of debts proved before me, will constitute an indebtedness of twenty-two thousand six hundred and thirty-two 36-100 dollars due by the Charleston Theatre Company. In

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my opinion, all the debts set forth in the above detail are properly due by the incorporated company, and ought to be paid by the incorporation, while the debt due to the executors of Haslett was incurred for building the theatre before the charter was granted or accepted by the association,—and for the payment of which debt the individual members have always remained and still continue liable.—Whether the members of the association are not liable for all the debts of the theatre as partners, inasmuch as they have never given any notice to their creditors or the public, either of the dissolution of the partnership or their acceptance of the charter, is a grave difficulty, which prevents me from giving a more decided classification of these debts.

As to the property with which these debts are to be paid, there is none belonging to the company, for the fee simple of the theatre has been sold under an execution against the company; and although it was chartered with a present capital of sixty thousand dollars, at the time of the acceptance of the charter, the stockholders have only paid towards the capital of the company the sum of thirty-seven thousand five hundred and fifteen dollars, leaving a deficiency of twenty-two thousand four hundred and eighty-five dollars; in case the Court should be of opinion that in favor of creditors the company is under a legal obligation to make up the whole amount of their capital. Mr. Campbell, the solicitor for most of the creditors of the theatre, in filing his claim before me urged the suggestion, that the assets of the company, that is their capital not yet paid in, is chargeable with interest from the date of the acceptance of their charter in favor of creditors, in case the capital should prove insufficient to pay the debts, and this point I respectfully refer to the Court, at his request.

I have every reason to believe, and so report, that the defendants in this cause con-

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stitute all the solvent members, both of the association and the incorporated company, and I find that by dividing the debts equally among them, an assessment of five hundred and fifty dollars on each of them would make up a sum sufficient to pay all the debts of the concern, supposing that the theatre will pay fifteen thousand dollars of these debts. If the theatre should fail to pay this amount an increased assessment would be necessary. All which is respectfully submitted.

Edward R. Laurens,
Master in Equity.

February 13th, 1845.

On the appeal, the following decree was pronounced by the Court of Appeals:

Dunkin, Ch. This Court concur entirely with the Chancellor, that the associates, or

persons who subscribed the articles of the 10 March, 1835, are liable, jointly and severally, for all the debts incurred for the purpose of the association before the Act of incorporation. In the case of *Walburn v. Ingilby*, (referred to in the decree,) "whosoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility which that holds out, must have himself to blame, and be the victim of his ignorance of the law of the land."

The Court concurs, too, on the other points ruled by the decree, except as to the liability of the applicants as corporators under the charter of December, 1837, on which the opinion of the Court is reserved.

It is ordered and decreed, that the decretal order of the Circuit Court be enlarged, and that, in taking an account of the debts of the theatre, the Master distinguish, as far as practicable, between those contracted by the association and those contracted by the corporate body. And that he also take an account of the sums paid in by the several subscribers to the association, as well as by the several corporators; and also, an account of the administration of the funds by the trustees appointed under the articles of the association. The question of costs being also reserved until the final hearing.

Under this appeal decree, the Master reported as follows:

State of South Carolina, Charleston District.
In Chancery.

To the Honorable the Chancellors of the said State:

Pursuant to the order of the Appeal Court in this cause, made on the 31 March, 1845, directing that the decretal order of the Circuit Court be enlarged, and that in taking an account of the debts of the theatre, the Master distinguish, as far as practicable, be-

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tween those contracted by the association, and those contracted by the corporate body; and that he also take an account of the sums paid in by the several subscribers to the association, as well as by the corporators; and also, an account of the administration of the funds by the trustees appointed under the articles of association: I respectfully report, that the original subscription for building the theatre, is dated 10th of March, 1835, and the names which are subscribed to it, were signed at various times, and that some persons who became members by paying their money signed no memorandum at all. No question is raised by any parties thus situated. That the Act for incorporating the theatre was passed on the 20th day of December, 1837, and was accepted, at a meeting called by the trustees, on the 28th February, 1838.

The following lists, Nos. 1 and 2, will shew what debts were contracted before the

28th February, 1838, and those which were contracted afterwards.

List No. 1.

No. 1.—Haslett. Sutton & Fogartie had a contract dated 1st March 1837, for mason work, in building the Theatre, for 14,500 dollars; extra work between 1st April, 1837, and 15th December, 1837, 1,500 dollars. On the 3d January, 1838, they drew on Logan, Treasurer, in favor of R. E. Sutton, for 2,000 dollars. This was credited as cash on their contract; endorsed to Haslett. E. Curtis & Co. had a contract dated 1st March, 1837, for the Carpenters' work, in building the Theatre, for 13,500 dollars; extra work in the course of the year 1837, 2,317 dollars. On the 15th December, 1837, Curtis drew on Logan, Treasurer, in favor of Lance, for 1,500 dollars, accepted and credited as cash on their contract; endorsed to Haslett. The above draft for 2,000 dollars was renewed 5th February, 1838, and renewed again on the 10th March, 1838. The draft for fifteen hundred dollars was renewed, payable 1st March, 1838. On the 1st February, 1840, Haslett obtained judgments on these drafts against the incorporated company. On the 21st February, 1840, there was paid on account, 1,500 dollars, leaving a balance due of \$2,623.40, on which there have been subsequently payments of 300 dollars, made on the 25th February, 1841, and of 40 dollars made on the 5th March, 1841, and of 40 dollars made on the 6th March, 1841, leaving a balance due on the 6th March, 1841, of \$2,432.94.

No. 2.—W. J. Bennett. Bill for lumber furnished Theatre to 28th February 1838, \$431.38; bill for lumber furnished since the 28th February, 1838, \$116.52. On these two

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*demands, making a sum of \$547.90, Mr. Bennett obtained a judgment, 29th January, 1842, against the incorporated company, for \$723.45, with interest on \$547.90 till paid.

No. 3.—Hayden. Fabin & Allen, Painters, had a demand against the Theatre Company for work and labor, previous to January 1838. On the 29th January, 1838, they drew on Logan, Treasurer, for 228 dollars in favor of Hayden, which was accepted, and credited as cash in their account. 6th March, 1838, there was paid on account 100 dollars; and on the 4th December, 1839, 100 dollars on account, leaving a balance due on the 4th December, 1839, of 44 dollars. Hayden, on the 8th January, 1842, obtained a judgment for balance on this draft for \$50.75, and \$8 costs.

No. 4.—Birnie & Ogilvie. Goods sold and delivered to the Theatre Company, between 11th September, 1837, and 8th February, 1838, \$552.86. On the 4th December, 1839, there was paid on account \$250, leaving a balance of \$302.86 due. Judgment was obtained against the incorporated Company,

4th June, 1844, on this debt, for \$385.84, and \$25.62, costs.

No. 5.—Moffett & Calder. Goods sold and delivered to the Theatre Company, between November, 1837, and 28th February, 1838, \$902.81; goods sold and delivered after the 28th February, 1838, \$543.10. Payments made by the company after the 28th February, 1838, \$610; and applying the payments made by the incorporated company to the debts contracted by them after the acceptance of the charter, leaves a balance of \$835.91 due on the debt contracted before the 28th February, 1838. On the 4th of June, 1834, Moffett & Calder obtained a verdict against the incorporated company for \$942.75, and \$25.62 costs.

No. 6.—Cornelius & Co. Goods sold and delivered to the Theatre Company 18th November, 1837, \$1,072. Payment by the company 28th August, 1838, \$1,000, which leaves a balance of \$72 due on this debt. On the 1st December, 1838, goods sold and delivered to the Company, \$812.87; payment by the company on the 20th January, 1840, \$300, leaving a balance due on this debt of \$512.87. Cornelius & Co. on the 29th January, 1842, obtained a verdict against the incorporated company for \$752.79, with interest on that sum from 1st June, 1841, till payment, and \$24.25, costs of suit, for which judgment was entered up for \$811.87, with interest on \$752.79, till paid.

No. 7.—Elias Thomas. 22d November, 1837, goods sold and delivered, \$269.75. On the 23d August, 1838, Logan as Treasurer, gave a note for the above amount, with in-

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terest from 21st December, 1837. December 4th, 1839, paid on account \$125, leaving a balance unpaid on the 4th December, 1839, of \$181.55.

No. 8.—J. C. Levy. Fogartie & Sutton had a contract, (see No. 1.) On the 7th March, 1838, they drew on Logan, Treasurer, in favor of Levy, for \$182, accepted and credited as cash on their account. 5th December, 1839, paid on account \$100, leaving a balance unpaid on the 5th December, 1839, of \$104.21.

No. 9.—Bank of the State. 24th March, 1837, Mortgage to the Bank, of the Theatre, to pay all notes of Robert Wotherspoon, James Rose, Henry Gourdin, Richard W. Cogdell, and William A. Carson, in favor of George W. Logan, Secretary and Treasurer, and by him endorsed, and discounted by the Bank. 13th November, 1837, the notes drawn, endorsed and discounted as above, all consolidated in one of \$18,000, reduced by subsequent payments to \$15,000, for which a renewal note was given, dated 29th June, 1840, and payable 28th September, 1840. On this debt judgment was obtained by the Bank, on the 23d of November, 1844, for \$19,366.84, and \$47 costs of suit.

No. 10.—Joseph Lawton. Goods sold and

delivered to the Theatre Company, 21st November, 1837, \$247.55; 5th December, 1839, payment on account, \$147.50, leaving a balance due of \$100.05.

No. 11.—South Western Rail-Road Bank. 21st February, 1840, \$2,000; Fogartie & Sutton had a contract (see No. 1) dated 1st March, 1837. Fogartie & Sutton having no credit, the company bought, 14th September, 1837, bricks to the amount of \$1,077.20, from Gordon, and credited as cash in Fogartie & Sutton's accounts. This bill not being paid, Gordon sued and obtained judgment. With the proceeds of the above \$2,000 note, Logan, Treasurer, paid on account of Gordon's judgment, \$500 on the 21st February, 1840, and on the same day he paid \$1,500 on account of Haslett's judgment, (see No. 1.) Subsequent payments reduced the note on the 30th April, 1841, to \$915.

No. 12.—Fire Loan. 19th November, 1839, \$6,500. W. & R. Walker contracted with the company for stone, flagging, &c. Work completed 22d February, 1838; amount of their bill \$1,524.25. On 11th April, 1838, Wother-spoon, chairman of trustees, gave a note for \$1,524.25, for the above bill—note never paid. The note was sued to judgment, and the judgment paid out of the Fire Loan, being antecedent to mortgage. The residue went to reduce note No. 9, with the exception of \$100, paid for a new drop-scene for the theatre.

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*List No. 2.

No. 1.—Davids & Harrison. November, 1841, for goods sold and delivered, \$10.71.

No. 2.—McCartney & Gordon. December, 1838, for goods sold and delivered, \$8.75.

No. 3.—Paul Jones. November, 1840, work and labor for the theatre, \$125.

No. 4.—John S. Jones. November, 1840, for goods sold and delivered, \$111.05.

No. 5.—Jefferson Bennett. May, 1838, goods sold and delivered, \$116.52.

No. 6.—Cornelius & Co. 1st December, 1838, goods sold and delivered, \$512.87. (See No. 6. List No. 1.) 9th Nov. 1839, goods sold and delivered, \$160.95.

No. 7.—Bank of the State. Amount paid for insurance on the theatre, \$500 on the 1st February, 1841; \$500 on the 3d February, 1842; \$500 on the 4th February, 1843, and \$500 on the 5th March, 1844—\$2,000.

No. 8.—H. Gourdin. Promissory note, \$1-100, with interest thereon from 27th January, 1841.

Recapitulation.

List No. 1.

No. 1. Haslett	\$2,432 94
with interest thereon from 6th March, 1841.	
No. 2. Bennett	431 38
No. 3. Hayden	44 00
with interest thereon from 4th Dec. 1839.	
No. 4. Birnies & Ogilvie	302 86
No. 5. Moffett & Calder	835 91

No. 6. Cornelius & Co.....	72 00
No. 7. Thomas	181 55
with interest thereon from 4th Dec. 1839.	
No. 8. Levy	104 21
with interest thereon from 5th Dec. 1839.	
No. 9. Bank of the State.....	1,500 00
with interest thereon from 28th Sept. 1840.	
No. 10. Lawton	100 05
No. 11. Rail Road Bank.....	925 00
with interest thereon from 30th April, 1841.	
No. 12. Fire Loan.....	6,500 00
with interest thereon from 19th Nov. 1839.	

List No. 2.

No. 1. Davids & Harrison.....	10 71
No. 2. McCartney & Gordon.....	8 75
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*No. 3. Paul Jones.....	125 00
No. 4. John S. Jones.....	111 05
No. 5. Bennett	116 52
No. 6. Cornelius & Co.....	673 83
No. 7. Bank of the State—Insurance	2,000 00
No. 8. H. Gourdin—Promissory note..	1,100 00
with interest thereon from 27th Jan. 1841.	

The order of the Appeal Court, enlarging the decretal order below, having directed me to distinguish between the debts contracted before the acceptance of the Act of incorporation and those contracted afterwards, I have thus gone into a minute history of them, and in reporting the above debts in List No. 1, as contracted before the acceptance of the charter, I have discarded such items as costs, interest on open accounts, &c. which have been added to them, and charged against the incorporated company, in the judgments obtained against them on some of these debts. In my opinion these items are not debts contracted before the acceptance of the charter, nor the legal consequence of such debts, as against the original subscribers for building the theatre. Heretofore the attention of the Master was not directed to the discrimination of the debts of the theatre, which has been made above, pursuant to the order of the Appeal Court. And under the order of reference, dated 8th of July, 1844, the same demands were proved as debts against the incorporated company, and some of them as judgment debts, because judgments had been obtained on them against the company, while the point itself, as to when the debts were contracted, whether before or after the acceptance of the charter, was unnoticed in the former proceedings, and never raised until made by the decree of the Court of Appeals.

The account herewith filed, marked A, is an account of the administration of the funds by the trustees appointed under the articles of association, by which it appears that on the day of the acceptance of the charter the association was very greatly indebted for building the theatre. It will be seen from this statement, that the whole of the capital was not paid in at the time the

charter was accepted. In fact a large portion of it was paid in afterwards by the subscribers; but there never was but one list of subscribers. After the incorporation no additional subscription was opened. Those who had not paid before, paid then, but they paid as original subscribers for building a theatre, and some of the subscribers made further payments, corresponding with additional shares, and of these additional pay-

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ments some were made *before and some after the acceptance of the charter. There is no one among the corporators who was not a subscriber to the original articles of association.

In relation to the debt originally due the Bank of the State of South Carolina, Mr. Furman, the cashier of the Bank, proves that since the present suit has been commenced, the Bank has, for a full consideration, assigned their judgment to Martin, Starr & Walter; and that the Bank has now no claim or interest in the judgment.

Respectfully submitted,

Edward R. Laurens,

Master in Equity.

July 8th, 1845.

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*B.

Charles M. Furman, Esq., Sworn. There is nothing now due to the Bank of the State in the matter of the statement submitted, signed by him, and dated 16th June, 1845, by the master. The Bank assigned their judgment over to Martin, Starr & Walter; does not know whether Martin, Starr & Walter have been paid or not. Neither the corporation, nor the voluntary association, now owe the Bank any thing except the fire loan and insurance. The only obligations the Bank ever held in this matter, are the fire loan bond and mortgage, and the notes of Wotherspoon, Gourdin, Rose, Cogdell and Carson, signed as in the note produced and now in evidence. The consideration paid by Martin, Starr & Walter, was the full amount of the debt, principal, interest and costs.

By Mr. Petigru. The assignment to Martin, Starr & Walter, was the 23d November, 1844.

In the matter of the Fire Loan.—Under the provisions of the Act for re-building the city, a loan of six thousand five hundred dollars was made to the Charleston New Theatre Company. The Board agreed, that out of this

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*A.

Dr.	The Subscribers to the Theatre in account with the Treasurer.	Cr.
1835.		1835.
Oct. 15.	To this amount disbursed by Mr. Chas. Warley, Treasurer, to date \$15,568.75	Oct. 15. By this amount received by Mr. Charles Warley, Treasurer, to date \$15,568.75
1837.		1837.
Mar. 14.	To this amount disbursed by Mr. William Ravenel, Treasurer, to date 5,051.72	Feb. 22. By this amount received by Mr. W. Ravenel, Treasurer, to date 5,051.72
1838.		1838.
Feb. 28.	To this amount disbursed by Mr. G. W. Logan, Treasurer to date 47,771.51	Feb. 28. By this amount received by Mr. George W. Logan, Treasurer, to date 47,276.45
" "	To this balance of cash in the hands of George W. Logan, at date 504.94	
	\$68,896.92	\$68,896.92
1838.		1838.
Feb. 28.	To this amount disbursed, on account of Theatre, from July, 1835, to date..... \$68,391.98	Feb. 28. By this amount of cash capital, received from subscribers, from July, 1835, to date..... \$26,278.10
" "	To this amount of cash in the hands of George W. Logan, at date 504.94	" " By this amount received for old buildings on Theatre site..... 601.72
	\$68,896.92	" " By this amount of money, borrowed by subscribers, from July 1835, to date..... 42,017.10
		\$68,896.92

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loan the amount of Walker's judgment was to be paid, and the balance applied on account of the former note of the trustees.— This was done. The payment on account of the old note reduced the debt to \$15,158; it was again renewed once, and reduced to \$15,000: was present when Walker was paid; saw the money applied to this payment himself. The fire loan mortgage is still held by the Bank.

Sworn to before me, 16th June, 1845.

Edward R. Laurens, Master in Equity.

ating the debts, so as to fix the liability of the subscribers to the voluntary association, and the members of the incorporated company, merely referred to the date of the contract; without inquiring when the contracts were consummated, and without inquiring whether the benefit of these contracts was for the voluntary subscribers, or the incorporated company.

2. Because, if the voluntary subscribers are to be charged with all the debts contracted before the acceptance of the charter, they

R. Wotherspoon, James Rose, H. Gourdin, R. W. Cogdell, and W. A. Carson.

1837.			1837.		
May 22.	To G. Logan, Sec. & Treas.	Aug. 22.	25.	\$ 6,000	These two notes taken up 15th Nov., from proceeds of \$18,000 note.
July 10.	"	Oct. 8.	11.	7,000	
			1838.		
Nov. 13.	"	Jan. 6.	9.	18,000.	Taken up 15th M'ch in part by proceeds of \$17,000 note.
			1838.		
Mar. 12.	"	May 5.	8.	17,000.	Taken up 21st Feb. 1840, in part by Fire Loan, in part by proceeds of \$15,158 note.
			1840.		
Feb. 17.	"	May 19.	22.	15,158.	Taken up July 1, in part from proceeds of \$15,000 note.
June 29.	"	Sept. 25—23.		15,000.	The note sued on.
I certify the above statement to be correct.				C. M. Furman, Cashier.	
16th June, 1845.					

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*W. P. Bennett, Birnies & Ogilvie, Moffett & Calder, Cornelius & Co. judgment creditors of the incorporated Charleston New Theatre Company, excepted to the second report of the Master, filed 8th, July, 1845, as follows:

1. Because, having proved their claims, in conformity with the decree, and having judgments at law against said corporation; and the Master, upon proofs before him, having, on the 13th day of February, 1845, reported the correct amount of said claims, and no exception having been taken to said report, but all parties having, in fact, assented to the same, the Master was not at liberty, without proof or pretension of error, and without authority, to set aside his report on file.

2. Because the Appeal Decree only directs the Master to distinguish between the debts of the corporation, and the debts of the association, and the claims of these creditors are debts of the corporation, and the Master should have so reported, without making statements, which, so far as he has reported, there is no evidence to sustain or authorize.

3. Because, having judgments at law regularly obtained, it would be at least unusual for a Master in this Court to set them aside, without any evidence or reason, (so far as his report exhibits) save his own volition.

4. Because, so far as these parties are concerned or affected, the report is unauthorized by the decree of the Appeal Court, and irregular and improper.

Jas. B. Campbell, Solicitor.

Ker Boyce and T. Street excepted to the report of Mr. Laurens, one of the Masters, in this case, on the following grounds:

1. Because the said report has, in enumer-

are well entitled to be credited with the value of the contracts, as afterwards adopted and enjoyed by the members of the incorporated company. And that this matter, as well as that set forth in the first exception, are properly to be inquired into, in a case where the creditors are not to charge the voluntary subscribers or the incorporated company, but have, by the permission of the incorporated company, established their claims against

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that company, and a portion *of the members of the incorporated company are seeking to charge the voluntary subscribers.

3. Because, although the incorporated company received all the property of the voluntary subscribers, and enjoyed the same, no account is furnished, and the payments made after the incorporation, are credited on the debts of the incorporated company. It is submitted that, in a case where neither the debtor nor the creditor specifically appropriates the money, it must be applied to the debt which has been due longest. And the Master has no right to elect, as to the debts to which the payment shall be applied.

4. Because a note accepted as payment (Lévy's) is the debt claimed. And if the creditor chooses to receive such note, as cash, in payment of an open account, the parties bound by such account are discharged. And the party who receives the note has no claim resting upon the original cause of action.

5. Because the master has proved \$15,000 due to the Bank of the State, upon the testimony of Mr. Furman, who testifies that, on the debt, nothing is due to the Bank. That the debt has been assigned; that he does not know whether the assignees have

been paid. And the parties to whom the debt was assigned, have given no proof of the debt.

6. Because, inasmuch as the members of the incorporated company received and took possession of all the property of the voluntary subscribers, without any consideration passing from the members of the incorporated company, it will be presumed, at least, that the company took the property subject to all claims. And where that fact is established by the admission of the company, in assuming to pay, and in all cases of default, in allowing judgment to be entered up against the company, there is no claim against the voluntary subscribers, either by the creditors, or by the members of the incorporated company. And 1st. The creditors have no claim, because the notes, drafts and judgments which they hold, are against the incorporated company, and discharge the voluntary subscribers. And 2dly. The members of the company have no claim, inasmuch as they assumed the management of the whole business, took the property and held it as their own, gave their own notes and bills in payment of the debts, and enjoyed the use and profit, if any of all the property for which such debts were contracted.

8. Because the report is unsatisfactory and inconclusive on these and other points.

A. G. & E. Magrath,
Solicitors.

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*The defendants, L. A. Pitray, and Thomas J. Roger, concurred in and prayed the benefit of the above exceptions of Ker Boyce and T. Street, and they further excepted to the report, on the following grounds.

1. That these defendants never having become members of the corporation, and the trustees or directors of the corporation having, by the order of the corporation, taken possession of all the property and assets of the company, and appropriated them to the use of the corporation, the said property and assets being amply sufficient to pay all the debts contracted by the company before the incorporation, the Master should have reported that the corporation, or the trustees and directors thereof, were, at least, primarily liable before the members of the company, not members of the corporation, can be called upon.

2. That in contracting debts exceeding the amount of subscriptions paid in, if such were the fact, the trustees exceeded their authority and violated their duty, and are, at least, primarily liable, and the Master ought so to have reported.

3. That if these defendants are liable at all, it is as simple contract debtors, and they are protected by the Statute of Limitations; and they are entitled to set up this defence without claiming the benefit of the Statute by their answer, inasmuch as the debts are not stated in the bill, with but one exception,

and that is set forth as a debt of the corporation, and these defendants are claimed to be liable, not as members of the company, but of the corporation.

4. That these defendants are in no respect liable for any of the debts mentioned in the Master's schedule, and he ought so to have reported.

Bailey & Brewster,
Defendants' Solicitors.

Upon the report and exceptions, was made the following order and decree:

Johnson, Ch. The order of the Court of Appeals of the 31st. March, 1845, reserves the question as to the liability of the defendants, Boyce, Street, Pitray and Roger, as corporators, and have not sent that question down to be adjudicated here, but directed certain inquiries to be made by the Master, apparently with a view to enable that court to decide that question, although I do not readily perceive how the inquiries directed could aid in arriving at a conclusion. All that remains for this court to do is, to determine whether the Master has correctly discharged the duty assigned him. The order directs that he shall take an "account of

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the debts of the "Theatre," distinguishing, "as far as practicable, between those contracted by the association, and those contracted by the corporate body." The amount of the several sums paid by the association and corporation, and an account of the administration of the funds by the trustees of the association; reserving also the question of costs until the final hearing. The Master has filed two reports, one of the 13th February, and the other of the 8th of August, 1845, which are, in some respects, different in their results, and it is objected that he had no authority to make the second report; but I apprehend that he was at liberty to correct, at any time, before the judgment of the court is pronounced, any error of law or fact into which he had fallen, and I shall treat the last, without reference to the first, as the Report. That has given rise to numerous exceptions on the part of the defendants, Boyce, Street, Pitray and Roger, and some on the part of the creditors, which cover almost the whole ground of controversy between the parties. Some of them having no reference to the matters referred, the consideration of a few only, will dispose of all the rest.

The creditors except, on the ground that the report does not allow interest on demands bearing interest, and clearly that is erroneous. The question is not whether the association or corporation is to pay it, but whether the creditors are entitled to it from either the one or the other, and as far as the creditors are concerned, the report in that respect must be reformed.

Several of the demands against the association were on simple contracts, which have been assumed by the corporation, and some of them passed into judgment. In the report

these are charged as debts against the association, and Boyce, Street, Pitray and Roger except, on the ground that they are barred by the Statute of Limitations. The time limited by the Statute has run out since the debt was contracted, but the fact that the members of the association were partners, and that all of the partners, amounting to about fifty in number, except these four, admit that these debts are due, and profess their willingness to pay their proportion of them, seems to have been overlooked. It will not be questioned that the promise of any one of them would take the case out of the Statute.

The former decree of the Circuit Court decided, and in that respect it is affirmed by the Court of Appeals, that the corporation was primarily liable for the debts of the association, and that if the assets of the corporation were insufficient to pay all the debts

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due, the corporators were bound to *contribute rateably to increase the capital to \$60,000; and it is conceded, on all hands, that the property of the corporation and the funds so to be raised, will be more than sufficient to pay all the demands against both. The creditors, therefore, have no interest in the inquiry as to what debts were contracted by the association, and what by the corporation. The Court have, however, directed a reference to ascertain the fact, and the Master's report on this subject has given rise to various exceptions, which, from the view I have taken of the case, it is not necessary to refer to particularly. The only possible object of the reference must have been to ascertain in what amount Boyce, Street, Pitray and Roger were liable, in the event of their being held not to be corporators, and the property of the corporation, with the addition to the capital by the corporators. If they are not corporators or if they are, the inquiry would seem unnecessary, as, in the first instance, they are bound to contribute to the capital, and if not, there is no probability that they will ever be called on. It is due, however, to the order of the Appeal Court, that the amount should be correctly stated.

The defendants, Boyce, Street, Pitray and Roger, except to the report, on the grounds—

1st. That the association is charged with certain sums which the association owed, and for which the creditor accepted a draft on the treasurer of the corporation, and judgments obtained on the acceptances.

2d. That it is also charged with certain sums of money borrowed by the corporation, to pay the debts of the association.

The first exception is disposed of by the former Circuit Court decree. There is no evidence that these creditors agreed to accept the promise of the corporation in satisfaction of their demands; on the contrary, all the defendants, concede their liability,

except these four. In the event of the funds of the corporation and the increased capital being insufficient to pay the debts, and Boyce, Street, Pitray and Roger being held not to be liable as corporators, they must only be liable to contribute rateably towards the payment of the debts due by the association; and although the terms of the order would seem to indicate the necessity of taking an account of all the debts contracted by the association, it is only important to ascertain what portion of them still remain due.

It is therefore ordered and decreed, That the Master do so remodel his report as to show what is the amount of the debts of the association now remaining unpaid, computing

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*interest on the judgments and other interest-bearing contracts, without regard to any act or agency of the corporation, up to the date of the report, and that he also re-state the accounts of the creditors, computing interest on the interest-bearing demands, either on the association or corporation, up also to the date of the report, showing how much of the debts of the association, and how much of the corporation, remains unpaid.

March 31, 1846.

The Master then thus remodeled his report:

"State of South Carolina. Charleston District. In Equity.

To the Honorable the Chancellors of the said State:

The decree in this case, filed 31st March, 1846, directs me to state "the debts of the association now remaining unpaid, computing interest on the judgments, and other interest-bearing contracts, without regard to any act or agency of the corporation, up to the date of the report." In exhibit A, herewith tiled, I submit this statement.

I am further to "re-state the accounts of the creditors, computing interest on the interest-bearing demands, whether on the association or corporation, up to the date of the report."

In exhibit B, I submit this statement of the debts of the corporation.

I am also to shew "how much of the debts of the association, and how much of the corporation, remains unpaid."—On reference to the exhibits A and B it will be seen that, with interest to date on the interest-bearing demands,

The debts remaining unpaid of the association are	\$37,691 13
The debts remaining unpaid of the corporation are	5,322 10
	\$43,013 23

Respectfully submitted,
Edward R. Laurens,
Master in Equity.

30th June, 1846.

Exhibit A.—Debts of the Association.

Executors of John Haslett.....	\$ 2,432 94	
Int. from 6th March 1841, to 1st July 1846.....	905 70	3,338 64
W. J. Bennett.....	431 38	
Int. from 29th Jan. 1842, to 1st July 1846.....	133 52	564 90
N. Hayden.....	44 00	
Int. from 4th Dec. 1839, to 1st July 1846.....	20 25	60 25
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*Birnies & Ogilvie.....	302 86	
Int. from 4th June 1844, to 1st July 1846.....	43 95	346 81
Moffett & Calder.....	835 91	
Int. from 4th June 1844, to 1st July 1846.....	117 03	952 94
Cornelius & Co.....	72 00	
Int. from 29th Jan. 1842, to 1st July 1846.....	22 29	94 29
E. Thomas.....	181 55	
Int. from 4th Dec. 1839, to 1st July 1846.....	83 30	261 85
J. C. Levy, Executor.....	104 21	
Int. from 5th Dec. 1839, to 1st July 1846.....	47 93	152 14
Bank of the State.....	15,000 00	
Int. from 28th Sept. 1840, to 1st July 1846.....	6,046 13	21,046 13
J. Lawton.....	100 05	100 05
Rail-Road Bank.....	925 00	
Int. from 30th April 1841, to 1st July 1846.....	334 75	1,259 75
Fire Loan.....	6,500 00	
Int. from 19th Nov. 1839, to 1st July 1846.....	3,010 38	9,510 38
	\$37,691 13	
	=====	

Exhibit B.—Debts of the Corporation.

Davids & Harrison.....	\$ 10 71	
McCartney & Gordon.....	8 75	
Paul Jones.....	125 00	
John S. Jones.....	111 05	
W. J. Bennett.....	116 52	
Cornelius & Co.....	673 82	
Bank of the State, Insurance.....	2,000 00	
Int. from 1st Feb. 1841, to 1st July 1846.....	758 34	2,758 33
H. Gourdin.....	1,100 00	
Int. from 27th Jan. 1841, to 1st July 1846.....	417 92	1,517 92
	\$5,322 10	

Exceptions to the Report of Mr. Laurens, dated June 30, 1846.

1. That interest is allowed on W. J. Bennett's debt.

2. That interest is allowed on Birnies & Ogilvie's debt.

3. That interest is allowed on Moffett & Calder's debt.

4. That interest is allowed on Cornelius & Co's debt.

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*The same being unliquidated demands

against the share holders in the Charleston New Theatre. Petigru & Lesesne.

July 2d, 1846.

The defendants appealed from the decree of Chancellor David Johnson, and relied on the following grounds of defence against the operation of the same:

1. That there is in said decree mistake in point of fact, in assuming that Mr. Laurens, after making a Report, changed it without authority. Also, in assuming that he disallowed interest on demands bearing interest; and also, in assuming that the amount of the subsisting debts of the Charleston New Theatre, and the amount of the assets of the company, and the sums received and paid away by the Trustees of the Company, are not ascertained by the Report.

2. That the decree sends back the Report to ascertain and set forth matters already ascertained and set forth.

3. That the only questions involved in this case are, 1. Whether the members of the Charleston New Theatre Company are liable as partners. 2. Whether the acceptance of the charter was a dissolution of the partnership. 3. Whether a member, by absenting himself from the charter meetings, is thereby discharged, either positively or sub modo, from his liability to creditors, or to his associates. 4. Whether the circumstances, as disclosed by the evidence taken in this case, are sufficient to bring Boyce, Street and Roger within the operation of any rule, by which they can be released, either absolutely or sub modo, from their liability as members of the Charleston New Theatre. 5. What are the respective rights of the members who consent, and those who refuse to pay the debts of the Company. But for the proper decision and solution of these questions, the report of Mr. Laurens furnishes all the information that is needed, or can by any possibility be useful, and the Court should have proceeded to decree, that the members are liable as partners to creditors, and to one another. That there was no dissolution of the partnership, and that the recusant members are liable as well as the others to creditors; and that there is no ground to infer that any of the members have agreed or incurred any obligation to purchase the assets of the company at \$60,000, or any other sum, or to buy the shares of recusant members, or to exonerate them from any liability, either in the way of debt or contribution.

4. That the decree makes the members of the company in this proceeding against them individually, bound by the judgments obtained by Bennett, Birnies, Calder, and Cornelius,

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*against the corporate body, and liable to pay the interest recovered in those actions, on demands not bearing interest.

Petigru & Lesesne,
Plaintiffs' Solicitors.

The defendants, Lewis A. Pitray and Thomas J. Roger, likewise appealed from his Honor's decree, and moved that the same might be modified, for the reasons and in the particulars following, to wit:

1. That the inquiry directed by the Court of Appeals, so far as the same relates to the debts of the Theatre Company, is limited to existing, unsatisfied, debts, which are to be discriminated into such as were contracted before, and such as were contracted after, the acceptance of the charter by a portion of the original association.

2. That this inquiry should have been made by the Master with reference to the rules of law applicable to the questions manifestly reserved by the Court of Appeals in directing the inquiry; for which reason he ought to have discriminated between the supposed liability of such of the members of the original association as did not become members of the corporation, first as to creditors for the debts, and second as to the stockholders of the corporation, or the trustees, for contribution.

3. That the Master, in reporting the several debts enumerated in List No. 1, annexed to his report, as debts contracted before the acceptance of the charter, has violated the spirit and letter of the order of reference, by not distinguishing between the liability to creditors, and a supposed liability for contribution; it being respectfully submitted that not one of the debts mentioned in the said list is an existing, unsatisfied debt of the original association, for which these defendants, as members of that association, and not of the corporation, are liable; inasmuch as all the said debts have been merged in judgments against the corporation, extinguished by the substitution of other securities, or barred by lapse of time, and the Statute of Limitations: nor can these defendants by any proceeding be made liable to such creditors.

4. That the Master has manifestly erred in including the said debts in List No. 1, as debts of the original association, on the ground of a supposed liability of the members of the association to the corporation, or the trustees, for contribution; which, it is respectfully submitted, is not in conformity to either the spirit or letter of the order of reference: but it is also respectfully submitted, that if the liability to contribution were a sufficient ground for inserting the said debts in List No. 1, yet these defendants are

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not liable to the stockholders *of the corporation, or the trustees, for contribution for the said debts, for the following reasons: 1. That there is no existing common liability which entitles the stockholders, or the trustees, to contribution. 2. That by accepting the charter, and disposing of the property of the association without the consent of these defendants, the stockholders and trustees

have assumed the debts of the association, and released all equity to contribution. 3. That the debts for which contribution is claimed, were contracted without authority, and in violation of the express conditions of the original agreement. 4. That the trustees and corporation have, in fact, received funds, which were applicable, in the first place, to the payment of the debts of the association, more than sufficient to pay all the debts due, or contracted for, by the association, at the time of the acceptance of the charter or incorporation.

5. That for these reasons, his Honor the Chancellor ought to have sustained the exceptions of these defendants, and ordered the Master's report to be reformed, by transferring the debts enumerated in List No. 1, to List No. 2, as debts contracted after the acceptance of the charter, and reporting that there are no existing unsatisfied debts of the original association, contracted before the acceptance of the charter of incorporation; and that he should have ordered the report so reformed to have been sent up to the Court of Appeals, for the final adjudication of the cause by that Court.

Wherefore, it is respectfully moved, that his Honor's decree may be now so modified; and that such decree may be made in the cause, as if the Master's report had been so amended.

Bailey & Brewster,
Defendants' Solicitors.

Per Curiam. HARPER, Ch. The question reserved by the former decree of this Court is whether the defendants, Boyce, Pitray, Roger, Street and Boineist, are liable as members of the corporation, under the charter of 1837. We think it must be inferred from the decision in the case of the Steam Packet Company v. McGrath, McMul. Eq. 93, that they are not so liable. In that case it did not appear that the defendants had, in any manner, signified their refusal to accept the charter, yet they were held not to be corporators. It seems that there must be some act or expression to signify their acceptance of the charter, in order to charge them in the character of corporators.

The confusion and embarrassment which have appeared in the case have arisen from not discriminating between the effects of the decrees in the cause, as applied to the corporation and its members, as individuals, or

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as against the members *of the association, as partners. Let us examine what are the matters settled by these decrees. First: by the first Circuit decree, affirmed in this respect by that of the Court of Appeals, the corporation is declared primarily liable for all the debts of the association, though contracted previously to the grant of the charter. It is liable for its own proper debts and those of the partnership.

Then it is settled that if there shall not

be found sufficient assets to satisfy creditors, the individual corporators are declared to be individually liable to make good the deficiency, to the extent of sixty thousand dollars, deducting the capital, (about thirty-seven thousand dollars,) which has been actually paid in. I need hardly say that property possessed by the corporation, for which it was in debt, is not to be reckoned or regarded as part of the capital, either at an estimated value or according to its cost. Such is not the common understanding, and such was not the meaning of the decree.—Though the word may have been variously used, yet a man's capital properly means the property which he has clear of debt. A man with much property in his hands, but indebted to a still greater extent, would scarcely be called a man of large capital. As the market value of buildings is seldom equal to their cost, the capital was rather diminished than increased by the outlay in building and the debts contracted for that purpose.

Then there is no question of the liability of the corporation and corporators, for the interest on simple contract debts, which was recovered at law, or the costs of the suits at law. This hardly needs illustration. If the interest was not properly recoverable at law, the corporation was bound to defend itself at law, and the judgments of the Court of law are binding upon us. If the corporation had property out of which they could be made, the costs would be collected of course, and the corporators are liable, as the corporation would have been.

The Court does not think it necessary, at the present stage of the proceedings, to institute any inquiry as to the liability of the members of the association, in the character of partners. It seems to be taken for granted by the parties and the last Circuit decree, that the contributions of the individual corporators, to make up their capital, will be more than sufficient to satisfy all the debts; and indeed it seems evident enough that they will be so. The Court is unwilling to moot questions of doubtful character, as matters of speculation, when, practically, the determination of those questions may never become necessary. If, contrary to expectation,

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*the fund provided shall prove insufficient, the creditors will be at liberty to apply to the Court, to determine the liability of the partners, and for further relief against them. Then will come up the questions which have been principally argued on the present hearing—whether the acceptance of the drafts on the treasurer of the corporation, or the judgments obtained against it, operated an extinguishment of the debts as against the partnership; whether the partnership is liable for interest improperly recovered against

the corporation, by costs incurred by it; whether the Act of incorporation operated a dissolution of the partnership; and whether the partners may avail themselves of the lapse of time or the Statute of Limitations, &c.

It is not understood that there is any difference between the first report of the Master, Mr. Laurens, of the 13th February, 1845, and the second, of the 8th July, 1845, except that which is made by the calculation of interest and the inclusion of the costs at law, and the including of the mortgage debt in the latter report. The former report is applicable to the case, as we now consider it, as against the corporation and the individual corporators. The second is such as he supposes would be correct, if the account were against all the defendants as partners. The former report is, therefore, confirmed. The direction by the decree of this Court, of March, 1845, for a recommitment of the report, may have been supererogatory, as the case now stands. It was merely matter of inquiry, however, and concluded nothing.

A decree has been made, in another case, directing a sale of the mortgaged property, for the satisfaction of the amount due on the mortgages and the judgment against the trustees. It is not thought necessary now to give any direction as to the manner in which the deficiency shall be made up, in the event that the property, (perhaps aided by the amount of rents and profits, an account of which is directed in another case, if they shall be found applicable to the mortgage debts,) shall not sell for enough to satisfy these demands. The direction will be that the other debts reported be paid by the defendants who are corporators; the parties to be at liberty to apply for further direction in the event spoken of.

It is therefore ordered and decreed that the defendants who are members of the corporation, severally and equally pay and contribute so much money as may be necessary to satisfy the costs reported to be due by the said report of 13th February, 1845, and accruing interest, excluding the sum reported to be due on account of insurance paid by the Bank of the State, and interest thereon:

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as to which sum a further *application may be made after the sale of the mortgaged property: provided that the aggregate sum to be paid by the said defendants shall not, when added to the amount of capital actually paid in, exceed the amount of sixty thousand dollars. In the event of any of the said defendants proving insolvent, such deficiency to be made up by the equal contribution of the other said defendants. Costs of this suit, up to the present time, to be paid by the defendant corporators.

I Strob. Eq. 257

BANK OF THE STATE OF SOUTH CAROLINA v. ROSE, CAMPBELL, et al.
ROSE et al. v. THE BANK OF THE STATE OF SOUTH CAROLINA.

(Charleston. Jan. and Feb. Term, 1847.)

[*Equity* ⇨409.]

At the hearing of a report, the practice is, that the Court hear no evidence but what was before the Master, and reported by him as evidence upon which his report is founded.

[Ed. Note.—Cited in *Griffin v. Griffin*, 20 S. C. 491.]

For other cases, see *Equity*, Cent. Dig. § 920; Dec. Dig. ⇨409.]

[*Appeal and Error* ⇨266.]

Where an appeal is taken from the Master's judgment, or report, no matter in point is to be considered by the Court, which was not before the Master; and his report must stand in all particulars not excepted to.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1553; Dec. Dig. ⇨266.]

[*Principal and Surety* ⇨14; *Subrogation* ⇨31; *Witnesses* ⇨99.]

Where the Trustees of a company made a loan from the Bank, and mortgaged real estate of the company to secure its payment, and the Cashier of the Bank, by mistake, entered satisfaction on the record of the mortgage in the Register's office, under his own seal, and the Bank proceeded at law and recovered judgment against the Trustees; the Court held the Cashier to be a competent witness to explain the mistake, and that the Trustees, standing in the posture of sureties, were entitled to the enforcement of the mortgage in exoneration of their personal liabilities under the judgment.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 33; Dec. Dig. ⇨14; *Subrogation*, Cent. Dig. § 77; Dec. Dig. ⇨31; *Witnesses*, Cent. Dig. § 374; Dec. Dig. ⇨99.]

[*Corporations* ⇨455.]

The instrument to estop a corporation, must be the deed of the corporation under its own proper seal; and if the deed of a third person is insisted on, as against the corporation, then his authority and agency must be established by the party claiming adversely.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1801; Dec. Dig. ⇨455.]

[*Lis Pendens* ⇨24.]

Where the equities of a party have been stirred in a suit, no acts of the other parties will be allowed to his injury, during the time the Court has under consideration the merits of the case. They and their assignees, intervening under them pendente lite, will be bound by the decree.

[Ed. Note.—Cited in *Hutto v. Black*, 88 S. C. 6, 70 S. E. 420.]

For other cases, see *Lis Pendens*, Cent. Dig. § 42; Dec. Dig. ⇨24.]

[*Mortgages* ⇨306.]

Without proof of some understanding to the contrary, a note given to the Bank as a renewal is entitled to all the securities of the original note.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 890; Dec. Dig. ⇨306.]

[*Mortgages* ⇨600.]

The rule is, that when a mortgagor comes to redeem, he must pay, not only the mortgage debt, but all that is equitably due as incidental to that contract.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1753; Dec. Dig. ⇨600.]

Before Johnston, Ch., at Charleston, June, 1846.

The original bill in this case was filed for the purpose of obtaining foreclosure, in the reverse order of their date and record, of two alleged mortgages of the lot and premises in Meeting-street, known as the Charles-

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ton New Theatre; and *it appeared, among many other things, that, on the 10th day of July, 1835, the Grand Lodge of Ancient Free Masons of South Carolina, by deed poll duly executed, conveyed said lot and premises to Robert Wotherspoon, James Rose, Henry Gourdin, R. W. Cogdell, and William A. Carson, and the survivors and survivor of them, and the heirs of such survivor forever.

On the 24th day of May, 1837, Robert Wotherspoon, James Rose, Henry Gourdin, and R. W. Cogdell, four of the five parties above named, executed a deed, by way of mortgage, of the said lot and premises, to the Bank of the State of South Carolina, to secure payment of a promissory note, and the renewals thereof, for 6,000 dollars, discounted by the Bank for them two days previous, and also, all other notes of similar character, and the renewals thereof, that might thereafter be discounted for them by the Bank. William A. Carson did not join in the execution of this deed.

On the 16th day of September, 1839, all the aforesaid parties—namely, Wotherspoon, Rose, Gourdin, Cogdell and Carson, joined in a declaration by deed poll, setting forth that the 12,500 dollars consideration money paid by them to the Grand Lodge, had been advanced by the subscribers to the Charleston New Theatre Company; and that the deed of bargain and sale by the Grand Lodge to them, was made with intent and upon the trust and confidence that they, and the survivors and survivor of them, and the heirs of such survivor, should hold the said lot to and for the use of the aforesaid subscribers, until they should obtain a charter of incorporation, and be made thereby capable in law to take and receive a conveyance of said lot, and then and thereupon to convey the same to such body corporate in fee.

And the said subscribers having then become a body corporate, by the corporate name of "The Charleston New Theatre Company," and thereby become capable and competent in law to hold said lot and premises,—in consideration thereof, and of the trust aforesaid, and of the nominal consideration of five dollars, they, the said Trustees, in execution and performance of their trust, granted, bargained, sold and released the said lot and premises to said corporation, in fee simple, together with all and singular the rights, members, hereditaments and appurtenances to said premises belonging; and also, all their estate, interest, use, possession,

reversion and reversions, remainder and remainders, covenants, rights, benefits, property, claims and demands whatsoever, in law or equity, of, in and to the same and any and every part and parcel thereof. This deed does not mention or refer to the previous mortgage by a part of the grantors.

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*On the 19th day of November, 1839, the corporation executed to the Bank a mortgage of the premises to secure the payment of six thousand five hundred dollars, loaned to them under the provisions of the Act of Assembly known as the Fire Loan Law. The mortgage is in conformity with the provisions and regulations of said law.

On the 7th day of March, 1842, James B. Campbell became the purchaser of the premises at Sheriff's sale, under an execution of Fl. Fa. against the corporation, and received from A. H. Brown, Esq., Sheriff, a conveyance of the same and of all the estate, right, title and interest of the "Charleston New Theatre Company," in fee simple, under which he has held possession of the premises from that date. On the 18th day of November, 1843, the complainants in the first case filed their bill, and the cause was first heard on Circuit before Chancellor Johnston, March 1st, 1844.

The defendant, James B. Campbell, neither admitted or denied the existence of the mortgage deed of May 24th, 1837, in the manner and form as set forth in the bill; but for the terms of the same, referred to the original deed itself, when it should be produced for inspection. But he altogether denied that it was then, or had been since his purchase, a valid subsisting security, and claimed that, if it ever did exist it had been long since in law cancelled and annulled, and ought to be formally satisfied and discharged; and insisted that the debt claimed to be secured by the mortgage, was a new and subsequent debt, for which the mortgage never was a security. And he relied upon the law of the land, prescribing the only order and manner in which mortgages shall be paid, and upon the circumstances and transactions between the parties, to show that the prior mortgage of May 24th, 1837, ought to be deemed to have been satisfied at the time of the fire loan mortgage. And especially did he rely upon the judicial opinion of his Honor Chancellor Dunkin, delivered upon this question in 1843, at the instance of the Bank of the State, and never overruled—that "the necessity and propriety of the act" (satisfaction) "in order to have the" (fire) "loan effected, had been demonstrated." And, "that they" (the trustees) "were not at liberty to insist that the entry of satisfaction by the Bank worked any injury to their just rights."—([*Wotherspoon v. Bank*] 1 Speers' Eq. Reps., 494.)

On the first day of April, 1844, after the hearing, the cashier of the Bank entered

formal satisfaction of this mortgage upon the face of the record thereof. On the 23d day of November, 1844, the Bank recovered and entered judgment and execution in Common Pleas against *Wotherspoon, Rose, Gour-*

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*din, *Cogdell and Carson*, for their debt, and on that day assigned the judgment for full value to Martin, Starr & Walter.

On the same day, Messrs. *Wotherspoon, Rose, Carson, Gourdin and Cogdell* filed the cross bill in this cause, and afterwards appended to it an affidavit, "that the mortgage was not assigned, as stated, to Martin, Starr & Walter, but on the contrary, they expressly stipulated that the mortgage should not be assigned to them." The original mortgage had been delivered up to James B. Campbell, in whose possession it has ever since remained. On the 25th November, the Bank moved for leave to dismiss their bill on payment of costs. The motion was refused; and on the 29th day of November, his Honor Chancellor Johnston filed his circuit decree. On the 13th and 14th days of February, 1845, the cross bill was fully heard upon evidence and argument before his Honor Chancellor Dunkin, who, on the 27th day of May and 2d of June, 1845, made interlocutory orders, enjoining Martin, Starr & Walter from enforcing their execution—and on the 19th of January, 1846, filed a decree to the same effect. An appeal was taken from the circuit decree of Chancellor Johnston in the original cause, and heard on the 14th and 15th days of January, 1846.

Under the orders of reference made in the circuit and appeal decrees, the Master reported as follows:

To the Honorable the Chancellors of the said State:

This case has been referred to me under the decree of Chancellor Johnston, and that of the Court of Appeals, to ascertain and report the amount due on both mortgages referred to in the proceedings.

I respectfully report that the Bank of the State of South Carolina have established their claim under the fire loan, the particulars of which, including the premiums of insurance, with interest, will appear in schedule A, herewith filed, and I find that there is now due, of principal and interest, to the 19th inst., eleven thousand eight hundred and seventy-one dollars thirty-two one hundredths, (\$11,871.32.)

I further report, that the claim of Martin, Starr & Walter, as assignees of the judgment of the Bank of the State of South Carolina, against *R. Wotherspoon*, and the other trustees, has also been rendered to me duly attested, which claim, with interest to the 18th inst., amounts to twenty-one thousand and ninety-six dollars sixty-seven one hundredths, (\$21,096.67); the particulars of which will appear in schedule B, which is herewith filed. This amount, however, has been ob-

tained by computing interest on the whole

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judgment, including interest from the 23d November, 1844, when it should have been reckoned only on the principal of the debt, and I report the claim so corrected thus, viz:

Note due 26th Sept., 1840, \$15,000 00
Interest to 18 Feb., 1846, 5 years,

145d 5,667 12
Costs 47 00

Making the true amount, \$20,714 12

Twenty thousand seven hundred and fourteen dollars twelve cents.

I have taken the testimony of Mr. Furman, the Cashier of the Bank, and find that this note was the last renewal of that originally given by the trustees, secured by the mortgage of the 24th May, 1837; and there is appended to his testimony a statement showing how the several renewals of the note were paid.

The testimony of Mr. Furman will also explain how the mistake occurred in the entry of satisfaction, on the record of the mortgage, in the office of the Register of Mesne Conveyances for Charleston District, (which testimony was received, subject to Mr. Campbell's objection) showing clearly, that by an error of the Deputy Register, the book was opened at this mortgage, instead of quite a different one intended to be satisfied; that the satisfaction was written by the Deputy Register, and executed by Mr. Furman, without first reading the mortgage, to which it had reference.

I beg leave also to annex copies of the correspondence and of the resolutions of the Bank connected with it, as explanatory of the terms on which Martin, Starr & Walter became the purchasers of the judgment before mentioned. This judgment was obtained the 23d November, 1844, and the assignment to Martin, Starr & Walter was made the same day. There is no proof that the mortgage of the trustees was assigned to them with the judgment, and Mr. Campbell admits that the original mortgage is now in his possession. The following dates are deemed important to be noted:

That the case was heard March 1st, 1844.

The satisfaction entered on the record of the mortgage, April 1st, 1844.

The motion before Chancellor Johnston to dismiss the bill, November 25th, 1844.

And the decree of Chancellor Johnston, November 29th, 1844.

I further report that the insurance was to secure both mortgages, and that the first

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insurance was by the Augusta Insurance Company, on \$20,000; premium \$700. Respectfully reported.

(Signed) James W. Gray,
Master in Equity.

Filed 2d March, 1846.

Exceptions of James B. Campbell, one of the defendants in this case, to the report of the Master, filed 2d March, 1846.

1st. Because the payments by the Bank, for insurance premiums, were not made to secure the fire loan mortgage, (the valuation of the lot alone being twice the amount of that loan,) and were not authorized by the prior mortgage, but said premiums were advanced upon the personal credit of the makers of the note to the Bank, and not chargeable under either mortgage.

2d. Because there is nothing due on the mortgage of May 24th, 1837. The satisfaction deed of the Bank by the cashier being conclusive upon that point, and the parol evidence of Mr. Furman, to contradict and cancel the same, was inadmissible, and should have been rejected by the Master; and the witness himself was incompetent, by reason of interest.

3d. Because, by the order of reference, the matter for the Master to inquire into, was an account of the debt due; and it appeared that pending this suit and subsequent to the hearing upon which the decree was made, satisfaction had been duly entered of record, under seal, discharging the lien of the mortgage, so fully that a subsequent purchaser would not be affected by it, and the production of such satisfaction was the highest evidence that could be afforded of the discharge of the mortgage, and also of the matter of account referred to the Master. That the satisfaction was, to all parties claiming adversely, a release, enuring to their benefit, and estopping the Bank from further proceedings; and if the Bank can have relief it must be upon new proceedings, wherein the grounds upon which the satisfaction deed is to be set aside, must be set forth; and it being new matter, arising after the hearing and in no way brought out in the pleadings, the defendant has no means of availing himself of his answer to the same, to which he is entitled.

4th. Because relief against fraud, accident and mistake, is a distinct ground of equitable jurisdiction, and must be exercised, according to the established practice of this Court, upon allegations charged; and the defendant has a right to his answer and an issue thereon; and it is essential, upon every principle of correct pleading and practice, that it should not be exercised collaterally, in disregard of the rules of evidence, which are the same in equity as at law.

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*5th. Because if parol evidence were admissible for complainants, it was unsupported by circumstances, and altogether insufficient, in this case, to set aside the deed of satisfaction, particularly as the satisfaction was fully authorized by the circumstances and presumptions of the case.

6th. Because the note for \$15,158, of which the present note for \$15,000 is a renewal, was

a new note, and not a renewal of the old note for \$17,000, which was the last of the old notes secured by the mortgage; and said note for \$17,000 was paid in money, and not by renewal, and the mortgage never was security for this new note.

Copy note and receipt offered in evidence at the hearing before the Chancellor.

\$17,000. Charleston, March, 5, 1838.

Sixty-one days after date we promise to pay at the Bank of the State of South Carolina, to the order of George W. Logan, Secretary and Treasurer of the Charleston New Theatre, seventeen thousand dollars, for value received.

[Renewal on
\$18,000.]
R. Wotherspoon,
R. W. Cogdell,
Henry Gourdin,
James Rose,
William A. Carson,
Trustees for New Theatre Co. now
incorporated.

Copy receipt indorsed on above note.

Received, thirteen thousand nine hundred and fifty dollars eleven one-hundredths, 21st Febr'y, 1840.

\$13,950 11-100. R. W. C.
Tr. (Teller.)

Upon the report and exceptions the following Circuit decree was pronounced:

Johnston, Ch. These cases come up again upon a report of Mr. Gray, one of the Masters, ascertaining the amount due on both the mortgages referred to in the pleadings.

The Master also reports the amount due Martin, Starr & Walter, on the judgment assigned to them by the Bank, and referred to in the cross cause.

In computing the amount due on the mortgages, the Master has included the sums advanced by the Bank as premiums for insuring the premises from fire, for the particulars of which he refers to schedule A, accompanying his report. To this allowance on account of insurance, Mr. Campbell, the owner of the equity of redemption, has excepted, to the following effect:

1st. That the insurance was not warranted by the mortgage of 1837, given by the trustees; because the note constituting the debt which the Bank intended to secure under the

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*policy, was not taken under that mortgage, but upon the personal credit of the trustees, who drew it; and so was not covered by that mortgage; and

2d. That the insurance was not warranted by the fire loan mortgage of 1839, because the value of the naked lot on which the theater was built, was, itself, twice the amount of the sum (\$6,500) loaned under that mortgage; and, therefore, did not require so large an insurance as was effected (\$10,000,) nor authorize so large a premium (\$500) as was advanced per annum.

The first branch of this exception involves a matter of fact upon which the Master took

testimony; and the evidence satisfied him, and satisfies the Court, that the note alluded to in the exception was not taken upon the mere personal credit of the drawers, but was a renewal of notes intended to be covered by the mortgage which they gave the Bank. That mortgage was, therefore, a good subsisting lien for the amount of that note; and the interest which the Bank had in the premises authorized the insurance which they effected.

If this were otherwise, and it became necessary to consider the second branch of the exception, as I have stated it, (it is the first branch in the exception, as filed,) I do not see that any evidence was given or insisted on, at the reference, to show that the fact was as stated in the exception. I say nothing of the correspondence between Mr. Campbell and the Bank, at the time Martin, Starr & Walter purchased the judgment of the Bank through him. It is appended to the Master's report, and certainly shows that the Bank stipulated for the payment of these expenditures for insurance by the purchasers of this judgment; and as I understand the reply of Mr. Campbell, acting as their agent, it concedes that they are referable to the fire loan mortgage, and are so to be paid by the purchasers. Certainly, according to the best opinion I can form upon this correspondence, Martin, Starr & Walter became liable for the premiums; and I suppose must have paid them to the Bank, when they took its assignment of the judgment; and if so, the real party against Mr. Campbell, on this exception, is not the Bank, but its assignee. But I decide nothing on this correspondence, because Mr. Campbell protests that he never intended to enter into such an engagement as I have supposed. I found myself, therefore, exclusively on the want of proof to support the fact stated in the exception.

The policies of insurance were effected in the names of the mortgagors, and assigned to the Bank, who paid the premiums. Mr. Campbell, as the purchaser of the equity of

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*redemption, is bound to redeem upon the same terms as the mortgagors to whose rights he has succeeded; and the familiar rule is, that when the mortgagor comes to redeem, he must pay not only the mortgage debt, but all that is equitably due, or, at least, all that is equitably due as incidental to that contract. This disposes of the first and sixth exceptions of Mr. Campbell, which I accordingly overrule.

His four remaining exceptions are founded upon the fact, that the Bank did not assign the prior mortgage with the judgment; and upon the further fact, that on the 1st of April 1844, (while the merits of this case were before me for adjudication, on a former occasion, and were still under consideration,) Mr. Furman, the Cashier of the Bank, endorsed a satisfaction, under his hand and

seal, upon the registry copy of this mortgage. On this, Mr. Campbell contends this mortgage is extinguished; while he admits that the judgment, including the same debt, is in full force against the trustees.

Whatever has been decided in the prior proceedings in this cause, must be conclusive now. We are not to go back and re-examine points adjudicated. And, if any thing has been decided in this case, it is that the trustees, standing in the posture of sureties, are entitled to the enforcement of this mortgage, in exoneration of their personal liabilities under the judgment. It was for this reason the Court refused leave to the Bank to dismiss its bill: and it was for the same reason that it enjoined the judgment. It is true that the decree establishing this equity in the trustees, was not promulgated until 29th November, 1844; prior to which time the entry of satisfaction was made on the mortgage, and the judgment assigned to Martin, Starr & Walter; the satisfaction being endorsed the 1st of April, and the assignment the 23d of November, 1844. But the cause was heard the first of March, prior to either; and the merits were under consideration at the time these acts were done. The equities of the trustees were stirred in the suit; and not only the Bank, but her assignee, intervening under her, *pendente lite*, must be bound by the decree which followed; and neither could separate the mortgage from the judgment, (they standing to each other in the equitable relation of primary and secondary liens, or as principal and surety,) to the injury of the trustees. Neither the Bank nor its assignee, separately, or by any arrangement between them, would be permitted to enforce the judgment against the trustees, and, at the same time, deny them, or deprive them of, the benefit of the mortgage lien. To the extent of the loans made by the Bank at

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the instance of the trustees, the first mortgage and the judgment are securities for the same identical debt: satisfaction of one would be a satisfaction of the other. If no payment had been made of the debt at the time the judgment was assigned, (1 John. R. 580,) the assignment of the judgment operated to carry the mortgage with it; and if payments were made, to the same extent that they satisfied the mortgage, they satisfied the judgment also, and diminished the effect of the assignment of the latter.

According to the foregoing views, then, while it would be a fraud on the trustees to keep the judgment on foot against them, at the same time that the mortgage upon which they depended for their indemnity is extinguished, it would be equally a fraud on the assignees to have transferred to them, upon a full consideration, a judgment apparently open, but really extinguished by the entry of satisfaction on the mortgage.

Mr. Campbell, as the owner of the equity

of redemption, has the right to have his premises exonerated from the lien of the mortgage, if it has been really paid off; and in that case the fraud practised by the Bank on the assignees of the judgment, can be obviated by a decree that the Bank make them compensation. But if no money was in fact paid, Mr. Campbell has no right to be exonerated, at the expense of a fraud on the trustees. But it is not pretended that any money was paid; and the evidence satisfactorily establishes that no fraud was intended, the entry of satisfaction having been made by mistake. The Master reports the testimony of Mr. Furman, to the effect that he called at the registry, for the purpose of entering satisfaction on an entirely different mortgage, and that this mortgage having, by some inadvertence, been presented to him by the register, instead of the other he entered the satisfaction on it without looking into it. One of the exceptions objects to the competency of Mr. Furman, as an interested witness, and to the competency of his testimony, even if he be disinterested. I am satisfied that he has no disqualifying interest; and that, as a disinterested witness, his testimony is competent; and surely it cannot be necessary to refer to authority on a point so plain, (5 John. R. 69, 71; 2 Bac. Ab. Evid. G. Sta. 794, 1260, 1261, and notes.) Then it is objected, in other exceptions, that if there be mistake in this matter, that it is not to be obviated collaterally, but only on bill filed for the purpose. It is said that the satisfaction entered is the deed of the Bank, which cannot be disregarded, but must be set aside. But the facts are misconceived. The deed of a corporation can only be known

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by its seal. But the satisfaction here is not under the seal of the Bank, nor does it so profess to be. It is under Mr. Furman's seal.

The strength of Mr. Campbell's objection is that this is an actually existing technical release on the part of the Bank, which estops the Bank, while it subsists. But this is a mistake. The instrument to estop the Bank, must be the deed of the Bank, which it cannot be unless it is under the seal of the Bank. It is true, that on proof of authority to the agent to make the instrument and affix the Bank seal, the act of the agent may be attributed to the principal. The onus of showing this, however, lies on him who relies on the release. This shows that this is not an existing and formal estoppel to the Bank, as Mr. Campbell contends, but only capable of being made an estoppel by proper proof. The proof has not been given. The facts are the other way.

Lastly, it is said in one of the exceptions that the entry would be sufficient to protect a subsequent purchaser, ignorant of the real state of facts, who bought depending on the endorsement upon the mortgage. But Mr.

Campbell is not a subsequent purchaser; he bought subject to this very incumbrance, and should be subject to it, unless he can show it actually and fairly satisfied.

These exceptions are overruled. It is ordered that Mr. Gray's report be confirmed, and that, unless the defendant, James B. Campbell, do, in thirty days from the filing of this decree, pay off the sums therein found due on the mortgages, (of 1839 and 1837, referred to in the pleadings,) for principal, interest and insurance, the property mortgaged be sold by Mr. Gray, for cash, and possession delivered to the purchaser, and the proceeds applied to discharge the said demand; and, if there be any surplus, after paying the said demands, that the same be paid over to the said Campbell, as owner of the equity of redemption. But in case the purchase money do not suffice to pay off the said demands, then the rents and profits received by said Campbell, since the demand of possession made on him, the 31st of October, 1843, be applied to that purpose, and that Mr. Gray do take the account of said rents and profits for the benefit of the parties entitled to have the same so applied; and that the defendants, James Rose, Henry Gourdin, W. A. Carson and Richard W. Cogdell, do pay to Martin, Starr & Walter, so much of the debt as may be left unsatisfied by the sale of the mortgaged property, and be re-imbursed out of the rents and profits aforesaid, so far as the same will go. That James B. Campbell

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do pay *the costs in the case of the Bank v. Rose and others; and that in the cross cause, Martin, Starr & Walter do pay the costs of the plaintiffs and their own, and that their co-defendants in that cause do pay, each, his own costs."

Grounds of Appeal.

1. Because the premiums of insurance were not advanced under the terms of the fire loan mortgage, nor authorized by the fire loan law, the valuation of the lot being twice the amount of the mortgage loan, as stated in the exceptions, and said valuation was in evidence, as stated in the exceptions, and his Honor, the Chancellor, was mistaken in assuming the contrary.

2. Because the satisfaction deed by the Cashier was, in fact, the act of the Bank, the Cashier having a general power to make the same and bind the Bank; besides, it was in evidence in this case, that either the Cashier or President of the Bank would be authorized to enter satisfaction. And it is incompetent by parol evidence, and collaterally, without an issue made, to set aside said deed.

3. Because the Cashier's receipt, under seal, for payment in full of the debt, and his release and satisfaction, by deed, of the mortgage, is a complete estoppel to the Bank; and the parol evidence of the Cashier to set aside his own deed and discharge himself of mon-

ey, which, in the most solemn manner known to the law, he had charged himself with and acknowledged to have received, is clearly incompetent and inadmissible by reason of his interest, and his evidence ought to be struck out.

4. Because the decree, ordering the sale of the premises for cash, is in violation of the law of the land.

5. Because the receipt in writing, of the Teller, on the old note of \$17,000, for the sum of thirteen thousand nine hundred and fifty dollars 11-100, which was put in evidence at the hearing before the Chancellor, is higher proof of the intention of the parties at the time than any parol evidence, and shows that it was not intended to renew, but to pay the old note; and the debts contracted subsequent to the fire loan, were new debts. And said receipt is conclusive as to the propriety of the satisfaction entered.

6. Because the decree is, in other respects, contrary to Law and Equity.

James B. Campbell,
Appellant.

Petigru, for Appellees.

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*Per Curiam. JOHNSTON, Ch. It is asserted in the first ground of appeal, that certain facts, referred to in the exceptions and in the decree, were in evidence at the hearing of the report. The counsel should be aware, that at the hearing of a report, the practice is, that the Court hear no evidence but what was before the Master, and reported by him, as evidence, upon which his report is founded. I am not aware that any other evidence was offered or received, when the report in this case was heard, and no evidence, which appears to have been offered to the master, seems to establish the facts asserted.

The master did report evidence, however, very material to this ground of appeal, which the counsel has omitted in his brief. From motives of kindness, stated in the decree, I preferred to put my decision, respecting the premium for insurance, upon the absence of evidence, rather than upon the correspondence which led to the purchase of the judgment.—But, as I intimated in the decree, that correspondence, in my opinion, was conclusive of the question raised by the exceptions, both as to Mr. Campbell, and as to Martin, Starr, and Walter.

Mr. Campbell, in his first letter to the Bank, says: If the Bank of the State will accept from a purchaser, in cash, this day or tomorrow, the full amount of the above recovery, (the judgment,) and assign the same, and all the interest and demand, both in law and equity, therein, and substitute myself, as attorney and solicitor, on the records, I am authorized to say, they shall receive the said amount in cash.

Upon the reception of this communication, the Bank "Resolved, that the proposition

made to-day, by J. B. Campbell, to purchase the verdict obtained by the Bank against the Trustees of the Charleston New Theatre Company, cannot be accepted, in its present form—because there is no stipulation proposed that the mortgage to secure this shall be postponed, in its lien on the Theatre, to the mortgage held by the Bank, to secure the fire loan on the said theatre.

"Resolved, also, That in any sale or settlement of this debt, the Bank will require the purchaser to pay all insurances advanced by the Bank for the Theatre, with interest on the same, and also the payment of all costs, to which the Bank is liable, or may be made liable, in the several suits in law and equity decided or pending in regard to the Theatre, on this debt."

Mr. Campbell replies: "I have received and submitted your resolutions of yesterday,

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containing objections to the *propositions of the same date, to the parties in whose behalf the proposition was made. They understand, that by the final decree of the appeal Court of Chancery, already pronounced, the fire-loan mortgage has precedence and priority over the mortgage executed by Wotherspoon et al. bearing date May 24th 1837: and their offer to purchase is subject to this understanding. This, I apprehend, meets your views, and removes the first objection. The insurances, to which the second resolution refers, are covered, as understood, by the express terms of the fire-loan, and are secured by the mortgage to secure that bond. It is, therefore, intended to refer the payment of premiums advanced to that security, inasmuch as it does not pass to a purchaser of the judgment, by the assignment of the Bank. In order to facilitate the recovery of the premiums of insurance advanced by the Bank, I will waive the six months notice on the fire-loan mortgage, to which I am entitled under the Act, and every other obstacle to prevent the Bank from pressing the fireloan mortgage, which may exist at any time; or, I will make any other arrangement to secure or pay the premium, which shall be agreeable and satisfactory to your President. The costs, to which the resolution also refers, will be discharged by the purchase of the judgment, as proposed by the resolution. This disposes of every objection to the proposition submitted through me, and I consider the matter closed; and payment for the purchase of the judgment will be made this morning."

On the reception of this last letter, the Bank closed the transaction, by accepting the proposition, as modified.

I deem it unnecessary to add a single word, by way of comment, on the evident meaning of this correspondence.—The second and third grounds of appeal are, in my conception, sufficiently answered in the decree. If the Bank was to be estopped, it must be

by its own deed. The proposed estoppel was not, on its face, the deed of the Bank. If the deed of a third person was insisted on, as against the Bank, then his authority and agency must be established. As that which Mr. Campbell insisted on was not, on its face, the deed of the Bank, the burden was upon him to make it their deed, by proof of Mr. Furman's authority. There was no such proof; or (to meet, more explicitly, the assertion in the second ground of appeal,) there was no evidence reported by the master as having been before him, that either the Cashier or President of the Bank would be authorized to enter satisfaction.

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*There is another view, less technical, which is equally satisfactory. As the parties stood at the hearing of the case, the 1st of March, 1844, the trustees claimed the benefit of the first mortgage, for their indemnity, and it was adjudged to them by the decree subsequently delivered. The Court took time to consider of its decree, and in this interval the Bank undertook to transfer the judgment upon which the trustees were to be made personally liable, and at the same time, (if we are to attribute the entry of satisfaction to the Bank,) to deprive them of the indemnity of the mortgage. But this indemnity the trustees were as much entitled to, as the Bank was entitled to the judgment, and no man ought to suffer by the delay of the Court, while deliberating what judgment to give. (Park. R. 34.) If the Bank had retained its judgment in its own hands, it will not be pretended that it would have been at liberty to deprive the trustees of the benefit of the mortgage, and at the same time enforce the judgment against them. It would not be permitted to do this at any time, and especially after its right to do so was sub judice; and certainly the assignee of its judgment, coming in pendente lite, can stand on no better footing than the Bank itself. Neither can Mr. Campbell, who stands as the mortgagor, avail himself of any mistake to the prejudice of co-parties with himself in the same suit, whose rights were, at the time, in the custody of the Court.

The fifth and sixth grounds of appeal require no comment. The fourth ground, as it stands in the brief, is entirely too vague. But it has been explained, in argument, to mean that the order to sell for cash is in contravention of the Act of 1842, p. 237, sec. 2. This could only apply to the fire loan mortgage. But to understand the force of the objection presented, it is necessary to recur to the fire loan Act of June, 1838, ch. 2. It is therein prescribed that loans under that Act shall be secured by bonds and mortgages, which bonds shall be payable in extended instalments, and in case of failure of the borrower to pay the instalments, with interest, the President and Directors of the said Bank shall and may, after six months'

notice to the obligor, his heirs, &c. proceed to sell the property mortgaged, by auction, for ready money, &c. This Act was amended in certain particulars, not necessary to be noticed here, by the Act of December, 1838, ch. 8.

Then comes the Act of 1842, before referred to. The second clause of this Act provides that whenever any property, mortgaged to secure payment of any loan made pursuant to the provision of the Acts of Assembly here-

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inbefore first mentioned, (the Acts of June and December, 1838,) shall be sold for foreclosure of such mortgage, such sale shall not be made for cash, but only for cash as to the instalments due, and as to the residue, upon credit, corresponding to the terms of the loan—as to which residue the purchaser shall give bond and mortgage, with sureties to said bond, to be approved by commissioners, to be appointed by the President and Directors of the Bank, and by the City Council of Charleston.

But by the second section of the first clause of the same Act, it is declared that no borrower, or his legal representative or assignee, shall be entitled to the benefit of this Act, until he or they shall have given notice in writing to the President and Directors of the Bank, that he or they claim the benefit thereof, and assent to and accept all the terms and conditions thereto annexed, which assent shall be endorsed on the bond and mortgage of the said parties, &c.

It might be doubted whether the clause relating to the terms of a foreclosure sale has any application, except where the foreclosure is effected in the summary method provided for in the Act of June, 1838; and if it extends to sales ordered by other authorities, it might still be questioned whether the mortgagor is entitled to the indulgence granted by the clause referred to, unless he has complied with the conditions laid down in the second section of the first clause, of which compliance there is no evidence.

Again, it might be doubted whether Mr. Campbell, the only party now objecting, did not stipulate to waive every such objection, in the correspondence to which I have already referred.

But, be this as it may, he is precluded by the settled practice of this Court, an adherence to which is necessary to the regular administration of justice, from taking his objection in its present form.

When an appeal is taken from the Master's judgment or report, no matter in point is to be considered by the Court which was not before the Master; and his report must stand in all particulars not excepted to.

It was referred to the Master to report what was due on the mortgage in question, and he reported—and so far as we see, without objection—that the entire mortgage debts were due. It does not appear to have been made a point before him that any portion was not due. It was certainly competent for the party now objecting to waive any objection to which he was entitled. He put in no exception, and how was the Court to know,

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or conjecture, without any point *being made before it, that the report was not correct? It was bound to assume its correctness. The decree was itself correct, upon that assumption. And we see no sufficient reason for going behind the report, (even if at liberty to do so,) in order to set aside a decree, the error of which, (if erroneous,) is owing to the laches of the party complaining.

It is ordered that the decree be affirmed: and it is further ordered that unless the defendant, James B. Campbell, shall, within thirty days from the filing of this decree, pay off the sums found due in the report of the Master, referred to in the decree, for principal, interest and insurance, the said decree, in all its provisions and directions, be carried into effect, and executed. It is further ordered that the appeal be dismissed.

Decree affirmed.

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CASES IN EQUITY,

COURT OF APPEALS

ARGUED AND DETERMINED IN THE

AT CHARLESTON, SOUTH CAROLINA—APRIL,
EXTRA TERM, 1847.

CHANCELLORS PRESENT.

HON. WILLIAM HARPER,

“ JOB JOHNSTON,

“ B. F. DUNKIN,

“ J. J. CALDWELL.

1 Strob. Eq. *275

*Ex parte—MARIA SHACKELFORD, Ex'rx
of Richard Shackelford, Deceased.

In re—JOHN PORTER et al. v. J. W. CHEES-
BOROUGH, Ex'or of John Porter,
Jun. et al.

(Charleston. April Term, 1847.)

[*Executors and Administrators* ⌘265.]

Where two parties took a bond payable to them, or either of them, as executrix and executor of the same testator—the Court, regarding them as trustees of the estate, when the executor afterwards became executor also of the obligor in the bond, on the petition of the executrix would not allow him to deny his fiduciary character, nor her to be met with the technical objection, that the bond was extinguished by the appointment of her co-obligee as the executor of the obligor; and although all the assets of the obligor's estate which had

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*come into the hands of the executor, had been appropriated to the payment of other debts, decreed the bond debt entitled to priority of payment out of other assets yet to be administered.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1020; Dec. Dig. ⌘265.]

[*Executors and Administrators* ⌘50.]

If the obligee in a bond appoint the obligor his executor, no action can lie at law, and the debt is extinguished; but in such case, equity raises a trust, not only for a residuary legatee, but for the next of kin.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 302; Dec. Dig. ⌘50.]

[*Executors and Administrators* ⌘265.]

Although an executor, who is the obligee of the testator, accept and qualify on the will, he may, on failure of assets coming into his hands, sufficient for its payment, sue the heir

in a court of law, for the bond debt due to him by his testator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1012–1022; Dec. Dig. ⌘265.]

[*Executors and Administrators* ⌘265.]

In reference to the question of extinguishment, it is immaterial, in this tribunal, whether the assets of an estate were applied to debts of an equal or lower degree.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1012–1022; Dec. Dig. ⌘265.]

[*Executors and Administrators* ⌘434.]

Where the executor of two testators had kept joint accounts, and on a separation of the accounts by the Master, had obtained a decretal order for the payment, by the receiver, of a debt found to be due him for advances made the estate of his first testator, and had assigned this order—the Court refused, on the hearing of a subsequent report on the accounts, to confirm the recommendation of the Master it was error to set off, against the sum assigned, the value of a negro of the estate of the second testator, which had been sold by the executor previous to the first hearing, and not then accounted for, holding that there was no privity in the connection of the executor with these two estates, and that the rights of third parties had intervened since the decree.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1699; Dec. Dig. ⌘434.]

On appeal from the decree of Johnson, Ch., at Charleston, February, 1846.

John Porter, of Prince George, Winyaw, who outlived his son, John Porter, jr., by his will directed the income of his estate to be applied to the maintenance of his son's children and the payment of his son's debts, and devised the whole in certain parts to

his son's children as they came of age. John Porter, jr., was at the time of his death insolvent, but in February, 1829, his executors obtained an order from the Court of Equity, authorizing them to borrow money on the credit of the estate. The money was borrowed on notes discounted by the Bank of the State, which George T. Ford became liable to pay as endorser, and was expended chiefly in paying simple contract debts. Mr. Cheesborough, executor of both estates, kept a joint account.

These bills were filed in March, 1841. The first bill, by the devisees of John Porter, sought to have the accounts of the estates of John Porter and John Porter, jr., separately taken, and for a receiver. The second bill, by George T. Ford, sought to charge the estate of John Porter with the money borrowed for the estate of John Porter, jr. Mr. D. L. McKay was appointed receiver, and the accounts of Mr. Cheesborough were re-

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ferred to Mr. Gray, who was directed *to separate them, and to ascertain the amount of the debts and assets of the two estates, and to give notice to creditors.

The accounts being analyzed, the Master found that the estate of John Porter was indebted to the estate of John Porter, jr., in \$2,158.97; and to the executor in \$926.23. The case was heard on the bills, answers, report and evidence, in March, 1843, and a decree made on the construction of the will of John Porter. And the claims of the complainant, Ford, as a creditor of John Porter, were disallowed, and a sale of the estate of John Porter, jr., and a further account, were directed. (See the decree, Speers' Equity, 496.)

In June, 1844, a further order was made as to the accounts between the two estates, respecting sums paid on a joint purchase, and the receiver was directed, out of the estate of John Porter, to pay to Mr. Cheesborough, the executor, the sum of \$926.23, found due to him by the report of 16th March, 1843, with interest from the date of the report.

The Master, in obedience to the orders, sold the estate of John Porter, jr., in December, 1844. At this sale, J. W. Cheesborough purchased a slave, Sye, for \$450, and did not pay the money. In January, 1845, he assigned the decree in his favor against the estate of John Porter to R. F. W. Allston and J. H. Allston, to secure them for certain endorsements.

In February, 1845, Mary L. Shackelford presented a petition, praying payment out of the assets of John Porter, jr., of a bond of John Porter, jr., dated 1st May, 1824, and on the hearing of the petition, the Court referred it to Mr. Gray to take evidence of the petitioner's debt. At the same time an order was made on the petition of George T. Ford, directing the Master to take evidence in support of the claim for the money bor-

rowed from the Bank, as a charge against the estate of John Porter, jr.

On the 16th May, 1846, Mr. Gray made his report of the sales of John Porter, jr.'s estate, and set forth an account between the two estates,—and found that the bond claimed by Mrs. Shackelford was a just debt, and ought to be paid; and that the claim of George T. Ford was for \$7271.85, paid by him on the 24th January, 1844, in satisfaction of notes endorsed by him for the use of the estate of John Porter, jr., and the Master disallowed the claim.

The Master further reported, that J. W. Cheesborough, before the hearing of the cause in 1842, had sold a slave, Jim, belonging to the estate of John Porter, jr., for which he had not accounted; and stated an account, charging the price of that slave, and of the slave purchased by him at the

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Master's *sale in December, 1844, and interest, as a set off against the sum of \$926.23, found due to him by the former report.

To this report, Mr. Ford, and R. F. W. Allston and J. H. Allston, excepted. Mr. Cheesborough died on the 21st August, 1845, and no administration has been taken out on his estate.

The cause came on to be heard before his Honor Chancellor Johnson, and on the 20th February, 1846, his Honor pronounced the following decree:

Johnson, Ch. In considering the exceptions on the part of R. F. W. and John Allston, which I propose first to notice, it ought to be kept in mind, that the trust confided by the will of John Porter, senior, to the defendant Cheesborough, was to apply the income from his estate to the payment of the debts of his son, John Porter, junior, if the assets of his estate should prove insufficient to pay them; and as between Cheesborough, the executor, and the devisees of Porter senior, he had no right to resort to that estate, until the whole assets of the estate of Porter, junior, was exhausted. I think, therefore, that the price of the negro Jim was properly applied to the credit of the amount which Cheesborough was in advance for the estate of Porter, senior.

The case is somewhat different as to the price of the negro Sye: when he was sold, Cheesborough had ceased to have any control over either estate, and all the powers he had, as executor, were transferred to the receiver. Sye belonged to the estate of Porter junior, and Cheesborough had no right to appropriate the proceeds of the sale to the debt due him by the estate of Porter senior, without the consent of the receiver, nor had the receiver a right so to apply it, without the consent of Cheesborough, and without any contract or agreement between them on the subject: The estate of Porter senior, remained debtor to Cheesborough in the amount he had advanced, and he debtor to

the estate of Porter junior, the price of Sye. And the Allstons would be entitled under their assignment to the balance due Cheesborough from the estate of Porter senior, after deducting the price of the negro Jim.—But the fact that Cheesborough was embarrassed with debt, bordering on insolvency, if not actually insolvent, and that no money was paid, or note taken, for the price of Sye, furnish strong grounds to suppose that there must have been some agreement or understanding between the parties, which rendered the payment of the money or the giving of a note unnecessary,—and as the evidence was not directed to these circumstances, probably from inadvertence, I shall direct a further inquiry into it.

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*The first and third exceptions in behalf of George T. Ford, were abandoned in the argument—and the second and only remaining exception raises a question of priority of payment between Mrs. M. L. Shackelford and Mr. Ford. The claim of Mrs. Shackelford is upon a bond executed by Porter, junior, in his life time, made payable to her as the executrix, and Cheesborough, the executor, of Richard Shackelford, deceased, or either of them, and was unquestionably entitled to be preferred to any debt the executors of Porter might create after his death. But the executors of Porter were authorized, by an order of the Court, to borrow money on the credit of his estate, to meet pressing demands,—and Ford lent them his name to enable them to raise the money,—and has since been obliged to pay it. Priority is claimed for him on two grounds. 1st. That the money borrowed was applied to the payment of judgments against the testator in his life time, or specialty debts contracted by him, or both—but this is not sustained by the evidence. 2d. That Cheesborough being entitled equally with Mrs. Shackelford to receive the money due on the bond, and being in possession of the funds of Porter, out of which it was to be paid, was in effect a payment of the bond debt. My first impression was, that the Shackelford debt ought to be preferred, but more reflection has induced me to change that opinion.

The trust confided to Cheesborough, arising out of Porter's will, was to pay his debts in the order prescribed by law, according to which, bond debts rank amongst the favored, and for that purpose the whole of the estate is confided to his care and management. He had no discretion, but was bound to apply the assets as directed by law. If he was now alive and a party to this proceeding, as he must have been if living, there could be no question about it, and his death cannot alter the relative rights of the parties. The answer to his claim to this debt preferred in that case, would be "you were entitled to receive it, you had in your own hands funds which the law set apart for the payment. If

you have diverted them from their legitimate purpose by wasting or misapplying them, it is your own folly."

It is ordered and directed, that the Report of the Master be so reformed as to give the demand of Ford priority over that of Mrs. Shackelford, and that the Master do ascertain and report whether there was any contract or agreement between Cheesborough and the receiver, that the price of the negro Sye should be appropriated towards the payment of the debt due to Cheesborough on account of his advances for the estate of Porter junior, and if any, at what time.

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*From this Decree, the parties interested appealed, viz:

R. F. W. Allston and J. H. Allston insisted that the amount due to J. W. Cheesborough by the estate of John Porter, should be paid to them, subject only to the Solicitor's lien.

And Mrs. Shackelford, that she is entitled to the rights of a bond creditor of John Porter, junior.

Yeadon for appellant, Mrs. Shackelford. Cheesborough stood in the double relation of executor of both of the Porters—so the bond debt cannot be considered as extinguished.

Mitchell for appellant, Ford. There is no evidence of any consideration for the bond. It is not the property of the estate of R. Shackelford. There was nothing behind the bond to be considered by equity, therefore it was considered only in its legal position. *Pride v. B——*, in *Rice's Equity*, referred to in *Shoot v. Carter*, *Spears*, 533. One advancing money to an estate, if he can shew the money to have been used in paying the debts of the estate, even though an executor or an administrator, may go against the estate instead of against them, and stand in the place of those whose debts he has paid. Mrs. Shackelford is part owner with the executor of Porter, Jr. of this debt, and must share the same fate, viz: that of an executor with funds in hand.

Petigru for Allston et al. The debt of Porter, Jr. cannot be set off against that of Porter, Sen. because one person was executor of both. These estates, (it is established by a decree,) are not to be blended.—*Vide Montagu on Set-off*, 17th page. There must be mutual debts for set-off—both due on the commencement of the action, &c. There is no mutuality here. This debt was assigned, and the assignee claims the benefit of it, while the Master has set it off against the debt of another testator. An executor, a creditor in funds, is paid, or his debt extinguished, and only then. *Berry v. Izzard*, 11 *Vesey*, 90.

Per Curiam. DUNKIN, Ch. The bond, which is the subject matter of the second ground of appeal, was executed by John Porter, the defendant's testator, and was con-

ditioned to pay \$1,121.58, "to Mariah L. Shackelford, executrix, and J. W. Cheesborough, executor, of the estate of Richard Shackelford, or either of them."

There is no doubt that, if the obligee appoints the obligor his executor, no action can lie at law, and the debt is extinguished. This is fully established by the leading case of *Wankford v. Wankford*, 1 Salk. 299. But it is equally well established, as was de-

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clared by Sir William Grant, in *Berry v. Usher*, 11 Ves. 87, that, in such case, Equity raises a trust, not only for a residuary legatee, but for the next of kin. In *Wankford v. Wankford* Justice Powell and Lord Holt both agree that "there would be a great diversity where the obligee made the obligor executor, and where the obligor made the obligee his executor; for, in the last case the debt is not extinct, but only upon supposal that the executor has assets, which he may retain to pay himself; for though the obligee may give the obligor the debt, yet that will not hold vice versa, but in case of failure of assets, the executor may sue the heir."

It appears on the face of this instrument, that the money was due to Maria L. Shackelford and J. W. Cheesborough, as executors of Richard Shackelford. In this Court Cheesborough would not be permitted to deny his fiduciary character. In 1839 he, as executor of John Porter, confessed a judgment to M. L. Shackelford, which, if it have no other effect, was a recognition by him of the original trust.

It is true that, as executor of Porter, Cheesborough received assets; but it has been judicially ascertained that all these assets were appropriated by him to other debts of his testator. There are other assets of John Porter, (the obligor in the bond,) now to be administered. The petitioner asks to be ranked as a bond creditor in the distribution of these assets. She is met by the technical objection, that the debt of the obligor is extinguished by the appointment of Cheesborough, one of the obligees, as his executor. But it has been shewn that, even at law, this is not necessarily and absolutely a release of the debt, as Lord Kenyon, in a note to *Wankford v. Wankford*, is reported to have said, "the proposition that if A owes B a sum of money, and choose to make him his executor, though B will not act, his legal remedy is extinguished, is a proposition too monstrous to admit of any argument." So it has been seen, that though an executor, in such case, accept and qualify on the will, he may, on failure of assets, sue the heir in a Court of law, for the bond debt due to him by his testator. In this Court, both Cheesborough and Mrs. Shackelford are regarded as trustees for the estate of Richard

Shackelford. The surviving trustee has proved that all the assets of the obligor, which came to the hands of his executor, have been applied to the discharge of his other debts. In reference to the question of extinguishment, it is immaterial, in this tribunal, whether the assets were applied to debts of an equal or lower degree. The estate of Porter is not discharged from the debt, because all the funds of that estate

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have been accounted for, and it has been proved that they were not diminished by any appropriation for the payment of this debt. If Cheesborough were yet alive, he might well be held responsible to the estate of Shackelford for this irregularity in his administration. But on what principle can it be insisted that Porter's estate, which has not paid the debt, should be discharged, or that the remaining assets should be exonerated, because the previous assets have been otherwise appropriated? In the judgment of the Court there is error in so much of the Chancellor's decree as sustains the complainant's second exception to the Master's report.

D. L. McKay was appointed receiver of the estates of John Porter and John Porter, Jun. on the 10th July, 1841. According to the report of the Master, in March, 1843, the estate of John Porter, the elder, was indebted to the executor, J. W. Cheesborough, \$926.23, and in June, 1844, a decretal order was made, directing that sum to be paid, with interest from the date of the report, out of the assets of John Porter, the elder, in the hands of the receiver. In January, 1845, this decree was assigned to R. F. W. Allston and J. H. Allston.—In May, 1846, the Master reported that J. W. Cheesborough, before the hearing of the cause, in 1842, had sold a slave, Jim, belonging to John Porter, Jr. for which he had not been charged in the account. By the recommendation of the Master, the Circuit decree directed that this amount should be deducted from the sum heretofore decreed to be paid to Cheesborough from the estate of John Porter, the elder. But it is not perceived that there exists any privity in the connection of Cheesborough with these estates. The rights of third persons have intervened since the decree of June, 1844, and the claim of the assignees is entitled to the protection of the Court, to the extent set forth in their ground of appeal.

It is ordered and decreed that the decree of the Circuit Court be reformed, according to the principles of this decree. It is further ordered that the Master re-sell the negro, Sye, on the terms prescribed by the former order, the original purchaser having failed to comply with the terms of sale.

Decree reformed.

1 Strob. Eq. *283

*VIDEAU M. DE VEAUX et al. v. S. G. DE VEAUX et al.

(Charleston. April Term, 1847.)

[Wills 524.]

Slaves, left by testatrix to her son, "until her grand children, the heirs of his body, arrive at age or marry, they then to have their portions given them," were held to have been properly distributed under the will, among all the grandchildren, (including those after-born of a second marriage) who were in esse at the time the eldest grandchild of the first marriage attained the age of twenty-one years, but not among those born after that time.

[Ed. Note.—Cited in *Clark v. Clark*, 19 S. C. 350; *Tindal v. Neal*, 59 S. C. 17, 54 S. E. 1004; *Robinson v. Harris*, 73 S. C. 477, 53 S. E. 755. 6 L. R. A. (N. S.) 330.

For other cases, see Wills, Cent. Dig. § 1127; Dec. Dig. 524.]

[Wills 519.]

Where there are conflicting claims under a will, the first duty of the court, in giving it construction is to ascertain how many of the claimants come within the description given by the will; and the second is to discover whether all who do come within the description, can be allowed, by the rules of law, to partake of the bounty intended.

[Ed. Note.—Cited in *Rembert v. Vetoe*, 89 S. C. 213, 71 S. E. 959; *Gardner v. Horton*, 89 S. E. 638.

For other cases, see Wills, Cent. Dig. § 1073; Dec. Dig. 519.]

[Wills 457.]

It is a familiar rule in the construction of legal instruments, alike dictated by authority and common sense, that common words in the instrument are to be extended to all the objects which, in their usual acceptation, they describe or denote, and that technical terms are to be allowed their technical meaning and effect; unless, in either case, the context indicates that such a construction would frustrate the real intention of the draughtsman.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. 457.]

[Wills 524.]

With various fluctuations in the progress of adjudication, the authorities have settled down in the result, that where the bounty is given to classes by description, and not by designation, all the beneficiaries described in the instrument, in esse at the time fixed for distribution, shall be entitled to distribution then, in exclusion of those who come into being afterwards, though answering to the description as well as themselves.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1124; Dec. Dig. 524.]

[Parent and Child 9.]

Where a son, upon his marriage, had been put in possession of a plantation by his father, without any written title, and had died before he had held the possession for a sufficient length of time to give him a statutory title—the parol evidence of the nature of the possession being quite obscure and somewhat contradictory, the court refused to decree a gift to the son.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 133; Dec. Dig. 9.]

[Gifts 50.]

Where a son had been placed in possession of slaves, by his father, although that possession was of such a nature as to have entitled a creditor to subject them as the property of the son, the court were of opinion that, as between the parties to it, the question whether a

gift was made or not, was one of fact and not of law, and that the facts, from which the gift was to be inferred, were only evidence—the weight of that evidence being against the gift, they decreed accordingly.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 101; Dec. Dig. 50.]

Before Johnston, Ch., at Charleston, June, 1846.

The Chancellor states the facts necessary to the understanding of the points made in this case, in the following circuit decree.

Johnston, Ch. Leaving the pleadings in this case to speak for themselves, I shall proceed immediately to the questions presented for decision, making such a statement of facts as is necessary to the understanding of each.

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*The first question arises under the will of Mrs. Esther Marion, the widow of the Hon. Robert Marion.

It appears that this testatrix had no issue by Mr. Marion, but that, by a prior marriage, she had issue, one son, Stephen G. DeVeaux, one of the defendants in this cause.

Her will was executed the 2d February, 1821, at which time her said son had three children, to wit:—Robert Marion DeVeaux, Esther Gabriella DeVeaux, and Francis Peyre DeVeaux, of whom Robert was born in November, 1812, and Francis, in October, 1820; Robert was, consequently, between eight and nine years, and Francis about four months old, at the date of their grandmother's will. Esther's birth was between those of her two brothers.

Under these circumstances, the testatrix executed her will, containing, among others, the following provisions:—"I give and bequeath to my beloved son, Stephen Gabriel DeVeaux, the use and produce of the labor of all my negroes, until my grand-children, the heirs of his body, arrive at age or marry; then they are to have their portions given them. Should any of my grand-children die, before they arrive of age, or marry, then their part is to be divided between the survivors.

"My stock, of every kind, and bonds, I leave my beloved son, S. G. DeVeaux, forever. Also, all my furniture. Also, my lot and house in Pineville, during his life, and after his death, to my grandson, Robert Marion DeVeaux.

"I also give to Robert Marion DeVeaux my pair of silver pitchers.

"Also to my dear grand-daughter, Esther Gabriella DeVeaux, my silver sugar dish, silver bowl and silver milk pot.

"And to my beloved grand-son, Francis Peyre DeVeaux, I leave my pair of large silver tea pots.

"And the rest of my silver and glass-ware, and china, I desire to be divided, equally, between all my dear grand-children. Also, all

my bed quilts and counterpanes to be divided between them.

"My Bible I leave to my grand-daughter, E. G. DeVeaux."

"I give to my grand-son, Robert Marion DeVeaux, my carpenter, John, when he arrives of age."

Francis, the youngest of the three grand-children in esse at the execution of the will, died in the August ensuing its date, at the age of about ten months, of course intestate and without issue.

The testatrix died in November of the same year.

Stephen G. DeVeaux, the son of the testatrix, lost his wife, the mother of the three grand-children above named, about two years after testatrix's death; and married a second

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*wife, who is now alive, and by whom he has eight children, viz:—Elizabeth, Salina, Stephen, Ann, Georgianna, Isabel, Kate and Amarantha.

Robert Marion DeVeaux, the eldest of the first set of grand-children, came of age in November, 1833, and married the plaintiff, Videau M. DeVeaux.

At the time of his marriage and majority, the five first named of the second set of grand-children were born and in esse; the remaining three have been born since.

In the January following Robert's majority and marriage, his father, who was the executor of his grand-mother, in pursuance of legal advice, allotted and delivered to him one-seventh of the slaves generally bequeathed, retaining the other six-sevenths for his sister, Esther, and for the five grand-children of the second marriage then born.

Subsequently, Esther intermarried with John Huger, who, with her, was made a defendant in this cause, but has since deceased.

Also, subsequently, to wit:—in May, 1843, Robert died intestate, leaving his wife and four infant children, who are the plaintiffs in the cause.

The bill is against Stephen G. DeVeaux, who is the administrator of the son, Robert, as well as executor of his mother, Mrs. Marion—his eight children by the second marriage, and his daughter, Esther, and her husband, being made co-defendants with him—and one of the objects of the suit is to obtain a partition of the slaves, based on a construction of the will, that the grand-children in esse at the execution of the will, were exclusively intended by the testatrix, as the objects of her testamentary bounty.

In the argument of the cause, three several constructions have been contended for, suited to the respective interests of the litigating parties.

The first is that on behalf of the plaintiffs, which I have just noticed. The interests of Mrs. Huger, one of the defendants, demand the same construction; but she does not insist on it; being willing to submit to any

construction of which the will is fairly susceptible, and to abide by the one-seventh of the slaves which were allotted and delivered to her husband after her marriage.

The second construction contended for is, that all the grand-children in esse at the majority of the eldest grand-child, or at the marriage of any of the grand-children, are entitled to the distribution, in exclusion of subsequently born grand-children. This is the ground taken by the five oldest of the second set of grand-children.

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*The third construction insisted on is, that the benefits of the will were intended for, and should be extended to, all the grand-children; and this is the ground for which the three youngest of the grand-children contend.

A great many cases have been quoted in the argument of these points; but though I have consulted many of them, I do not deem it necessary to refer to them specially in my judgment, because the general principles which must govern the construction are well settled, and free from obscurity.

The first duty is to ascertain how many of the claimants before the court come within the description given in the will; and the second is, to discover whether all who do come within the description can be allowed, by the rules of law, to partake of the bounty intended. These are very distinct enquiries, though often confounded. The persons described in the clause of the will from which this suit arises, are "my grand-children, the heirs of his (my son's) body."

It is a familiar rule in the construction of legal instruments, alike dictated by authority and common sense, that common words in the instrument are to be extended to all the objects which, in their usual acceptation, they describe or denote, and that the technical terms are to be allowed their technical meaning and effect: unless in either case the context indicates that such a construction would frustrate the real intention of the draughtsman.

The word "grand-children," employed in this will, is descriptive of a definite relation between an ancestor and a certain class of his descendants, and is equally applicable to all the descendants who bear that relation. The first set of grand-children in this case, would not, therefore, be exclusively intended by it, unless, from other parts of the will, it appears that the testatrix designed to apply it to them alone.—But I do not find, in any part of this will, sufficient evidences of such intention. In those clauses where the testatrix gives specific property to them, individually, she must necessarily name them, individually, as existing persons: but this does not infer that where the bequests are general, and where she omits a personal application of her bounty, a personal application was nevertheless intended—but rather

the contrary. If the testatrix had intended to limit the property now in question to those three grandchildren, it would have been natural for her to have named them; instead of which she adopts another method, and employs a general term, applicable to others as well as to them. The epithet "dear grandchild or grandchildren," elsewhere applied to these three, collectively or individually, has been relied on as evidence of a

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*state of affection, growing out of an actually existing relation: from which it has been argued that then existing grandchildren were intended, not only in those clauses, but in the clause now under consideration, and throughout the whole will.—This foundation seems to me too slight for so sweeping an inference. The source of our affection to grandchildren is our affection to our children, their parents; we love them, and we love their children for their sakes. It may be that this secondary affection is stronger when the objects of it are actually present—that it thrills more for those whom we have seen, than for those whom we have not seen—but it would be unwarrantable to conclude, from this, that unborn progeny take no hold whatever upon the heart of the ancestor, as to presume, in this case, that the testatrix intended to disinherit them, in the face of terms employed by her, amply sufficient to include and provide for them. Upon the epithets of endearment applied by the testatrix to the three children in existence, it may not be too minute to remark, that when speaking of them individually, she does not apply these epithets to Robert in any instance, while in almost every instance she does apply them to the other two; a difference which may possibly have proceeded from the very tender age of the two latter as compared with his: the helplessness of mere infancy calling forth those expressions of fondness, in their case, which every body must have remarked as the workings of nature, and especially woman's nature. But these by no means infer a difference of real affection in reference to the three.

It may safely be put to the common sense and common feelings of mankind, whether if, by another turn of events, the mother of these three children had brought other children into existence, after the date of the will, and before the death of the testatrix—whether, in that case, a claim by the three, in exclusion of those after born, would not have been repelled by the testatrix herself, as utterly repugnant to her intentions.

The terms (I say nothing of the technical terms, for the present,) of the will are sufficient to take in all grandchildren; and we are to presume that the testatrix, in employing them, intended that they should operate according to their meaning.

But how many of the grandchildren are

allowed, by the rules of distribution, to avail themselves of the bounty?

The direction of the testatrix is, that the usufruct of her son should expire when her grandchildren should come of age or marry: "then," says she, "they are to have their por-

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*tions given them." With various fluctuations in the progress of adjudication, not necessary to be noticed here, the authorities have settled down in the result, that where the bounty is given to classes by description, and not by designation, all the beneficiaries described in the instrument, in esse at the time fixed for distribution, shall be entitled to distribution then, in exclusion of those who come into being afterwards, though answering to the description as well as themselves.

According to this rule, the five grandchildren of the second marriage, together with the two surviving children of the first, (Francis's share having lapsed, and being, by the terms of the will, distributable among the others, if it had not lapsed,) were exclusively entitled to distribution at the majority or marriage of Robert. The three younger children of the second set, not being then in esse, could not be taken.

This rule of distribution is one of convenience, and not of convenience merely, but necessity. The reasons of it, in some respects, are stated by Sir Samuel Romilly, in the argument of Godfrey v. Davis, (6 Ves. 45.) when he says "if the distribution is not confined to some particular period, it cannot be ascertained who are to take, until after the death of the parents of all the persons to take, which leads to this inconvenience, that none of the persons for whom the fund is intended may receive any benefit from it."

In the same case, (Id. 49,) the Master of the Rolls sustains the rule by further reasons. "It is clearly established," says he, "by *De Bisme v. Mello*, (1 Bro. C. C. 537,) and many other cases, that where the testator gives any legacy or benefit to any person, not as persona designata, but under a qualification and description at any particular time, the person answering the description at that time, is the person to claim; and if there are any persons then answering the description, they are not to wait to see whether any other persons shall come in esse; but it is to be divided among those capable of taking, when, by the tenor of the will, he intended the property to vest in possession."

Where, as in this case, a period is assigned for vesting the property in possession, when that period arrives the persons then in esse and answering the description, are entitled to an execution of the will, and to be put in possession of the property; and it can be no reason for delaying the execution, that, by possibility, other persons may come into existence of like description. The will ought to be then executed, according to the rights then existing; and if other persons, suit-

ing the description, shall afterwards come in esse and claim participation, their claim can-

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not be allowed: not because they are *not intended by the instrument, but because, by the provisions of the instrument there is no property left for them.

The general intention of the will, in this case, is that the three youngest grandchildren shall receive the bounty given, as well as any other of the grandchildren; and it is not the intention of any part of the instrument to exclude them, except so far as such an intention arises from the provision fixing the time for distribution. But that must, from the necessity of the case, and according to well established authority, deprive them of the actual enjoyment.

The youngest grandchildren, however, insist upon the technical words in the will, to shew that the rights of the legatees are not to be determined during the life of Stephen G. DeVeaux, their father; and, of course, that not only they, but all other children who may yet proceed from his loins and survive him, are entitled. The persons described are not only "grandchildren," but heirs of his (Stephen's) body."—*Nemo hæres est viventis*, and therefore none of his children can exhibit the character of "heir" until his death.

The question is whether the words "heirs of his body" were used by the testatrix in a technical sense. And they are so to be construed unless the context of this will shews a different intention. I think the context does shew a different intention. The preceding usufruct of Stephen is not given for life, but until his children marry or come of age. They are then to be put in possession, whether he be dead or alive. In the construction of the will, either this express designation of a time for distribution must be set aside, or the words "heirs of the body" must be supposed to have been used in an intechanical sense. I cannot doubt that they were so used; and it is reasonable to conclude, from the context to which I have referred, that they were employed in their popular sense of "issue of his body," and used in that sense. By the way, they serve to confirm the interpretation put on this will, in a former part of this judgment, that the testatrix had not exclusive reference to the three grandchildren in esse at the execution of the will. My meaning will be better understood if we suppose the testatrix to have paused at the word "grandchildren," as if fearful that she might be apprehended to mean the three then in existence, and by way of removing that doubt, that she thereupon added "the heirs"—that is the issue "of his body;" as if she had said, "I do not mean the three only—I mean all my grandchildren who shall issue from his body."

My decree upon this part of the case is, that so far as the executor allotted to Robert

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Marion DeVeaux and Mrs. Huger *each one-seventh part of the slaves, the partition conformed to the will, and should not be disturbed. The five first born of the second family of grandchildren are entitled to a similar allotment to each of them.

The plaintiffs had, however, good ground for coming into court upon this part of the case, to relieve themselves of the claim that might at some future time have been made upon them, by the three youngest of the second family; and, therefore, the Court will, at a future term, entertain an application as to the costs, with a disposition to throw them upon any common fund, or the like.

Only two other points in this case were presented for adjudication.

One of them relates to the plantation, Belle Isle, which I believe was the seat of General Marion, and came, by his gift, to the possession of Mr. Robert Marion.

Mr. Marion, by his will, dated in 1810, divided this plantation into two parts, one of which he devised to his wife for life, with remainder to her son, Stephen G. DeVeaux, the other he devised directly to Stephen.

From shortly after the death of Mrs. Marion, in 1821, Stephen resided on and planted the Belle Isle plantation; but upon the marriage of his son, Robert, he gave up his residence to him, and removed to another plantation at a considerable distance. Robert was allowed to cultivate the whole plantation, and did cultivate it, with hands in his possession; but whether for his own exclusive benefit, or on the joint account of himself and his father, depends on the testimony in the case, which is somewhat obscure and a little contradictory. He also made some alterations in the premises, but these were of such a character as to leave it doubtful whether they were made with a view to the convenience of a temporary occupation, or in contemplation of permanent ownership. My own inference, from the circumstances given in evidence, is that the possession was only permissive, and that the culture was, for a part of the time, for the joint benefit of the father and the son, and, for another portion, for the benefit of the son only.

At the death of Robert he had not held the possession for a sufficient length of time to give him a statutory title.

The question is presented whether there is not sufficient evidence of a gift of this land to entitle Robert to it.

I cannot hesitate about such a case. It is decided, in all its parts, by *Caldwell v. Williams*, (1 Bailey's Equity, 175.) There is not sufficient possession to confer title without writing. There is no deed; and,

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if we could proceed upon *parol, the evidence is too doubtful, to say the least of it, to warrant a decree.

The other point relates to a stock of slaves,

alleged to have been given by Stephen to his son Robert, and employed by him in planting Belle Isle, but omitted in the inventory which the former made of the estate of the latter as his administrator.

There is much testimony on this point, which, as in the case of the land, I do not deem it necessary to detail, because it is all in writing, and may be considered in case of an appeal.

The amount of it is, that the stock of negroes was employed on Belle Isle during the time of Robert's occupancy, and, with some slight alterations, was in his possession at his death. They were with his own negroes while the planting was on the joint account of his father and himself. To strangers they appeared to be used as his own. One or two of them were employed about his house and about his person. From these evidences, Mr. Singleton, his father-in-law, judged them to be his property; and Mr. Singleton, his brother-in-law, details many circumstances from which he drew the same conclusion. On the other hand, Mr. BuBose, a neighbor, and who frequently acted as agent of the parties in the concerns of the plantation, was constantly of the opinion that the possession was permissive. These opinions on the one side or the other, are hardly testimony. We have the possession, which is a fact, but the character of it is equivocal. There is no evidence that at any time Robert claimed the negroes as his own; though he often used them in such a manner that a stranger or a creditor would have considered them his; and undoubtedly a creditor would have had a right to subject them as his property. But there is no evidence of a formal gift; and no evidence of a claim set up by Robert in opposition to his father. There is no evidence that in the use of the slaves, Robert at any time pretended to exclude the control of his father; a fact very material where there is evidence that the father interfered with and participated in the management of the plantation.

Left in perplexity by this evidence, it is very satisfactory that there is other evidence of facts and declarations to turn the scale. Among the slaves was one by the name of Tony; and it is in proof that after the circumstances which I have detailed had produced in the mind of Mr. Singleton the belief that all the negroes had been given, Robert bought this negro from his father, and Tony is accordingly included in the inventory of the administrator, and is not in contest here.

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*This is not all the evidence on that side. Mr. Peyre, the maternal uncle of Robert, testifies that towards the close of his life, when he was about to purchase some slaves from Palmer, Robert told him he had but 18 negroes to his name; a fact which, in the state of his property, he could not have

admitted if this stock of negroes had been given to him.

It has been contended that the fact of possession alone must be taken as conclusive, in law, of a gift. But whether a gift was made or not, is, as between the parties to it, a question of fact and not of law; and all the facts from which a gift is to be inferred are only evidence.

There is something entirely too high toned in the earlier decisions on this subject. The law undoubtedly is as laid down by Johnson, J. in *McKane v. Bonner*, (1 Bail. Rep. 115) where he says that "the question, whether the plaintiff's testatrix had or had not given the negro in dispute to defendant's wife, was one purely of fact, of which the jury were the legitimate judges. The court does, it is true, in extreme cases, exercise the power of setting aside a verdict; but it is only in those cases where the verdict is so palpably against evidence as to leave no doubt that it is erroneous."

I think that the weight of the evidence is against a gift in this case; and I do not conceive it to be the duty of the Court to lean against it. It must be remembered that this is not a case of creditors, but one between the donor on the one side and volunteers of the donee, (who stand as the donee himself,) on the other. It is a case in which there is danger of laying a precedent by which the kindness and indulgence of parents may be turned as weapons against them, to divest them of rights which they had no intention to relinquish; than which nothing could be better calculated to deter them from granting their children that assistance and succor which they often so much need, especially in the outset of life.

It is ordered that so much of the bill as relates to the supposed gift of the land and slaves be dismissed.

Having disposed of all the points presented for adjudication in this case, all other points are reserved for hearing, if the parties desire it.

The complainants appealed from the decree of the Chancellor, on the following grounds:

1. Because the bequest of negroes by Mrs. Esther Marion to her grand-children was intended as a personal benefit to the legatees, and the words used are merely descriptive of the person, and therefore the legacy is divisible among those only who are alive at the time of her decease.

2. Because the possession of personal

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property is evidence of title, and therefore all the negroes which were in the possession of Robert Marion DeVeaux are to be presumed to be his, until a better title be proved.

3. Because the evidence offered to impeach this title is insufficient, and cannot avail to set up a title in the father against that of the son.

4. Because the possession of the land by

the son, and the improvements made upon it at his own expense, while the father stood by and permitted or actually encouraged it, is evidence of an equitable title in the son, which this Court will set up as against the father.

5. Because the decree is in other respects erroneous.

Memminger, for the motion. We are entitled to all the negroes which were in the possession of Marion DeVeaux at the time of his death. He is not to make out titles in himself, but it is for the other party to divest him. He married and set out for himself, and his father then put him in possession of the negroes. Vide *Degraffenreid v. Mitchell*, 3 McC. 506; *Bird v. Ward*, 4 McC. 228; *McCluney v. Lockhart*, 4 McC. 251; *McKane v. Bonner*, 1 Bail. 114. The legacies should be limited to the children only who were in esse when the will was made, *Ellison v. —*, 1 Vesey, senr. 111. Stephen DeVeaux was not to have a life estate, but only to hold until the time arrived for distribution. *Godfrey v. Davis*, 6 Vesey, 43; *Heath v. Heath*, 2 Atkyns, 121, and 2 Vesey, senr. 84. The son was not a joint tenant of the land with the father.

Hayne, contra. There is a life estate in Stephen DeVeaux by implication—and positively, if we understand technically the words “heirs of his body;” grand-children cannot be his heirs until after his death. He has not only a life estate, but one to be in his executor until the “heirs of his body” arrive at twenty-one, or marry. All the words in a will shall prevail if possible, and the meaning of words is to prevail. Vide 4

Vesey, 329; 4 Vesey, 698, and 6 Vesey, 102, and 7 Bacon's Abrid. Wills.

Petigru, for the children of the second marriage, defendants. When property is given nominata, it goes to those named only, but when designated, to those answering the description. Vide *Roper's Digest of the Law of Legacies*, vol. 1st, pages 48 and 54. And when to be distributed at a certain time, it is to be distributed at the time the first of the class described comes of age, and those born after are cut off, *Myers v. Myers*, 2 McC. Ch. 214. The property, in this case, was given to the father until his son arrived at the

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age *of twenty-one years, (for the gift of the use is the gift of the thing. Vide *Pell v. Ball*.) It was not intended to be an estate for life, although it might become so.

The land and negroes were never given to Marion DeVeaux, and it would be a hardship upon his father to decree a gift—it would interfere with domestic liberty—it would be unreasonable and unjust. The father exercised concurrent control and possession. It only seems that some thought the father should have given these negroes to the son. If he did intend to give them, and, retaining the power, afterwards changed his mind, it concerns no one. Surely, Mr. DeVeaux is not to be construed or implied out of his estate.

Per Curiam. HARPER, Ch. This Court concurs in the decree, which is affirmed, for the reasons given by the Chancellor, and the appeal is dismissed.

Decree affirmed.

CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1847.

CHANCELLORS PRESENT.

HON. WILLIAM HARPER,
“ JOB JOHNSTON,
“ B. F. DUNKIN.
“ J. J. CALDWELL.

I Strob. Eq. *295

*MATILDA McCLENAGHAN v. HORATIO
McCLENAGHAN et al.

(Columbia. May Term, 1847.)

[*Aliens* ⚡12.]

A denizen cannot, under the Act of 1799, inherit real estate in South Carolina.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 41; Dec. Dig. ⚡12.]

[*Aliens* ⚡12.]

The legal effect of the Act of 1799, is to waive the right the State has to escheat the lands of an alien during his life, but not to remove the disability of the common law which bars him from inheriting.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 41; Dec. Dig. ⚡12.]

Before Dunkin, Ch., at Marion, February, 1846.

Dunkin, Ch. John McClenaghan, a naturalized citizen of the United States, died intestate in February, 1844, seized and possessed of a large estate, real and personal.

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*The intestate left no lineal descendant, father or mother, but he left a widow, the complainant, two brothers, Horatio McClenaghan and William McClenaghan, and several children of a deceased brother, George McClenaghan, and of a deceased sister, Mary McClenaghan.

These proceedings were instituted for a settlement and division of the estate. The only question about which any doubt or difficulty existed, was in relation to the real estate, supposed to be worth about forty thousand dollars.

The widow claimed the whole of the real estate, on the ground that the defendants,

the next of kin of the intestate, were aliens, and incapable of holding real estate in South Carolina. All the defendants are aliens born, and all were resident beyond the limits of the United States, except the defendant, Horatio McClenaghan, a brother of the intestate.

This defendant is a native of Belfast, Ireland, but has resided in South Carolina for more than sixteen years prior to the institution of these proceedings. On the 31st October, 1828, he filed his petition in the Court of Common Pleas, praying to be admitted to the privileges of a denizen. On the same day, before his Honor Judge Gantt, he took the oath of allegiance, engaging to support the Constitution of this State and of the United States, and abjuring all allegiance or fidelity to every foreign authority, and particularly to George the Fourth, King of the United Kingdoms of Great Britain and Ireland, of whom he was before a subject. The usual certificate was granted by the presiding Judge, which certificate was duly recorded in the mode prescribed by the Act of 1799, in the office of the Secretary of State at Charleston.

It is, I think, abundantly clear, that the rights both of the complainant and defendant, rest entirely on the statute law of South Carolina. At common law, neither of them, neither the widow, nor the alien born brother, though a denizen, could have any interest in this matter. The widow might be entitled to dower, but the fee must necessarily escheat “for defect of heritable blood.”—1 Bl. Com. 374: 11 Rep. 67. But the widow claims under the positive provisions of the Act of 1791. She is made an heir by the law of

the land; and so it was declared by the Court in *Seabrook v. Seabrook*, McMullan's Eq. 206.

The right of the brother is derived from the same charter. By the fourth clause of the Act, it is declared that, in the case presented by the pleadings, the widow shall be entitled to one moiety of the estate, and the brother to the other moiety.

The disability of an alien to hold real estate was originally founded on feudal principles.

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He owed no allegiance to the sovereign of whom all lands were held. This principle has been adopted in our own institutions. But to a denizen, the reason of this exclusion is inapplicable. In England, the oath of allegiance may be tendered to him—2 Just. 121; and by the law of South Carolina, (A. A. 1799,) 5 Stat. 355, it is expressly provided that the petitioner for denizenship "shall take and subscribe the oath of allegiance." In England, "a denizen may take lands by purchase or devise, which an alien may not, but cannot take by inheritance; for the parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son."—1 Black. Com. 374. "And upon a like defect of hereditary blood, the issue of a denizen, born before denization, cannot inherit to him; but his issue born after may."—Co. Litt. 8.—Arbitrary and unreasonable as these distinctions seem to be, they can have no application to the law of South Carolina.—No question of inheritable blood is presented. The widow takes as such, the father or the brother in the same manner, and the son, whether born before or after denization, because he is the lineal descendant of the intestate.

The course of legislation on this subject, before and since the Revolution, marks the difference in our institutions, and in the principles by which the right of succession, or of distribution, was regulated.

At a very early period of the colonial history, it was deemed important to encourage the settlement of aliens, by authorizing them to hold real estate. In 1696, the Lords proprietors passed an Act "for making aliens free of the Province." Among other things it was specially enacted that they might take, have, and enjoy any lands, &c., "and make their resort or pedigree as heirs to their ancestors, lineal or collateral, by means of any descent, remainder, reverter, right or title," &c., as also to keep and enjoy all lands which they had purchased and bought, &c., "as fully and effectually as if they had been born of English parents within the province;" and also to keep and enjoy all lands which they might have by way of purchase or gift of any person or persons whomsoever; provided such alien born took the oath of allegiance to the King, and procured a certificate from the Governor to that effect, which

should be recorded in the office of the Secretary.

In 1704, during the reign of Queen Anne, a similar Act was passed, authorizing aliens to hold lands, and to prove "their pedigree as heirs to their ancestors, lineal or collateral, by reason of any descent," &c., provided they took the oath of allegiance before a Justice, who should grant a certificate, to be recorded in the Secretary's office. It was provided,

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how*ever, that they should not be qualified to be elected as members of the General Assembly, nor was such alien born permitted to vote for members of Assembly, unless he had other qualifications of property and residence prescribed by the Act.

After the Revolution, but prior to the adoption of the Constitution of the United States, the Legislature of South Carolina passed an Act (A. A. 1786: 1 Brev. 7,) granting to resident aliens all the privileges of citizens, on certain conditions, and with certain exceptions as to political rights. This Act was virtually repealed by that clause of the Constitution which vests in Congress the power to establish a uniform rule of naturalization throughout the United States.

By the 10th article of the Constitution of this State, it was made the duty of the Legislature, as soon as might be convenient, to "pass laws for the abolition of the right of primogeniture, and for giving an equitable distribution of the real estates of intestates." In conformity with this injunction, the law of 1791 was enacted. The English rules of descent were abrogated or disregarded, and a new system established, more in unison with the spirit of our institutions. An heir, as was suggested in *Seabrook v. Seabrook*, is the person in whom real estate vests by operation of law, on the death of one who was last seized. In order to ascertain who is the heir, it is only necessary to inquire to whom, by the Statute law of South Carolina, the estate would pass, and whether the demandant comes under the description of the Statute. In England, a parent of the person last seized can never take, for the reason, as it is quaintly said, that lands never ascend. But in South Carolina, the father or mother may inherit, because they are made heirs by the Act of 1791. A denizen, in England, cannot take by inheritance, because his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to his son. But a denizen father in South Carolina may inherit from his native born son, and the inquiry as to the birth or the blood of his own father, or the intestate's grandfather, is wholly irrelevant.

But for wise and obvious reasons, neither father nor brother, nor any other person who is an alien, is permitted to hold real estate for his own use. He is a stranger, and

owes no allegiance to the country, or its government. When the reason ceases, the disability should also cease. The Act of 1799 simply declares that aliens, becoming residents of this State, and subscribing the oath of allegiance before one of the Judges, "shall be deemed denizens, so as to enable such persons to purchase and hold real property within this State, and in all other respects to entitle such persons to the like protection from the laws of this State, as citizens are

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entitled unto;" providing, *however, that such denizen shall not have the right to vote for any public officer of the State, or to hold any office of trust or profit in the State.

When the evil to be remedied is considered, it seems a very narrow construction of the Act to confine its benefits to those who have bought lands, or those to whom they have been devised, and exclude those on whom the law casts the estate. Nothing but an obvious necessity would justify the adoption of such construction. By the liberal terms of the Act, denizens are permitted both to purchase and hold real estate. It is true that the authority to hold includes the right to purchase, and it was unnecessary to give that right. But this objection, (if it be one,) might with more force be urged to the minute provisions of the Acts of 1696 and 1704. It is no part of the definition of a denizen, that he may not hold lands by inheritance. The Acts of 1696 and 1704 are entitled Acts "to make aliens free of this part of the province." The Act of 1799 is entitled "An Act granting the rights and privileges of denizenship to alien friends," &c. The meaning is the same. For reasons peculiar to the law of England, the letters patent of denization would not enable an alien to become an heir. They removed the political objection, authorized the denizen to hold lands which he obtained by purchase or devise, but could not cure the defect of inheritable blood. In South Carolina, the removal of the political objection, by compliance with the provisions of the Act of 1799, made the alien free of the State, and enabled him not only to purchase and hold real property, but entitled "in all other respects to the like protection from the laws of the State, as citizens are entitled unto," except that he could not vote for, or be elected, a public officer. Allegiance and protection are reciprocal. To enjoy "the like protection from the laws of the State as citizens were entitled unto," is to have all the rights and privileges conferred by the laws. And for this reason it was deemed necessary to declare and provide, that the right to vote, and the privilege of being chosen a public officer, should be excepted from the rights which protection from the laws of the State conferred on her citizens. To deprive a denizen of his birth-right, to exclude a man from inheritance who has become a resident of the State, and taken

the oath of allegiance, is not to extend to him "the like protection, in all respects, from the laws of the State, as citizens are entitled unto." Like all other remedial laws, the Act of 1799 should receive a liberal construction.

The Court is of opinion, that on the death of John McClenaghan, the intestate, his real

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estate vested in his widow, *the complainant, and his brother, the defendant, Horatio McClenaghan, and that a writ of partition should issue to divide the same between the said parties in equal moieties, which is, accordingly, ordered and decreed.

1. The complainant appealed, and moved to reverse the decree, on the ground that Horatio McClenaghan, being an alien born, is not entitled to inherit the real estate of the intestate, John McClenaghan, by the laws of South Carolina.

2. That denizenship does not entitle him to inherit the real estate of the deceased.

Dargan, for the motion.

Miller, contra. Before the adoption of the federal constitution the States exercised the right of naturalizing foreigners; but that power is now vested exclusively in Congress. The right to make a denizen, however, still belongs to the State governments; and further, a State may, within its local limits, confer upon a denizen, and even upon an alien, the rights and privileges of a citizen, to be exercised and enjoyed within the jurisdiction of the State, but not so as to entitle such denizen or alien to the rights of citizens in other States of the Union. For instance, a State may pass a law conferring upon an alien the right to purchase or inherit real estate, and this would not conflict with the exclusive right of Congress, "to establish a uniform rule of naturalization." (Const. art. 2, sec. 8, cl. 4.) In the exercise of this power the State governments, both before and since the adoption of the constitution, have passed laws, subject to certain conditions, giving to aliens coming hither to reside, and taking the oath of allegiance, in some cases, all the rights and privileges of citizens, except the political right to vote, or to hold office; and South Carolina has, by numerous Acts of the Legislature, declared her approval and adoption of this wise and liberal policy. (See A. A. 1696, 2 Stat. at L. 131, and 1704, Ib. 251, making aliens free of the province, with the right to inherit land, &c. also A. A. 1784, making aliens citizens, P. L. 339, repealing A. A. 1704.) The reasons of this policy are obvious. When this State was first settled by Europeans, to enable her to maintain a political existence, and to conquer a savage foe, population was the great desideratum, and, like infant Rome, our country became the resort of alien adventurers from various nations, who were encouraged to settle here. From the first settlement, down through every age, this want of population has ever prompted liberal laws for the en-

couragement of immigration; and as an inducement to this end much higher immunities

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were allowed to settlers *from abroad, than were granted by the old and densely peopled countries of Europe, where pride, prejudice, and the elevation of power caused aliens to be looked upon with suspicion or treated as enemies, and the ancient laws against them to be enforced with the utmost rigor.

The want of population in this country was particularly felt immediately after the war of the revolution, when the carnage and slaughter of that struggle had left but few inhabitants to people our fertile and widely extended territory, and South Carolina, like the other States, was poor in every thing but her dominion. To remedy this disastrous state of affairs as far as such legislation could, the General Assembly of this State, in the year 1786, before the adoption of the federal constitution, passed an Act, (P. L. 412,) entitled "An Act to confer certain rights and privileges on aliens, and for repealing the Acts therein mentioned." The chief provision of this Act is, "that all free white persons, (alien enemies, fugitives from justice, and persons banished from either of the United States, excepted,) who shall reside in this State for a year, take and subscribe an oath or affirmation of allegiance, before one of the Judges of the Common Pleas, (who shall give to such person a certificate of his having taken such oath or affirmation,) shall be deemed citizens, and entitled to all the rights, privileges and immunities to that character belonging. Provided always, that no such person shall be entitled to vote at the election of members of the Legislature, or the city council, nor qualified to serve on juries, (except on coroners' inquests, juries de medietate lingue, or special juries in the Common Pleas,) nor be eligible to the office of Governor, Lieutenant Governor, privy Councillor, delegate to Congress, Intendant of the city, or a member of the City Council, nor to a seat in the Legislature, until he shall have been naturalized by a special Act of the General Assembly."

By this Act, if unrepealed, the defendant, Mr. McClenaghan, would unquestionably be entitled to inherit the one-half of his deceased brother's real estate. Although the constitution of the United States, which was framed in 1787, (art. 2, sec. 8, cl. 4,) giving Congress the power "to establish a uniform rule of naturalization," takes away from the States the right to confer citizenship of the United States, and has repealed this Act, so far as it has this effect, yet all the rights to property and other substantial provisions of the Act, not repugnant to the constitution, remain of force, unless repealed by the Act of the Legislature of this State, passed in 1799, (5 Stat. at L. 355; 1 Brev. Dig. 236.) This last Act is entitled "An Act granting the rights and privileges of denizenship to alien

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*friends, residing or intending to remove within the limits of this State."

It is framed on the model of the Act of 1786, using the same words, for the most part, referring to the same subject, and the two Acts, with the clause of the constitution above quoted, being in *pari materia*, are to be taken together as one Act, and so construed that every part of the first Act shall stand, except such parts as are repugnant to the constitution and the provisions of the latter Act. The important provisions of the Act of 1799 are in these words: "That from and immediately after the passing of this Act, all free white persons, (aliens enemies, fugitives from justice, and persons banished from either of the United States excepted,) who now are, or hereafter shall become, residents of this State, shall, on taking and subscribing the oath or affirmation of allegiance, before one of the Judges of the Court of Common Pleas, be deemed denizens, so as to enable such persons to purchase and hold real property within this State, and in all other respects to entitle such persons to the like protection from the laws of this State as citizens are entitled unto."

After making provisions for the certificate of denization, &c. the Act concludes with this proviso: "Provided that nothing herein contained shall be construed to confer on any denizen the right of voting at any election for members of either branch of the Legislature, or for any public officer of this State, or of being eligible as a member of either branch of the Legislature, or to any office of trust or profit in this State."

The contending parties in this case are each entitled to inherit by virtue of the statute law of this State, and not by the common law canons of descent, and this point has been settled by the appeal Court, in the case of North and others v. Valk and others, Dudley's Eq. Rep. 215. In that case it is decided, "that persons in this State do not inherit by the common law, but by the direct force of the statute of distributions; therefore the child of a deceased alien brother or sister, who is naturalized at the time of the descent cast, may inherit real estate under that statute, notwithstanding the alienage of the parent of such child." Chancellor Harper, in that case, refers to his opinion in the case of Barksdale v. Bona (2 Hill's Ch. 416.) "for the reasoning to show that the various canons of descent have no application under our statute."

By the fourth clause of the statute of distributions of 1791, (1 Faust, 23, Brev. Dig.

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422,) the widow of the intestate and *his brother the defendant are each "entitled to one moiety," of the real estate—the subject of litigation.

But the question here recurs, can the defendant, being a denizen, legally claim the

one half of the estate? To settle this question, I take the position that the Act of 1786, the constitution of the United States, and the Act of 1799, above quoted, being construed together to form one system and one law, will clearly entitle him to it. But should it be held that the Act of 1786 is repealed by the constitution of the United States and the Act of 1799, the latter Act will in that event entitle him to inherit the aforesaid moiety of the land. The constitution is to be expounded by the same rules of construction as the Acts of Congress, or the Legislature. It is a part of the written law of the land, (see Judge Johnson's opinion in the allegiance case, Book of Allegiance 230, and 2 Hill L. R.) "The great object of the maxims of interpretation," says Chancellor Kent in 1 Com. 468, "is to discover the true intentions of the law." Judge Johnson, in the case of *Richards v. McDaniel and Richards*, 2 Mill's Con. Rep. 22, quoting Noy, 42, says "general laws and special laws, the old law and the new law, the laws of God and the laws of man, are oftentimes all joined together to help a man to his right."

He further says, "there is perhaps no rule better supported by justice and wisdom, than that when there are several Acts on the same subject they should be read together as one Act, so far as their provisions are consistent; by this means the mischief, the remedy, and the intention of the Legislature, are more distinctly seen and applied."

This was a decision in which it was held that the Act of 1806, and the Act of 1807, the first a special and the other a general law, giving aliens the right in certain cases to inherit and transmit real estate in this State, should be read and construed together as one law. As to the policy of these Acts he says (what will also apply to the Acts of 1786 and 1799,) "they speak a language worthy of an enlightened and liberal Legislature, which cannot be misinterpreted. It was an encouragement due to the industry of many respectable foreigners, who resided among us, that the fruits of their labor should be transmitted to their relations."

The intention of the law giver, and the meaning of the law, are to be discovered from a view of the whole statute, and of every part taken and compared together; (Dwarris on St. 45;) and the same author, at page 46, holds this language: "As one part of a statute is called in to help the construction of another part, and is fitly so ex-

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pounded as to support and *give effect if possible to the whole, so is the comparison of one law with other laws made by the same Legislator, or upon the same subject, or relating expressly to the same point, enjoined for the same reason and attended with like advantage."

"In applying the maxims of interpretation, the object is, throughout, first to ascertain

and next to carry into effect the intentions of the framer. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is therefore an established rule of law that all Acts in *pari materia* are to be taken together as if they were one law."

The author cites in support of the text 4 T. R. 447; 5 T. R. 417. *Earl of Ailesbury v. Patterson*, Dougl. 30. The same doctrine is treated of and supported in 1 Kent Com. 462. See also *The State v. Fields*, 2 Bail. L. R. 554; and the *State v. Baldwin*, *Ib.* 541, deciding the same principle.

Applying this rule to the case before the court, it will appear that the constitution of the United States, and the Act of 1799, have only in part repealed the Act of 1786. The whole effect of the power "to establish a uniform rule of naturalization," was to take away from the States the right to make citizens, because one State might have one regulation, and another a mode and conditions totally different; one State might be satisfied that an alien should become a citizen after only one year's residence, and another State might think five years little enough, (see 1 Kent Com. 423;) and it was the design of the framers of the constitution to give Congress alone this power to naturalize, so that the rule might be uniform. (See the *Federalist*, 183 and 184, in which Mr. Madison thus explains.) In *Chirac v. Chirac*, 2 Wheat. 269, the Chief Justice of the United States has expounded the constitution to vest in Congress exclusively the power of naturalization, (see 1 Kent's Com. 423.) The constitution, (Art 3, Sec. 2. Cl. 1) provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." As an alien becomes a citizen on being naturalized, justice, propriety and consistency all require that one coming for instance into South Carolina, should not be admitted to the "privileges and immunities of citizens in the several States," without having taken the same oath, resided in the United States the same length of time, complied with the same conditions, and gone through the same forms of naturalization as the naturalized citizens of any other State into which he might migrate and settle.

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*To effect this object best, the sole power of making citizens of aliens, by requiring them to go through the same forms and comply with the same conditions in all the States, was vested in Congress; but to that extent and no farther was the power given. It will not be urged that because Congress alone is to convert an alien into a citizen, that therefore the States have divested themselves of the power to pass laws declaring that within their local limits aliens may en-

joy the same rights to personal security, personal liberty, and private property, which their natural born citizens are entitled to.

A citizen of South Carolina is entitled to inherit real estate. Would it not be within the reserved rights of the State, to pass a law, that an alien should be entitled to the same privilege in express terms? If the Legislature, in the exercise of its sovereign power, should enact in these words, "that aliens shall unconditionally inherit land in this State," no one would say that such a law would conflict with the constitution of the United States. Can any one discover any substantial difference between such an Act, in regard to the right to inherit land, and one that should provide thus: "aliens shall be entitled, in South Carolina, to all the rights, privileges and immunities of a citizen?" Unquestionably, such an Act as this last, would not entitle aliens going from South Carolina into another State, to the privileges of citizens, but within the limits of this State, they would be clearly entitled to inherit land, and enjoy the rights of citizens. By the Act of 1786, the Legislature has enacted, that aliens coming into this State, taking the oath of allegiance, &c. "shall be deemed citizens, and entitled to all the rights, privileges and immunities to that character belonging," with a proviso denying certain political rights. So far as this Act is repugnant to the constitution, it is repealed by it, and no farther. Repugnancy in part, will not repeal the whole; if so, no two laws could be construed together as one law, where there was any difference in their provisions. The only repugnancy in this clause of the Act, to the constitution, consists in making an alien a citizen, so as to entitle him to rights out of the State. The power to do this, belongs, alone, to Congress; and therefore, the words "shall be deemed citizens," are perhaps null and void. But the rest of the clause remains of force within the limits of this State, surely; for it has no other effect than to provide for the enjoyment, by aliens taking the oath of allegiance, of the rights to personal protection, personal liberty and private property, which a natural born citizen enjoys. The enactment means no more than if the legislature

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had passed a law in these words: "that aliens, on taking the oath of allegiance to this State, shall thereby not be deemed citizens, but shall be entitled, within the limits of this State, to all the rights and privileges of citizens, provided they shall not hold office nor vote at elections," &c. Such an Act would not conflict with the constitution, and it would give to an alien the right, as in the case of the defendant, to inherit land. The object and design of the constitution was to prevent such an alien from going out of one State into another, to claim the rights and privileges of citizenship there; and there-

fore, it would not be saying too much, to assert that the whole Act of 1786, so far as the persons provided for by it should claim rights under it within this State, would be consistent with the letter and spirit of the constitution; and that it would only be regarded as null and void, when it should be set up as a charter of rights in another State, by any one of the class of persons protected by it here. The whole scope of the power to naturalize given in the constitution, was to prevent one State from passing any law concerning aliens, which would give them the rights of citizens in another State, or which would affect the rights of another State. Although South Carolina might lawfully enact that an alien should have the right to inherit land in this State, he would not, thereby, be entitled to inherit land in another State.

It would also infringe the rights of other States, if South Carolina should enact that aliens should have the right to vote for members of Congress in this State, because legislation by such members of Congress would affect the rights of all the States of the Union. For this, among other reasons, denizens are prohibited from voting in this State, by the proviso of the Act of 1799.

The Legislature of this State may pass any law, except such as are contrary to the law of nature, the law of God, the constitution of this State, and the constitution of the United States. Thus limited, the Legislature is the sovereign power of the State, invested by the people, the source of power, with the right to make laws for their government. The constitution of the United States is a body of delegated powers, and those not expressly given, "are reserved to the States respectively, or to the people," (Art. 10th of the amendments.) And the 9th Art. of the amendment provides, that "the enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

There is nothing in any of the restrictions upon State legislation, which forbids a State

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from enacting, as by the Act of 1786, that an alien, on taking the oath of allegiance, and residing within the State one year, shall be entitled to all the rights of a natural born citizen, to be enjoyed in this State, except the right to vote and hold office. Such an Act, while its operation is confined to the State enacting it, affects the rights of no other State, and does not seek such an object; but merely to act within the local limits of the State, and to promote and effectuate a State policy, which, so far from injuring any other State, is calculated to add to the wealth and power of the whole nation.

The form of words used in framing the Acts of 1786 and 1799 appears to have been dictated entirely by convenience and necessity. It was intended, that under the restric-

tions, and with the reservations mentioned in the Acts, aliens should be entitled to the rights which citizens enjoy. To particularize the manifold rights of a citizen, embracing and specifying each and all the rights of personal security, personal liberty, and private property, the three classes of absolute rights of persons, as divided by Sir William Blackstone, together with what he denominates the rights of things, would have been impracticable in a statute, as it would have required a codification of all the common law and statute law of force on these subjects in South Carolina at the time. Is there any thing in the word citizen which forbids the legislature from referring to it in a statute, lest the Federal Constitution should be invaded? Suppose the Legislature should wish to enact, that aliens should be entitled to purchase, inherit and convey real estate, and to effect this, should, if possible, frame an Act, in which these three things only should be provided for, not expressly, but by the words: "aliens shall be entitled to the rights and privileges of citizens," with a long voluminous proviso negating specifically every other right of a citizen; would such an enactment touch constitutional ground? It would be as clearly lawful as to confer those three rights in express terms.

If it be an undeniable position, that the State may confer certain rights of citizens upon aliens, then, in order to ascertain what the law now is upon this subject, let us adopt the method of the Appeal Court in the case of the State v. Baldwin, (2 Bail. L. R. 543,) by substituting the new law wherever it differs from the old, so that as much of the old may stand, as is not repugnant to the new. The result will be, that the substance of the Act of 1786 will stand, except that a year's residence is not required, but merely a residence; and that the terms "shall be deemed citizens," are changed into "shall be deemed

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denizens," by the Act of 1799; which *last was evidently done by the Legislature out of respect to the Federal Constitution, which confers on Congress the sole power of declaring who "shall be deemed citizens," but which still leaves in the States the power to say who shall, within their respective limits, enjoy the rights of citizens.

It is a rule of construction, that an affirmative statute will not repeal a former statute, except so far as the old law is repugnant to the new. (Broom's L. M. 37; 1 Bl. Com. 89; 19 Vin. Abr. 525; "Statutes," (E. 6.) pl. 132; 2 Dvarris on St. 638; 7 Law Lib. 6; 4 T. R. 2, 4; 12 A. and E. 470; 9 M. and W. 777.)

Both the constitution and the Act of 1799 are in affirmative terms, and there are no words of repeal used. Repeal, therefore, is only to be effected by repugnancy, and this, as has been noticed, makes but a slight change in the old law.

The Acts of 1786 and 1799 are remedial statutes, and are therefore entitled to a liberal construction. "Statutes that are remedial and not penal," says Chancellor Kent, (1 Com. 465,) "are to receive an equitable construction, by which the letter of the Act is sometimes restrained, and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy."

It is held the duty of Judges "so to construe a remedial statute, as to suppress the mischief and advance the remedy," (Tomlin's Law Dic. 521, citing Co. Litt. 11, 42; 3 Rep. 7.) "In cases of public utility, where the end and design of the Acts appear larger than the words, they shall be strained even beyond the words." (Vaughan, 179.) "Statutes for the benefit of the people, should be construed largely, and not with restriction." (Tom. L. D. Style 302.)

"For the sure interpretation of all statutes, whether penal or beneficial, four things are to be considered; what was the common law before the Act, what was the mischief against which the common law did not provide, what remedy the Parliament had provided to cure the defect, and the true reason of the remedy. It was held to be the duty of the Judges to give such a construction as would repress the mischief and advance the remedy." 1 Kent Com. 464, citing Heydon's case, 3 Co. 7.)

Having these rules of construction for our guide, it will not be difficult to determine that the only alteration or repeal of the Act of 1786, by the Act of 1799, consists in providing that the alien shall only be a mere resident, and not a resident for a year; that the alien, on complying with the terms of the Acts, shall be deemed a denizen, and not a citizen; and that the rights conferred are to

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be enjoyed within the *State, and not beyond. For the meaning of the Legislature is the same, evidently, when it says such alien shall be "entitled to all the rights, privileges and immunities to that character belonging," (referring to the word citizen,) and when it says such person shall be entitled "to the like protection from the laws of this State as citizens are entitled unto." The whole object, we may well suppose, in using a different phraseology in the two Acts, was to show that the Legislature did not wish to conflict with the constitution by making an alien a citizen, while at the same time it was the intention to preserve to aliens all the rights which they had before enjoyed in this State, without interfering with the laws of any other State. The reason of the old law still existed in 1799. The State still wanted population, and many enterprising aliens had settled here. It was but just in the State to allow them to inherit land from others, or to enjoy, or sell, or transmit it to their relations. But thirteen years had elapsed between the two enactments, and it is to be inferred that the

State intended to do no less, in substance, in 1799, than had been done in 1786. The difference of the two Acts is very small. The one Act calls the alien, complying with its terms, a citizen, and gives him the rights of a citizen; the other calls him a denizen, but likewise gives him the rights of a citizen. These rights were to be enjoyed, however, only within the limits of this State; for the words of the Act of 1799 are "like protection from the laws of this State as citizens are entitled unto."

The words "from the laws of this State," are restrictive and repugnant terms, and were evidently inserted for the sake of consistency with the constitution, and respect to the rights of other States. To the extent of this restriction, the new law repeals the old; but the rights and privileges conferred by the Legislature, so far as they are to be enjoyed in this State, are as large in one Act as in the other. Let us compare the two chief clauses of these Acts together, and see if there be any other repugnancy. The words "and in all other respects to entitle such persons to the like protection from the laws of this State as citizens are entitled unto," contain no opposition of meaning as to rights to be enjoyed in this State, to the words "entitled to all the rights, privileges and immunities to that character belonging," (alluding to the term citizen.) If it appears that there is no opposition in the meaning of the two clauses except that referred to, and there be no repealing clause in the Act of 1799, then, according to the rules of construction, the

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two Acts are to be taken together as one law, and the Act of 1799 read as enacting the same thing with, or as cumulative of, the Act of 1786.

But it may be asked, why did the Legislature see fit to use different language in regard to the same thing, in the Act of 1799, from that used in the Act of 1786, if it did not intend to repeal the old law? The reason seems inferrible from a view of the constitution, the decision of the Federal Court, and the history of parties at the time.

The constitution confers on the citizens of one State the rights of citizenship in the several States. The Federal Court had intimated that the power to make a citizen belonged solely to Congress, and was taken away from the States. There was in the United States, a party extremely inimical to the privileges which had been given to aliens, and this was testified by the famous "Act concerning aliens," passed by Congress in 1798, (1 Story's L. U. S. 515.) which was nullified, and by a law of Congress, passed in 1798, (1 Story's Laws of U. S. 512,) the year before our last Act, which required of aliens, before naturalization, a residence of fourteen years instead of five years, as required by the Act of 1795. South Carolina favored aliens, but was at

the same time loyal to the constitution, and as the Act of 1786, entitling aliens "to all the rights, privileges and immunities of citizens," might be construed as a provision to enable an alien to go into another State and claim the rights of citizens there, it is to be inferred that the Act of 1799 was passed to restrict the enjoyment of the rights of aliens to the local limits of the State in express terms, and to call such aliens denizens, while they should have the same rights under the laws of this State as citizens were entitled to. If these same rights were conferred in different language in the new law, it was within the power of the Legislature to do so. It is, perhaps, enough for us to know that the words used are large enough to convey them.

It is impossible to say with certainty, why different words were used. But the most probable inference is, that while the State desired to give the same encouragement to aliens, by securing to them the same rights as they had enjoyed under the Act of 1786, regard for harmony and consistency in the law of the State and the constitution of the United States, stimulated by the political struggles of the times, prompted the change in the form and phraseology, without intending to repeal the substance of the old law.

Taking the two Acts together, then, and concluding that the Act of 1786 stands, except where altered by the constitution and the Act of 1799, the law of this State, at this

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*time, would authorize us to read the two charters of rights thus: "All free white persons (alien enemies, fugitives from justice, and persons banished from either of the United States excepted.) who now are, or who shall hereafter become, residents of this State, shall, on taking and subscribing the oath or affirmation of allegiance before one of the Judges of the Court of Common Pleas, be deemed denizens, and entitled, within this State, to all the rights, privileges, and immunities of citizens, and in all respects to the like protection from the laws of this State as citizens are entitled unto." After striking out and reconciling repugnances, this is the residue, and it is clearly enough to entitle the defendant to be an heir of his deceased brother's real estate.

It was argued by the opposing counsel, on the circuit, that supposing the Act of 1786 to be unrepealed in its chief provisions, the defendant cannot take under it, because he has not proved that he was a resident in the State for a year before taking the oath of allegiance. The answer to this is, that the Act of 1799 dispenses with a year's residence, and requires that the alien should be merely a resident, without requiring a residence for any specified length of time. Both Acts prescribe the same mode of taking the oath of allegiance before a Judge of the Common Pleas. If there be a difference in the two Acts, in respect to the certificate of having

taken the oath, that prescribed by the Act of 1799, although in affirmative terms, repeals that prescribed by the Act of 1786, by repugnancy, pro tanto, in the new law to the old. As the defendant has complied with the new law, he is entitled to the benefit of the old law, so far as it remains unrepealed.—“Sometimes affirmative words imply a negative of what is not affirmed, as strongly as if expressed.” (See Judge Johnson’s opinion in the Allegiance case—*The State, ex rel. McCready, v. Hunt*—Book of Allegiance, 230, 2 Hill—Citing Judge Nott, in *Cohen v. Hoff*, 2 Tread. Rep. 671.)

The term naturalization, as used in the constitution, is a technical word, and is to be used in a technical sense, according to a rule of construction. *Dwarris on St. in 7 Law Lib.* 48. “By naturalization,” says Sir Wm. Blackstone, (1 Com. 280,) “an alien is put in exactly the same state as if he had been born in the King’s allegiance, except only, that he is incapable, as well as a denizen, of being a member of the privy council or parliament, holding offices, grants, &c.” He cannot even hold the office of constable—5 *Burrows*, 2788. In the United States he is, by the laws of Congress, entitled to many more privileges. “He becomes entitled to all the privileges and immunities of natural

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born subjects, except that a *residence of seven years is requisite to enable him to hold a seat in Congress, and no person, except a natural born citizen, is eligible to the office of Governor in some of the States, or President of the United States.”—2 *Kent Com.* 65.

Naturalization, therefore, in its technical sense, means the act of converting an alien into a citizen of the United States. It is admitted that the States, by adopting the Federal Constitution, have denied to themselves the right to do this.—But, as before said, they have reserved to themselves the right to confer any privilege or immunity of a natural born citizen on an alien that may be enjoyed within the State.—It is common, for example, for the Legislature to pass special Acts to allow aliens to be examined and admitted to practice law in this State. If one such privilege may be granted, there is nothing to prevent all. This will not be denied.

I am now brought to the concluding view of this branch of the case. The power to naturalize, is the power to convert an alien into a citizen of each and all of the United States. This power is exclusive in Congress, and no State can, by any legislation, constitutionally confer on an alien born, a right to go from one State to another and enjoy citizenship in that other. The reason why the words of the Act of 1786, “shall be deemed citizens,” are against the constitution of the United States, is obviously because the power to make citizens of foreigners is ex-

clusively in Congress, and because the rule of naturalization should be uniform. There is another reason; to say by an Act of the State Legislature, that an alien, on taking the oath of allegiance, &c. “shall be deemed a citizen,” although a State law, is to make such alien a citizen of the United States, for the constitution provides that “the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.” But although a State may not enact laws declaring how aliens shall be made citizens, it is not against the constitution of the United States for a State to enact that aliens, on certain conditions, shall be entitled “to the rights, privileges and immunities of citizens,” for this is not to declare that they shall be citizens of the State. If it be said that this provision would give them the rights of citizens in other States, and is therefore void, because one of the rights of a citizen of this State, is the right of citizenship in the other States, the answer is, that as far as the Act of 1786 gives this right, it is void; but there are other “rights of citizens” intended to be given which are not against the constitution, and as to such rights, it remains of force, on the ground, as before stated, that it is

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*repealed only to the extent of its repugnancy to the constitution, and no further.

Among the rights of a citizen which a denizen may enjoy in this State, without conflicting with the constitution or the rights of other States, is the right to inherit real estate.

I come now to the second position; that supposing the Act of 1786 to be entirely repealed, the provisions of the Act of 1799 clearly entitle the defendant to inherit a moiety of the land in dispute.

This latter Act is remedial of the common law, and is entitled to a liberal construction, so as to effectuate the intention of the Legislature. The common law and the mischief to be remedied have been sufficiently stated. The remedy provided, was to give denizens the rights of citizens in this State, with the exception of political rights, such as are denied by the proviso of the Act of 1799. The reason of the remedy as before remarked, was to encourage immigration, for the peopling of our thinly settled country, so that we might have arms to strike in our defence, and an increase of national strength, which is the result of the accumulation of wealth by the individuals of a nation. These ends could well be expected from the remedy provided, and all danger from ignorance of our institutions or prepossessions against our form of government in those coming hither from abroad, was completely guarded against, by the proviso which denies them the right to hold offices, or vote for officers.

The whole legislation, from the earliest period of our history as a State, before and

since the revolution, discovers the intention of the Act of 1799 to have been to confer on denizens the rights, in respect to land and personal property, as well as in respect to personal security and liberty, which natural born citizens enjoyed. The Acts before referred to, abundantly prove this, and Lord Mansfield has said, "it is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may be expired, or are not referred to, must be taken to be one system, and construed consistently." (Rex v. Loxdale and others, 1 Burr. 447; Dwarr. on St. 700.) It is not pretended that an Act repealed, is to be incorporated with a subsisting Act, as a part of it, but "for a collateral purpose, it may be deemed competent to call in aid a repealed statute to assist in the construction of another statute." (Dwarris on Statutes, 47, 7 Law Lib.) By some of these old Acts referred to, aliens were made free of the province; in others, they were entitled not only to the rights, but the name of citizen; and in all, the right to inherit real estate is,

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in some form of words or *other, unequivocally given. When the Act of 1799 was passed, the same reason for conferring these rights on aliens existed, and the legislature has, under a different phraseology in that Act, placed them in the same state as under the older Acts, except they are called denizens, as before said, out of respect to the constitution of the United States. The Act of 1799 provides that aliens, on taking the oath of allegiance, &c. shall be deemed denizens, "so as to enable such persons to purchase and hold real property within this State, and in all other respects to entitle such persons to the like protection from the laws of this State, as citizens are entitled unto."

The Act thus clearly confers all the rights of a citizen of this State. Had the Act stopped at the word "denizens," the defendant would have been restricted to the common law rights of denizens, and could not have inherited real estate; but other rights are added, if the clause means any thing, and we are obliged to find some meaning for it, on the maxim *ut res magis valeat quam pereat*. (Dwarris on St. 45, 7 Law Lib. See also, the allegiance case, 2 Hill.)

The Act drops the word denizen, and after enumerating the right of a denizen to purchase and hold real property, it adds, "in all other respects, the like protection from the laws of this State, as citizens are entitled unto;" taking up the word citizen, and putting him who is called denizen in this State, on the same footing, in all respects, as a citizen. The "protection" which a citizen enjoys, is protection in the enjoyment of certain rights. These, as before said, are the rights of personal security, personal liberty, and private property, embracing the right to inherit real estate.

If it means protection in the enjoyment of personal security, or in freedom from violence, it means protection in the enjoyment of all the rights of a citizen, for the Act says such person shall be entitled "in all other respects, to the like protection, from the laws of this State, as citizens are entitled unto." If the clause does not mean protection in the enjoyment of rights, it means nothing, and secures nothing to the persons intended to be benefited by it. But we are not allowed to conclude that the Legislature has used a long clause to mean nothing.

That protection which the citizen enjoys from the government in return for his allegiance, is the protection intended by the clause, and supposing it to be a technical term, it means a defence by the law, in the enjoyment of those rights secured by the government. Tomlin's Law Dic. Title "Protection." It had reference particularly to

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land under the *feodal system, from whence the reciprocal character of allegiance and protection is derived. 1 Black. Com. 336, and 337.

If a technical sense is to be attached to this word, the right to inherit land is embraced under it, for the feodal meaning was a protection, first of all, in the rights to land. But this appears to be refining too much on a term of such universally well understood and popular signification; and it can hardly now be said to have a strictly technical meaning. It seems more proper to construe it by the rule laid down in Dwarris on Statutes, 47, (7 Law Lib.) that "the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use." This is the rule except where words of art are used.

The meaning of the Legislature in giving like protection to denizens as citizens are entitled to, may be clearly seen by referring to the proviso of the Act of 1799. By the rule, as before stated, all the parts of a statute are to be read and compared for the purpose of ascertaining the intention of the law. If the Legislature had not considered that the words, "and in all other respects to entitle such person to the like protection from the laws of this State as citizens are entitled unto," were large enough to entitle a denizen to all the rights of a natural born citizen, and were not intended to signify either nothing or protection from personal violence only, there would have been no necessity to pass the long proviso denying some of the rights of a citizen, at the end of the statute—"That nothing herein contained shall be construed to confer on any denizen the right of voting at any election for members of either branch of the Legislature, or for any public officer of this State, or of being eligible as a mem-

ber of either branch of the Legislature, or to any office of trust or profit in this State."

A proviso is a qualification of a rule. If the Legislature had not in the Act laid down a rule that denizens should have all the rights of citizens, not only a citizen's rights of property but a citizen's rights of voting, and of holding office, no proviso would have been passed or thought of, qualifying the rule so as to negative political rights.

If there be any doubt as to the meaning of the words and the design of the law, by a rule before stated, the expositors of the Act, where it is remedial and of public utility, are authorized "to construe largely, and not with restriction;" and where "the end and design appear larger than the words, the statute may be strained even beyond the

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words." (Tom. *Law Dic. 524.) The words, however, seem to be so clear as not to require the help of this rule.

The same reason and policy, to a great degree, exist now in this State, which caused the enactment of the law of 1799. But if such reason and policy had now become changed, the law would still remain of force according to the original design; the maxim, *ratione cessante, cessat et ipsa lex*, applies to the common law, but not to a statute. (Dwarr. 23, 7 L. L.) This is not the only State which has seen the wisdom of encouraging aliens.

In New York, "Aliens are enabled to take and hold lands in fee, and to sell, mortgage and devise, but not demise or lease the same, equally as if they were native citizens; provided that the party had previously taken an oath that he was a resident in the State, and intends always to reside in the United States, and to become a citizen thereof, as soon as he could be naturalized, and that he had taken the incipient measures required by law for that purpose." 2 Kent, 70.

"There are similar statute provisions in favor of aliens in South Carolina, Indiana, Delaware and Missouri; and in Louisiana, Pennsylvania, Maryland, Illinois and Ohio, the disability of aliens to take, hold and transmit real property seems to be entirely removed." Id. 70.

"In North Carolina and Vermont there is even a provision inserted in their constitutions, that every person of good character, who comes into the State and settles, and takes the oath of allegiance, the same may thereupon purchase, and by other just means acquire, hold and transfer land, and after one year's residence, become entitled to most of the privileges of a natural born subject. Id. 70.

"These civil privileges, conferred by State authority, are dictated by a just and liberal policy; but they must be taken to be strictly local." Id. 70.

In the case of the Trustees of Lomesville v. Gray, 1 Litt. 149, (Kentucky, 1822,) it was

decided that under the Act of 1800, (of Ky.) a sister, though an alien, may inherit land from her deceased brother, if she prove two years' residence in the State, previous to the death of her said brother.—The Act is in these words: "That any alien other than alien enemies, who shall have actually resided within this commonwealth two years, shall, during the continuance of his residence herein, after the said period, be enabled to hold, receive and pass any right, title or interest to any lands or other estate known within this commonwealth, in the same manner and under the same regulations as the citizens of this State may lawfully do." 2 Litt. 399.

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*The word pass, thus, by a liberal and fair construction, transmits lands by descent. A similar liberal construction will transmit lands by descent to denizens, under our Act of 1799.

Act of 1819 of Tennessee, (Carter & Nicholson's Digest, 87,) gives aliens, intending to reside in, and become citizens of, the State, the right to inherit real estate.

An Act of Georgia, of 1700, (Hotchkiss's Digest, 317,) gives the right to inherit real estate in express terms. This Act still remains of force.

The opposing counsel, Mr. Dargan, on the circuit trial, stated that it was a tradition which had come down to him, concerning the Act of 1799, that South Carolina was at that time warmly interested to protect aliens against the onslaught made on them in the middle States by the federal party, and this Act was framed with the intention of giving aliens all the rights and privileges which a State might constitutionally confer. If such was the intention of the Legislature, the words used should be construed in their widest sense, to meet the end in view, and are sufficient to confer one right at least, which is not in conflict with the constitution, and that is the right to inherit real estate.

If the intention of the Legislature to confer on aliens, by the Act of 1799, the rights of a citizen, could be rendered plainer than our own numerous statutes have made it, history may furnish some of the light which is needed. In the years 1798 and 1799, the great contest for ascendancy occurred in the United States between the Federalists and Republicans. Among the measures of the federal party, under the administration of John Adams, was the passing of the Alien Law, before referred to. By that Act it was declared "that it shall be lawful for the President to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable ground to suspect are concerned in any treasonable or secret machination against the government thereof, to depart," &c.

The republican States of Virginia and Kentucky, in order to protect such alien friends

as were within those States from banishment and disfranchisement, declared this law of Congress null and void; and amid the fury of the contest for the Presidency, between the incumbent, John Adams, Thomas Jefferson, Aaron Burr and General Pinckney, (3 Ramsay's Hist. U. S. 130,) the Act of 1799 was passed by South Carolina. The cautious words of the Act, so as not to interfere with the constitution, were most likely, the result of party collision, but they are to be

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taken as a clear exposition by the *State of her opposition to the efforts of the federal party to disfranchise friendly aliens, and as an indication of the legislative will, that aliens should enjoy all the substantial privileges which they had before enjoyed. This State was then strenuously active against the federal party, and anxious for the elevation of a republican to the presidency. The expiration of the Alien Law, two years after its enactment, and the election of Mr. Jefferson, as President, allayed the excitement on the subject of aliens and the other federal measures, which might, otherwise, have involved the United States in the calamity of civil war. It is fair and lawful to make this reference to history; indeed, it has been decided by the Federal Court, (1 Wheat. 116, 3 Cond. Rep. 508,) that "in the construction of statutes, or local laws of a State, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of them, to enable a Court to apply with propriety the different rules of construing statutes."

As I have before said, if the Legislature, in the Act of 1799, had intended to confer no other rights than those of a denizen, the Act would have stopped at the word denizen, because that is a technical term, and has a common law signification, and it would not have been necessary to have added another word; but the Act goes on, after this word, and accumulates on the rights of denizens, the rights of citizens; and one of the rights of citizens, is the right to inherit land.

I have heard it said, that under the Act of 1799, the right to inherit land is not given in terms, nor does "protection" mean a gift of rights; and the "protection" of law will only be afforded to rights given. But in looking at the whole clause, in which the word protection is used, it is clear that a gift of the rights of citizens is conferred. If the Act had provided that aliens, on taking the oath of allegiance, &c. "shall be deemed denizens, and entitled to protection," and there stopped, the rights of a denizen only, would have been conferred; but when it goes on to add the like protection as citizens are entitled to, it becomes a gift of additional rights; for the protection which a citizen is entitled to, is protection in all the rights which the law allows him. For example, a citizen, on the

death of his father, has a right to hold his father's lands by descent cast, and when any one invades this right, the law affords its protection, by enabling him to recover and hold his land, and by redressing the wrong. So of any other right. This is the "protection from the laws of this State which citizens are entitled unto," and this is the gift conferred, by the Act of 1799, on denizens.

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*CALDWELL, Ch., delivered the opinion of the Court.

The only question involved in this case is, can a denizen under the Act of 1799 inherit real estate in South Carolina?

The acquisition of real estate is either by the act of law, or by the act of the party: when the law casts the estate upon the acquirer, independently of his own or of another's acts, it is generally by descent, escheat, curtesy, or dower.—When the estate is obtained by the act of the party, it is technically termed purchase, which includes every lawful mode by which it can be acquired. (1 Steph. Com 351.) An alien, at common law, cannot acquire a title to real property by descent or by other mere operation of law; (Ib. 406) and although he may purchase it, or take it by devise, yet he is exposed to the danger of being divested of the fee, and of the land being forfeited to the State upon an inquest of office found. (2 Kent Com. 53) But the law quæ nihil frustra, never casts the freehold upon an alien heir who cannot keep it: even a natural born subject or citizen cannot take by representation from an alien, because the alien has no heritable blood through which a title can be deduced. Upon the death of an alien who has purchased and held land, it instantly and necessarily (as the freehold cannot be kept in abeyance) without any inquest of office, escheats and vests in the State, because he is incompetent to transmit it by hereditary descent. A denizen is in a middle state between an alien and a natural born citizen, and although subject to some of the disabilities of the former, is entitled to many of the privileges of the latter: (1 Blac. Com. 374; Com. Dig. Aliens D. 1; 1 Vent. 419.) He may take lands by purchase or devise, which an alien may not, but cannot take by inheritance, for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the child; from a like defect of hereditary blood the issue of a denizen born before denization cannot inherit to him, but his issue born after may. The only exception to the rule of deriving title by descent through heritable blood, arose in the case of two sons born in England of an alien father. One of them purchased land and died without issue; it was held that the surviving brother could inherit to the other and derive title through the alien father. (Collingwood v. Pays, 1 Sid.

Rep. 193; 1 Vent. Rep. 413; contrary to the doctrine of Lord Coke, Co. Lit. 8. A.)

These established rules of the common law must control this case, unless they have been repealed or modified by our Statutes.

The Act of 1799 (5 Stat. of S. C. 355,) provides that "all *free white persons, alien

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enemies, fugitives from justice, and persons banished from either of the U. States excepted, who now are, or hereafter shall become, residents in this State, shall, on taking and subscribing the oath or affirmation of allegiance before one of the Judges of the Court of Common Pleas, be deemed denizens, so as to enable such persons to purchase and hold real property within this State, and in all other respects to entitle such person to the like protection from the laws of this State, as citizens are entitled unto," &c. withholding from them the right to vote for public officers, or of being eligible to such offices. The object of the Act was to remove the disability of aliens who were willing to take the oath of allegiance and desirous of settling in this State, and to place them upon the footing that the letters patent *ex donatione regis*, put an alien in England: the legal effect of the Act is to waive the right the State has to escheat the lands of an alien during his life, but does not remove the disability of the common law which bars him from inheriting. The words "purchase and hold real estate," had, at the passing of the Act a well defined meaning which we cannot presume the Legislature either misapprehended or misapplied; and if the object had been to remove all disabilities of alienage and to confer all the rights of citizenship, except those that were political, it is more than probable that it would have been explicitly expressed. The denizen claims the right, in derogation of the common law, under terms that qualify and restrict the privilege merely "to purchase and hold real estate," and it would be a violation of the rules of construction to infer that the Act intended to confer upon him the right to inherit by descent, (the principal impediment arising from alienage) as this is an entirely different mode of acquiring title. The granting of one privilege to an alien cannot be construed to bestow all the other privileges of a citizen upon him.

Although cotemporaneous exposition is not always conclusive, it is often strongly corroborative of the correct interpretation of a statute; and the note appended to the Act by the learned Judge Brevard, who compiled the digest of our Statutes, indicates his opinion in the negative of this question. (1 Brev. Dig. 236 note; Car. Law Journal 214.)

From principles of analogy (for no case can be found expressly in point) we may fairly infer that denization does not remove the disability of an alien to inherit.

In the case of *Richards v. McDaniel et al.* (which was three times before the Constitu-

tional Court) Mrs. McDaniel had taken the oath of allegiance when she applied for naturalization, instead of taking the declara-

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tory oath of her intention *to become a citizen of the U. States, agreeably to the Act of Congress, and although the Court held that it was a substantial and sufficient compliance with its requisitions, yet that she was bound to take the oath of allegiance after the prescribed period had expired, before she could be admitted as a citizen, and having failed to do so, she died an alien, and her husband, who was naturalized, could not inherit land through her. (2 Mill Const. Rep. 18; [Richards v. McDaniel] 2 Nott and McC. 351; [Richards v. McDaniel] 1 McCord, 187; *Ex parte Granstein*, 1 Hill Rep. 144.)

Although it is unnecessary to resort to the former Acts of the Legislature to expound the meaning of the Act of 1799, as those of 1696 and 1704 were expressly repealed by that of 1786, which was shortly afterwards annulled and superseded in its further operation by the adoption of the constitution of the U. S. which placed aliens in the same condition as if no Act had been passed removing their disability, and gave origin to the Act of 1799, by which the privilege of denization was conferred upon aliens: (2 Stat. of S. C. 131, 252; 4 Ib. 600, 746; 5 Ib. 355, 523, 547; *Chirac v. Chirac*, 2 Wheat. R. 269 [4 L. Ed. 234]; 1 Kent Com. 423;) it may also be remarked that their phraseology is very different from the latter—there never was any doubt about their construction—some of them expressly granted to aliens, who complied with their requisitions, the right to inherit by descent; with such models before them it is highly improbable the Legislature intended to grant more than they have expressed. Every State has the unquestionable right to establish the rules by which real estate shall descend or be distributed; some of them, Pennsylvania, New Jersey, Ohio, Louisiana and Michigan, have extended to aliens the right of inheriting real property, while others, Massachusetts, New York and South Carolina, have restricted the exercise of their rights over real estate.

In was argued that the Act of 1791, abolishing the right of primogeniture, and giving an equitable distribution of the real estates of intestates, had abrogated the English rules of descent and introduced a new system.

It was not a primary or incidental object of this Act to abolish the disability of aliens to inherit real estate, and if such a construction should be given to it, then alienism would be no bar to inheritance: (a bastard cannot inherit, 1 Blac. Com. 459; *Chit. on Descents*, 27, 28; 2 Cruise Dig. 374; *Barwick v. Miller et al.* 4 Des. E. R. 434; *Jones v. Burden*, Id. 439;) but the right of the heir depends not merely upon the Act of Distribution but upon his ability to inherit: thus it

has been repeatedly ruled, that when the next of kin, who would be entitled to inherit

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if not an alien, is disabled *to take, by reason of his alienage, yet the land shall not escheat, if there be an heir capable of taking by succession, (*Ennas v. Franklin*, [2] Brev. Rep. [398]; *Escheator of Char. Dist. v. Ex'rs of White*, [4 McCord, 452]; *Laborde v. Wightman*, 1 Speers R. 535.)

The Act does not contemplate an alien as coming within its provision, for no rule is better established than when an alien would take by a course of descent, then the estate shall go over to him to whom it would have gone if the alien had been already dead. (*Hamilton v. Fleetwood*; *North et al. v. Valk et al. Dud. E. R. 215*; *Edwards v. Barksdale*, 2 Hill Eq. R. 416.)

The Supreme Court of the U. S. held in *Orr v. Hodgson*, 4 Wheat. 461, [4 L. Ed. 613]—"when a person dies leaving issue who are aliens, the latter are not deemed his heirs at law, for they have no inheritable blood, but the estate descends to the next of kin who have inheritable blood, in the same manner as if no such alien issue were in existence."

The Statute of distributions has left the law on the subject of alienage where it found it, and has merely modified the canons of descent, without repealing the common law in other respects, and if it had not, proximity of blood under its provisions would invariably have been preferred, instead of having been postponed, in every degree from the nearest to the remotest, in favor of such as have inheritable blood. (*Vaux v. Nesbit*, 1 McCord Eq. R. 352; *Edwards v. Barksdale*, adm'r, 2 Hill Eq. R. 416, 419.) The succession is therefore cast upon the heir by operation of law, which declares an alien incapable of inheriting, and transmits it to the next of kin that is under no disability.

In *McKellar v. McKellar et al.* (Ms. cases, vol. B. 251, in 1820, note to 1 Speers Rep. 536) it was decided that the grand nephews who were citizens were entitled to the real estate of the intestate who died without leaving a widow or issue, in preference to his brothers who were aliens that had removed to this State and had given notice of their intention to become citizens, but had not completed their naturalization when he died. The brothers urged their claims under the provisions of the Act of 1807 (5 Stat. of S. C. 547) but the Court held that they were not entitled, "unless this is construed to be a new law of descent which has abolished in future a great rule of policy which forms a part of the legal jurisprudence of every country." This Act was passed eight years after the Act of denization, which was adopted eight years after the statute of distributions, and we cannot perceive that they have changed the law of descents depending upon inherit-

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able *blood. We are therefore of opinion, that a denizen is not entitled to a distributive share of the real estate of an intestate, and it is ordered and decreed that Matilda McClenaghan, the widow of John McClenaghan, dec'd, is entitled to the whole real estate of her deceased husband, and that the Circuit decree be reversed so far as it decreed that Horatio McClenaghan, a denizen and brother of the intestate, was entitled to a moiety of said estate, and ordered a writ of partition to divide the same.

HARPER, Ch., and JOHNSTON, Ch., concurred.

Decree reversed.

I Strob. Eq. 323

S. S. HOGAN v. WM. E. HALL, Ex'or of Elisha Jones, DORCAS HALL, ALLEN R. CRANKFIELD and JEMIMA, His Wife, and JUDITH JONES.

(Columbia. May Term, 1847.)

[*Chattel Mortgages* ⇨296.]

Where a principal gave an absolute bill of sale of certain slaves to his surety, with a verbal understanding that it was to operate as a mortgage to secure him against liability, and the surety, after paying the debt of his principal, had taken and retained possession of the slaves for more than two years—the Court held that the claim of the principal was barred by the Act of 1712.

[Ed. Note.—Cited in *Mosely v. Crocket*, 9 Rich. Eq. 344.

For other cases, see *Chattel Mortgages*, Cent. Dig. § 583; Dec. Dig. ⇨296.]

[*Execution* ⇨275.]

Where a creditor had agreed to take land from his debtor at a certain price, in part payment of the debt, and the land had been sold at sheriff's sale, to strengthen the title, and purchased at a nominal price and taken possession of by the creditor—there being strong evidence of a settlement having been afterwards had between the parties—after eight years' acquiescence on the part of the debtor, the Court refused to disturb the title after the death of the creditor.

[Ed. Note.—Cited in *Shettlesworth v. Hughey*, 9 Rich. 390.

For other cases, see *Execution*, Cent. Dig. §§ 16, 148, 345, 791-796; Dec. Dig. ⇨275.]

[*Limitation of Actions* ⇨45.]

Where a party borrowed a sum of money from another, and delivered him possession of a slave whose hire was to pay the interest for two years—there having been a settlement between them, about the expiration of that time, and the lender having retained possession of the slave afterwards, and for seven years previous to his death—the Court held that the claim of the borrower to the slave was barred by the Statute of Limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 237; Dec. Dig. ⇨45.]

Before Johnson, Ch., at Fairfield.

The Chancellor states all the facts necessary to the understanding of the questions made in this case.

Johnson, Ch. Complainant states in his bill, that at the sale of the estate of one E. H. Wilson, on the 10th day of April, 1838, he purchased three negroes, Grace, Louisa and Mary, at the price of \$1,230, payable twelve months after date, for which he gave his note, in which Elisha Jones, defendant's

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*testator, joined as surety; and that to secure the said Jones against this liability, he, on the 24th day of the same month, gave him an absolute bill of sale of the said negroes, and another, called Charity, on an agreement that it should only be regarded as a mortgage; and that they remained in his possession until the —— day of February, 1840, when they were taken out of his possession by the said Jones, and are now in possession of defendants, his executor and legatees; that in February, 1835, he borrowed of the said Jones, \$500, and allowed him a negro boy, called Peter, to work, for the interest upon it; that he also is in possession of the defendants, and that, further to secure the said Jones, he confessed a judgment to him for \$2,000, on the 5th day of April, 1835, and without any other consideration; and that afterwards, having been offered a large price for the negroes, he applied to Jones to permit him to dispose of them, to raise money to pay these debts, which he declined, or rather dissuaded complainant from doing. That he, complainant, afterwards went to Alabama, where he remained for two years; and that during his absence the said Jones caused a fi. fa. to be issued on the judgment, and levied on a plantation of the value of \$1,000, which was sold by the sheriff, and bid off by Jones, at \$100; that he also caused a stock of cattle and hogs of complainant's to be sold, under the said fi. fa. and he charges that he had left the said plantation in charge of the said Jones, when he went away, to be managed by him during his absence. That the said Jones, not long before his death, admitted that the said bill of sale was intended as a mortgage, and agreed that he would deliver the negroes to complainant, and release his title to the land, on being repaid the money he had advanced.

The prayer of the bill is, that defendants account for the hire of the negroes and the rents of the lands, and that the negroes may be delivered up to him, and the land re-conveyed, on his paying what may be found due by him to Jones.

The defendants admit, in their answer, that the bill of sale made by complainant to Jones was intended to operate as a mortgage, and to secure him against his liability, as surety on the note, which he afterwards paid; that he took possession of the negroes, and retained it up to the time of his death, in 1844, and that being more than four years after he obtained the possession, they insist they are protected by the Statute of Limitations.

The defendant, Hall, states, of his own knowledge, and as agent of the said Jones, that he advanced upwards of \$1,300 for the complainant, in payment of a mortgage and

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sundry judgments and executions against complainant; and that the said judgment was confessed to secure these advances, and for any further sums that Jones might advance, and for no other consideration. He further states that about the time the judgment was confessed, it was agreed between complainant and Jones that the latter should take Peter, at \$500, in part of the debt which complainant owed him, complainant reserving the right to redeem Peter on the 1st of January, 1837.

They admit the sale of the land, live stock, furniture, &c. and that Jones bid off the land at \$100, but state that they are informed, and believe, that complainant had offered the land to Jones at \$800, and that the sale was merely intended to perfect Jones's title.

The defendants, Hall and Jemima Crankfield, state positively and circumstantially, as facts coming within their own knowledge, that in the early part of January, 1837, the complainant and Jones came to a full and final settlement of all their dealings, by which it appeared that Jones had advanced for complainant \$1,578.56. That in this settlement complainant was credited with the value of the land, at \$800, with the whole of the live stock and furniture sold by the sheriff, with the value of Peter, at \$500, &c. and that complainant fell in debt to Jones \$88; that the calculations were made by defendant, Hall, a memorandum of which is now in his possession.

The facts that Peter was pledged by complainant to Jones, for money borrowed, and that the bill of sale of the other negroes was only intended to operate as a mortgage, to secure Jones against the note, leave but three questions to be considered, in relation to the parties' rights in the mortgaged negroes. 1st. Whether the defendants are protected by the Statute of Limitations. 2d. Whether complainant's right to redeem was not barred by his not redeeming within two years after condition broken. And, 3d. Whether there was a full and final settlement of all their dealings in January, 1837, as stated in the answers. I shall, therefore, state only so much of the evidence as applies to these questions.

Jones obtained possession of the negroes, by inveigling them out of the possession of complainant, in February, 1841. He died in April, 1844, and the bill was filed on the 23d of May, 1845. The witness, James G. Massey, says that in February or March, 1841, he went to Jones, at the request of complainant, to negotiate an amicable settlement between them, and after some conversation between them, witness "asked him if he apprehended no difficulty from the way in

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*which it was reported he came in possession of the property. Jones then said he did not claim the negroes as his property; that he wanted his money, and to tell Hogan, (complainant,) that he did not wish to see him at all, but to send him his money and take his negroes; and this he repeated two or three times." Witness inquired the amount due, and Jones mentioned a certain sum, between \$1,700 and \$1,800.

Daniel Motley, sworn for complainant, testified that in February, 1841, defendant, Hall, told him that he had been authorized by Jones to meet Col. A. F. Peay at the house of complainant, to settle the accounts between them, and that it was understood that Peay was to advance the money to pay Jones's debt, and requested the witness to go with him to witness the settlement. They went, but did not go into the house, and, learning that Peay was there, defendant, Hall, inveigled the negroes off, and in answer to the remonstrances of the witness, he said that if he could get hold of the negroes, he would not take double the amount that complainant owed Mr. Jones.

James Harrison, another witness, testified that in the latter part of 1837, or early in 1838, complainant applied to him to borrow money to pay his debt to Jones, and requested him to go with him, complainant, to Jones, to make a settlement. Witness did not go. Some time after, he met Jones, who said he had arranged matters with Hogan, and that he, Jones, was as well able to help complainant as witness. And to manifest that he was the friend of Hogan, Jones told him that he had bought his land at \$100, and had agreed to allow him \$800 on settlement. That complainant owed him \$900, and that Peter was pledged for \$500; that he did not intend to hold complainant to his bargain, but when they settled, he would allow him hire for Peter and make him pay interest.

In 1840 or 1841, he told witness that he had a bill of sale of complainant's property, but did not intend to use it as such, and only as a mortgage. The names of Peter and Charity were mentioned. Dr. Peak testified, that a few days before the trial, defendant, Crankfield, told him he thought complainant had been defrauded, and being one of the legatees of the will of Jones, he was willing to contribute his proportion to indemnify him.

The only evidence opposed to this, if, indeed, it amounts to an opposition, is that of Joel Dunn, who testified, that in a conversation with complainant, in 1845, he said that his land was worth \$1,000, but that he had agreed to let Jones have it at \$800. He com-

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plained that Jones had got his property *for nothing, and that there was something for him, if he could get it, and that he intended to go to law about it.

1st. As to the Statute of Limitations. That cannot prevail. Jones took possession in Feb. 1841, he died in April, 1844, and the bill was filed in May, 1845. His executor was, by the statute, protected from suit for nine months, and deducting that from the interval between the commencement of his possession and the filing of the bill, and there remains only about three years and three months, the time limited by the statute being four years.

2d. By the Act of 1712, (2 Stat. at Large, 587,) where the mortgagee of chattels has possession of them, the mortgagor is barred of his equity, unless he redeem them within two years. My first impressions were that it only applied to the case where he was in possession under the covenants of the mortgage. I am satisfied, upon reflection, that that position cannot be maintained. If the ordinary covenants of a mortgage be interpolated into this bill of sale, Jones would have been entitled to the possession of the negroes, in the event the condition was broken. His possession was, therefore, rightful, and he might have sold the negroes, or retained them until complainant redeemed, and not having done so, the statute attaches.

The slave, Peter, was not mortgaged, but put into the possession of Jones to work for the interest of a sum of money borrowed, and does not fall within the statute. If the value of his services was more than legal interest, the agreement was to that extent usurious, and I shall direct an inquiry into that matter.

3d. The answers of the defendants, Hall and Jemima Crankfield, as to the fact of the settlement and account in January, 1837, are very positive and circumstantial, particularly in regard to the purchase of Peter, but it is impossible to reconcile these to the declarations of Jones down to 1841, more than three years after the supposed settlement, that he did not claim the negroes as his own, and held them only as a security for money advanced, proved by three witnesses, one of whom, James Harrison, was known to the court as very respectable. This must prevail, as, according to the known rule of the court, the answers are not evidence.

The allegation of the bill is, that the judgment was confessed without any other consideration other than as additional security for money that had been before advanced. This is denied in the answer of defendants, and other considerations are distinctly stat-

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ed. No evidence was offered on *either side, and I propose to direct an enquiry into that matter also.

It is agreed on all sides, that \$500 was the amount advanced by Jones to complainant, the interest of which was to be paid by the labor of Peter. It is therefore ordered, that the commissioner do state an account between complainant and defendants, charging complainant with that amount from the

time it was loaned, and crediting him with the value of Peter's hire, from the time he went into Jones' possession; and that he do ascertain and report what was the consideration of the judgment confessed by complainant to Jones, the value of the land and personal property sold by the sheriff under Jones' execution; and also the value of the rents of the land, from the time Jones had possession; and any other matter that may be material to the matters in issue.

Grounds of Appeal.

Defendants appealed from so much of the Chancellor's decree in this case as directs an account, and moved to dismiss complainant's bill, upon the following grounds:

1. Because there was sufficient evidence that all matters of account between complainant and Elisha Jones, prior to the 10th April, 1838, when Jones became the surety of Hogan, on the note to John J. Wilson, had been settled before that time; and that Jones had become the absolute owner of the negro boy Peter, and the tract of land mentioned in the bill, and the bill ought to be dismissed.

2. Because complainant sold the negro boy Peter, to Elisha Jones, in the spring of 1835, at the price of \$500, with the right to redeem him on the 1st Jan. 1837, which constituted a verbal mortgage; and complainant having failed to redeem for the space of two years, is forever barred.

3. Because complainant's claim to Peter, or to an account for his hire, is barred by lapse of time and the Statute of Limitations.

4. Because, even if complainant has a right to redeem Peter, he has no right to an account for his hire; as by the contract between the parties, Jones was to have his work for the interest of the \$500, which was a legal contract, and not usurious; more especially as it was proved that the interest of \$500 was more than the hire of Peter was worth, when he went into possession of Jones.

5. Because the Chancellor received incompetent testimony, viz.: the declaration of Allen R. Crankfield, which seems to have influenced his decision, although the evidence was objected to on the trial.

McDowell & Cooke, Def'ts Sol'rs.

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*Complainant excepts to so much of the Chancellor's decree in the above case, as refers to the application of the statute of 1712, relative to a mortgagor's equity of redemption, after condition broken, and will move to reverse the same, on the following grounds:

1st. Because it is apparent from the testimony of the case, that the bill of sale of the negroes, Grace, Louisa, Mary and Charity, executed by complainant to testator, Elisha Jones, although, to some extent, intended by both parties to operate as a mortgage, did not so far partake of that character as to

come within the scope of the statute aforesaid.

2d. Because, to entitle a mortgagee to the benefit of the aforesaid Statute of Limitations, it is necessary that the mortgage should be in writing, and that there should have been an actual delivery of the chattels mortgaged.

Hammond & Clarke, Compl'ts Sol'rs.

DUNKIN, Ch., delivered the opinion of the court.

This court concur entirely with the Chancellor on the subject of the negroes included in the bill of sale from the complainant to Elisha Jones, dated 24th April, 1838.—The complainant's witness, Jonathan Watts, proves the circumstances of the transaction very satisfactorily. He says that the consideration of the bill of sale, to wit, \$1,305.40, was made up of the note to the estate of Wilson, for which Jones was surety, and a note due by Hogan to Jones himself. Charity, as the bill of sale states, was about thirty-five years of age, Grace, about thirty-three, Louisa, about four years old, and an infant, Mary, about six months old. This witness, Watts, says that Charity, if sound, was worth \$500; but that she was unsound. "The understanding of the parties," says he, "when this instrument was executed, was, that Hogan, at the end of the year, was to pay the purchase money of Grace and her children, \$1,220, and the \$88 above referred to, and if he did so, he was to have the negroes again."

Hogan failed altogether to pay the debt to Wilson's estate, and in November, 1839, it was paid by Jones, amounting, then, with the interest, to \$1,354.06, and making the amount due by Hogan, including the \$88 note, about \$1,500. This was in November, 1839, and explains perfectly the testimony of Dr. Myers and other witnesses. The conversation to which they allude was evidently in relation to this matter. It occurred, according to his testimony, just before Hogan went to be the overseer of Col. Peay, a few months before the negroes were taken from the possession of Hogan, "one, two, three, or four months." The bill expressly states that the

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negroes *were taken from the defendant's possession in February, 1840. The answer admits the allegation. There is no doubt that the complainant overlooked for Col. Peay in 1840, and Watts, complainant's witness, testifies that Hogan told him, in the Spring of 1840, that the negroes had been taken from him. Dr. Myers says that in this conversation between Col. Peay, Jones and Hogan, Col. Peay stated his disposition to aid Hogan by paying what was due to Jones. Witness thinks the amount alleged to be due was about \$1,600. Jones said "he had no objection—that his necessities were such that he was compelled to have the money or the

property soon." An appointment was made for a meeting "at Hogan's house, to know whether Peay would pay the money for Hogan."—Watts says that "in December or November, 1839, he heard Col. Peay tell Jones that he had examined into Hogan's affairs, and found he was so much in debt that he could not relieve him." Two months afterwards the negroes were taken into the possession of Jones, under his bill of sale, and there remained until his death in 1844. There can be no doubt that the claim of the complainant was barred by the Statute referred to in the decree. It was said the mortgage was not in writing. But the bill of sale—that which constituted the title, was in writing. It was only the defeasance, that on which the complainant relies, which was in parol; and the reasoning of the Chancellor is quite satisfactory on the point.

It becomes now necessary to inquire into the transaction which relates to the land and the negro Peter. The charge in the bill is that in February, 1835, the complainant being pressed by some debts, Elisha Jones, the defendant's testator, agreed to advance money to relieve him, provided complainant would permit him "to take into his possession a negro boy named Peter, to work for the interest of five hundred dollars of said money for two years, and confess a judgment for two thousand dollars, as a further indemnity"—that in April, 1835, he confessed the judgment, and delivered Peter into the possession of Jones. He states that in May, 1835, he, the complainant, went to Alabama, and did not return to this State until 25th December, 1836—that, during his absence, his land, worth \$1,000, was sold by the Sheriff under some execution, and bought by Jones for \$100—that Jones told several persons at the sale that he had purchased the land from the complainant, and only bid in order to get a Sheriff's title. Complainant avers that, at the end of the two years he tendered the five hundred dollars for Peter, but that Jones refused to receive the money or deliver the negro, but said he would do so at some future time. The bill calls on

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*the defendants to discover the precise amount of money paid by the said Elisha Jones for the complainant. The interrogatory was the more proper because it had been previously alleged in the bill that the moneys advanced by Jones were paid through his agent, Wm. E. Hall, one of the defendants. In reply to this interrogatory the defendant, Hall, answers that on the 6th of April, 1835, he met the complainant in Camden, and, as the agent of Jones, paid off debts of the complainant, in the Sheriff's office and elsewhere, to the amount of one thousand and sixty-seven dollars, and on the 27th April, paid the balance due on one of the debts of \$245, making together \$1,312, besides some smaller debts of which he can-

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not state the particulars. Although the answer, thus far, is strictly evidence, yet it is not very material, for the same is substantially established by other testimony hereafter to be noticed. The answer admits that the defendant's testator did not mean to keep the land of the complainant at the bid made at the Sheriff's sales, and admitting also the possession of Peter, says he was to be redeemed if the \$500 was paid in January, 1837. But the answer proceeds with a statement that the land which was knocked off to Jones during complainant's absence in Alabama, was to be taken by Jones at \$800; and further, that, soon after the return of the complainant from Alabama, to wit, early in January, 1837, a settlement took place between his testator, Jones, and the complainant—that the calculations were made by the defendant, Hall, in the presence of the parties—that the amount then ascertained to be due by Hogan to Jones was \$1,578.56—that he was allowed \$800 for the land, \$500 for Peter, and certain other amounts specifically set forth by him for other articles of Hogan's, purchased by Jones, and that a balance was thereupon ascertained to be due by Hogan to Jones of \$88.33—that he speaks with accuracy, as he has the paper still in his possession on which the calculations were made.

We concur with the Chancellor, that the answer of the defendant is not evidence to establish the settlement. It remains then to inquire whether such settlement may be with propriety inferred from the other testimony in the cause. The letter from the complainant to E. Jones, dated Alabama, 28th October, 1836, seems to have entirely escaped the observation of the Chancellor, or was probably not given to him after the hearing of the cause. In that letter the complainant writes "I am able to pay you \$500 cash now, and will act the gentleman with you;—you shall never lose a dollar on my account. You can take my land at \$800, and I will pay you \$500 in January—that will be \$1300, and you

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will be so good *as to send my two negroes out to me any time in December, so that I can get them in time to hire out, or put in a crop; and what you do not make over of the balance I am as good as wheat for." It cannot be doubted that this letter admitted an amount, then due to the person to whom it was addressed, exceeding thirteen hundred dollars. The letter was in reply to one which he had received on the day previous, as appears from the first part of it—"You can take my land at \$800" is, apparently, in reply to a proposal to that effect on the part of Jones. But the complainant's witness, Watts, being examined by him to prove that he did not buy the land at Sheriff's sale with an intention to keep it at his bid, testified that "after the sale of Hogan's land by the Sheriff, he heard Jones say that the title of Hogan was not

good, and that the Sheriff's title would be better than one Hogan could make—that Jones said he was to allow Hogan \$800 for the land. Jones told witness that he had bargained privately with Hogan for the land at the price of \$800." Another witness, Joel Dunn, testified that he heard Hogan say "the land of his was worth \$1,000, but that he had agreed to let Mr. Jones have it in a settlement, for \$800." The conversation took place in 1845. Hogan complained of Jones—said he was going to law, or was at law—"that Jones had got his property for nothing—that his land was worth \$1,000, but that he had let Jones have it in settlement for \$800." But on the subject of the land the Court can perceive neither contrariety nor discrepancy in the evidence. The letter of October, 1836, admitted an indebtedness of more than \$1,300, and proposed or agreed that the land should be taken at \$800 in part payment. It is not alleged in the bill, it was not suggested by the complainant at any subsequent period, in Court or out of Court, that he had actually paid, in any other way, any part of the sum then acknowledged to be due to Jones. The latter, in possession of the Sheriff's title, remains also in undisturbed and unchallenged possession of the land from 1836 until his death in 1844; and, for the first time, in May, 1845, his title is called in question by the institution of these proceedings. Then as to Peter. The complainant alleges that in January, 1837, he tendered the money and demanded the negro. It is very difficult to conceive why the complainant did not then insist on his rights. But the defendant ascribes the silence of the complainant to the fact that, in the alleged settlement of January, 1837, the complainant received credit for the value of Peter. Is this allegation confirmed? It will be recollected that at that time the complainant owned Charity as well as Peter; in his letter of October, 1836, he

self the owner of Peter, and that he was wrongfully detained from him by the person to whom it was addressed. But it is quite consistent with the supposition that, in January previous, the settlement had been made, and that Peter had then become the absolute property of Jones. It may not be an immaterial circumstance to remark that the balance of \$88, which was alleged to have been found due by Hogan on the settlement in January, 1837, constituted, according to Watts' testimony, one of the items of the consideration for the bill of sale of April, 1838. The evidence is very strong that a settlement was made in January, 1837, and that the value of Peter was included in it. But the complainant avers, and it will be assumed, has proved, that in January, 1837, he actually tendered the money to Jones and demanded the negro. On the refusal of the defendant's testator the right of the complainant was perfect either at law or in this Court. The complainant does not allege that any new contract was then made. If he held as mortgagee in possession, the complainant's right would be barred in two years.—But if, as complainant avers, there was no mortgage, and that Jones was only to hold the negro for two years for the interest of \$500, complainant's right of action accrued in January, 1837, and was barred in January, 1841, more than three years prior to the death of the testator. There are circumstances in the case which seem peculiarly to entitle the testator's estate to the protection of this statute of repose. Wm. Sanders, the most important witness of the complainant, proves that "he was at Jones' in January or February, 1837. Dr. Hall (the defendant) was engaged in a calculation of some matters between Jones and Hogan. Hall was a good while engaged in the calculation. At the instance of Mr.

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had requested *Jones to send out his two negroes. Another letter, or note, was adduced in evidence (not noticed in the decree) from the complainant to Jones, dated 15th December, 1837, eleven months after the alleged demand by the complainant, and eleven months after the settlement in which defendant avers Peter became the absolute property of Jones, his testator.—The letter is sent by Charity, and in it the complainant writes, "I request you to be so good as to let me have Peter for the next year. As I have got to hire a hand—I will give you your own price for him the next year," adding that the testator, Jones, had hands enough for his land without Peter, and that Charity would be better satisfied if Peter was there with complainant; he concludes, "and I will give you a fair price for him, as I do take you to be one of my best friends," &c. It is hard to suppose that this letter came from a man who supposed him-

Jones, *witness and Hogan called on Dr. Hall, and requested him to come up to Mr. Jones' for the purpose of making the calculations above referred to. The calculations occupied some two or three hours, perhaps." This is the exact period at which the defendant alleges he prepared the statement on which the settlement was made. The testator, Jones, lived for seven years afterwards, and the matter was never moved, although the complainant never lived at a greater distance than 25 miles, and during a part of the time, in the employment of an opulent and influential gentleman, who was disposed to befriend him. The grave closed on the principal party in the transaction, and the witness, who could alone give a satisfactory explanation of it, had become incompetent. The Court would be reluctant to infer that the complainant waited for this fortuitous conjunction in order to prefer this long standing claim, but he has availed him-

self of it, and cannot complain that he is made to abide the consequences of his delay.

It is ordered and decreed, that the decree of the circuit be reformed, and the bill dismissed.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

HARPER, Ch., absent.
Decree reformed.

I Strob. Eq. 334

M. L. BRYAN and J. C. RICHARDSON v.
U. M. ROBERT.

(Columbia. May Term, 1847.)

[*Chattel Mortgages* ⚡213.]

Where, on the sale of a slave, the purchaser gave his bond with two sureties for the price, and a mortgage of the slave, and then sold the slave to another, who, before the execution of his bill of sale, sold to a third party, who took the bill of sale from the first purchaser, and who again sold to another, and then he to a fifth party, who removed the slave, and the sureties of the mortgage bond afterwards paid the debt to the first vendor, and took an assignment of the mortgage, the first purchaser having become insolvent, the Court *held* that this was not a case in which their bill would lie for the specific delivery of the slave, nor for the foreclosure of the mortgage, but ordered that the third purchaser, who had sold the slave with notice of the mortgage, and against whom the bill was filed, should pay to the complainants the sum for which he had sold the slave, with interest thereon from the date of the sale.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 463; Dec. Dig. ⚡213.]

[*Specific Performance* ⚡69.]

A bill may be sustained for the specific delivery of slaves where the owner has had possession of them and has been deprived of that possession by another, or where the party contracts for the purchase of specific slaves, or where one is entitled to slaves by the gift or limitation of a friend, relative or ancestor; for in such cases the general presumption is, that

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there may be some attachment to, or some particular qualities in, the slaves themselves, or some other sufficient reason which would render them of more value to the owner than could be compensated by their price estimated at a mere market value.

[Ed. Note.—Cited in *Sims v. Shelton*, 2 Strob. Eq. 224.]

For other cases, see *Specific Performance*, Cent. Dig. § 201; Dec. Dig. ⚡69.]

[*Chattel Mortgages* ⚡129.]

In this Court the mortgagee of slaves, though having the legal title, is not considered in any manner as the owner of the slaves—he is regarded as having taken a pledge or security for his debt, with no view to the possession of the property itself—his object is merely the recovery of his money.

[Ed. Note.—Cited in *Wheeler v. Durant*, 3 Rich. Eq. 460; *Calhoun v. Calhoun*, 2 S. C. 308.]

For other cases, see *Chattel Mortgages*, Cent. Dig. § 216; Dec. Dig. ⚡129.]

[*Chattel Mortgages* ⚡269.]

Bills are entertained in equity for the foreclosure of mortgages of personal property, on

the ground that the property may be sold under the direction of the Court; that if it fall short of satisfying the debt, the mortgagee may have a decree for the residue, or if there should be a surplus, that it may be awarded to the mortgagor, and so put an end to litigation.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 553, 554; Dec. Dig. ⚡269.]

[*Trover and Conversion* ⚡9.]

The sale, by one in possession of a chattel, is of itself a conversion, as against the true owner, without any demand on his part; and although this Court does not entertain an action of trover, it may award the value of property which has been destroyed or removed.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 58-83; Dec. Dig. ⚡9.]

[*Election of Remedies* ⚡2.]

[Cited in *Nix v. Harley*, 3 Rich. Eq. 382; *Holliday v. Poston & Son*, 60 S. C. 107, 38 S. E. 449, to the point that if one person sells the property of another, the owner may pursue and recover the property itself, or affirm the sale and recover the proceeds in the hands of the seller.]

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 2; Dec. Dig. ⚡2.]

Before Johnston, Ch., at Barnwell, February, 1846.

The Chancellor states all the necessary facts in the following Circuit decree:

Johnston, Ch. This cause comes up now to be heard upon the proofs and the pleadings as amended by the order of the Court of Appeals, made at Columbia, Nov. extra term, 1845.

I have listened with attention and candor to the admirable argument of the defendant's counsel, Mr. Aldrich; but nothing which his learning, acumen and diligence have brought to my view, has changed the impression I had of the case when I heard it in the Appellate Court. The proofs, though somewhat varied, leave the case substantially what it was before; and the law, as indicated by the Appeal decree, though critically examined by the counsel, appears to me to be free from just objection.

It may be useful to make a brief statement of the circumstances of the case as they appeared at this second hearing.

Benjamin Coleman, the administrator of one Robert Minor, made sale of the personal estate of his intestate, on the 21st. of February, 1842; at which sale, James M. Loper became the purchaser of a slave named Stephen, at the price of six hundred and twenty-five dollars. By the terms of the sale, the purchaser was to pay the price at the expiration of twelve months, and to secure the payment by bond or note, with personal security and a mortgage of the property. The property in this instance, though not formally delivered by the vendor, was taken possession of by the purchaser the evening of the sale, and the terms were complied with a few days

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afterwards, by his giving Coleman, the ven-

dor, his bond, with the plaintiff, James C. Richardson, and Joseph C. Bryan, the intestate of the plaintiff, Martin L. Bryan, as sureties, together with a mortgage of the slave Stephen. It may be noticed here, that the time for the maturity of the bond was accidentally left blank at the execution of the instrument.

Loper, the purchaser, was at the time indebted to one J. M. Myers, a hog-driver from the western country; who being present at the sale, and understanding from Loper that he was going to bid for Stephen, told him that if the negro did not go at too high a price, he would take him off his hands. But Loper testifies that he intended to purchase at any rate; and bought for himself and not for Myers. After he bid him off, Myers at first refused to take him at the price; but eventually Loper sold and delivered him the negro that evening, at the price at which he had himself bought him.

There was no privity, whatever, between Myers and Coleman, the vendor. Loper gave Coleman his bond and mortgage, as I have stated, a day or two after the sale. Coleman appears not to have known of the transfer of the slave; although Myers, the day after the auction, asked him how he would like it if he, Myers, should take the negro with him to Kentucky; and upon his replying that he did not know, said he thought it likely that he and Robert (the defendant) would trade, and that he would leave him with him. Robert lived in the neighborhood; and it appears that the negro, Stephen, had a wife on his plantation, and was unwilling to go with Myers. Myers exchanged Stephen with Robert for two negroes, Liverpool and Phoebe; of whom he sold the former to one Janold for \$400, and the latter to one Ashley, for \$200.

This exchange was made shortly after Myers bought Stephen. Robert says, in his answer, that after the exchange was made and the property delivered Myers informed him he had bought Stephen from Loper, and requested him to take a bill of sale from Loper, to which he assented; and accordingly Loper conveyed the negro to him by bill of sale, dated the 26th day of February, 1842; which was the date of the exchange. Myers immediately returned to the western country.

Robert asserts in his answer, that when he made this exchange, and when he took this conveyance, he was entirely ignorant how Loper became the owner of Stephen, as well as of any incumbrance upon him. And there is no direct proof of notice of either of these facts; though it is proved, as I have stated, that Stephen had a wife on his plantation;

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*and Coleman says in his testimony that Robert must have known that Stephen was part of the estate of his intestate, Minors, who had partly brought him up.

At the time of these transactions Loper was generally regarded as a man in excellent circumstances. But shortly afterwards it began to be suspected that he was really embarrassed.

Coleman says that fifteen or twenty days after his sale to Loper, Robert, who, it will be remembered, had in the meantime purchased and taken Loper's conveyance, came to him and asked if he would not be willing to give up his mortgage on Stephen, and take a mortgage from Loper of two of his negroes in lieu of it. Coleman agreed to go with him to see Loper about it. But Robert never came, and the matter was dropped. Coleman says that he had never informed Robert of the mortgage: so that it is left to conjecture how Robert had learned the fact. At all events, this testimony is in direct contradiction of Robert's answer, which asserts that he never, while he was in possession of the negro, knew to what person he had been mortgaged, although he heard an indefinite rumor that there was some mortgage on him.

Coleman also testifies that, in the latter part of the summer or first of the fall of 1842, Robert came again to him, and asked him what he intended to do with his mortgage, and was informed by him that the mortgage debt was not yet due; but that when it came to maturity he should certainly be under the necessity to collect it.

Loper's creditors began to press him, and it became evident that he must fail; and, in fact, on the 7th of November, 1842, his property was brought to sale under executions to the amount of \$8,731.77, and on the 5th of the following month, to the further amount of \$1,800, which rendered him entirely insolvent.

Meantime, Robert, aware of his danger, and with a view, as he says in his answer, "to disconnect himself from the property," (but not with a view "to defeat the lien of the mortgage," which he positively denies,) sold the negro, Stephen, in the latter part of September, 1842, at the reduced price of \$400, to one John B. Powell, who was in the habit of buying and selling negroes, who took him forthwith to Charleston, and sold him to Wm. Prothro, of Orangeburgh. Robert gave no notice of the mortgage to Powell. Powell, upon offering him for sale, discovered a depression on one side of his thorax, on account of which he was obliged to take \$325 for him. But this was not the occasion of

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Robert's *having reduced the price when he sold him; for the deformity was not then discovered, and he was sold as sound.

The fact that the negro was sold to Powell, and that he came to the possession of Prothro, was studiously concealed, up to the moment of the trial—the defendant evidently evading the statement of the facts, as they existed, and leaving the plaintiff in the dark

as to where the negro, who had been carried off, was to be found.

Out of these multifarious circumstances I shall select a few, upon which, as I conceive, the case may be determined.

In the first place, I suppose, we may dismiss Myers, altogether, from the case. It is evident that he purchased with notice of the terms of the sale, and would be bound by all the conditions to which Loper was liable. The delivery of the slave to Loper, even if there was a formal delivery, was conditional, and subject to the execution of the mortgage. —So that if, in fact, the legal title had been transferred by Loper to Myers, still Myers would have held it subject to the mortgage stipulated for.

But, as I have said, it is unnecessary to notice Myers in the case. Robert agreed to take, and did take, Loper's title; which was subject, of course, to his mortgage previously executed. And Robert is to be considered merely as the assignee of the mortgagor. By the mortgage the title was vested in Coleman, the vendor; therefore, what Loper conveyed to Robert was nothing more than the equity of redemption. It matters not, therefore, whether he took this conveyance with or without notice of the mortgage; (though I think there is proof enough of notice,) since, in any case, according to *Donald v. McCord*, Rice Eq. 330, the legal title will prevail over the mere equity of innocent purchasers. Indeed I think it might be doubted whether a specific lien, though a mere equity, would not prevail over a posterior equity, though a general lien would not. Equity enforces liens. But it is unnecessary to take such a ground, for here the legal title of the mortgagee is brought into conflict with the assignee of the mortgagor; and, in such a case, without doubt, according to the principle of the case I have mentioned, the former shall prevail.

Then if Robert were still in possession of the slave, and this were a bill to foreclose the mortgage, I should have no hesitation in sustaining it. The appeal decree has decided that the assertion of his title by the mortgagor, by an action of trover or detinue, would not reach the exigencies of the case, nor afford complete relief; because it would leave the equity of redemption to be still

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adjusted by an appeal to this *Court. This is, therefore, one of the cases in which the mortgagee would be entitled to come against the assignee of the mortgagor, if he was still in possession, for a specific delivery of the slave to answer to the mortgage debt, and that the accounts between the parties might be definitively settled.

But the assignee is not in possession, and upon this fact alone the defence is now principally rested.

If the assignee is not in possession of the slave, whose fault is it? He had in his pos-

session, that which was pledged for the payment of the debt; and even if he had no notice of the mortgage when he received this property, the proof is too clear to admit of doubt, that he had that notice before he parted from it. His only object, as he states, in disposing of this slave, was "to disconnect himself from the property." Now, I have no doubt that the assignee of mortgaged property is not, as a general rule, liable, personally, for the mortgage debt. It is no debt of his. The only liability is on the specific property encumbered, and which he happens to have received. But he is liable for that property. To be sure, if he passes it away in good faith, and is ready to be called on to guide the creditor to it, so that he may have a remedy, this is very well. He may point out the property and compel the creditor to look to it in the hands of his sub-assignee. But how, if in "disconnecting himself with the property," he defeats the lien? Would it do to say, that if the assignee of mortgaged property should put it out of the jurisdiction, or beyond reach, he is not liable for the debt to the value of the property? That because he is not the debtor, and the property alone is liable, therefore, if he can place the property out of reach, he is entirely clear of all responsibility? Certainly not. He may disconnect himself from the property if he pleases, provided always, that in so doing, he does no injury to the creditor. And where is the difference between the case I have supposed, of the assignee removing the property, but still retaining his right to it, and the case which has occurred here of selling it, and sedulously concealing all the facts by which the creditor might be enabled to trace it, and obtain his remedy out of it? Certainly there is none in principle. And I hold that the tardy disclosure made at the trial came too late.

I should have stated that the sureties to the mortgage bond paid the debt to Coleman and took an assignment the 14th February, 1844; and this is their bill seeking relief against Robert.

It is said that the wrong, if any, committed by the defendant, was committed

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against Coleman, the mortgagee; and *not against these plaintiffs, who had, at the time, no title to the property, but only an equity to have the mortgage assigned upon paying the money; that the omission to fill the blanks in the bond with a specific day for its maturity, made it presently due, and that Coleman might have enforced it when, and even before, Robert parted from the property; and that, therefore, the wrong committed in removing the property, was a wrong done to his legal title in it; but that no wrong, legal or equitable, was committed against the plaintiffs; no wrong to their le-

gal title, because as yet, no title was assigned to them; nor to their equities, because they had not as yet paid the money, nor entitled themselves to an assignment. But I apprehend that this is too narrow a view of the case, and is rather subtle than solid.

The bond was not due in September, 1842, when Robert contrived the negro out of the way, nor until the following February. No doubt, when no time is specified for the payment of money, it is presently due at law. But when a time is stipulated, but accidentally omitted in reducing the contract to writing, if the holder of the instrument should take advantage of the mistake and proceed at law before the stipulated time, he would be arrested by this court.

The wrong committed was not against the legal title of Coleman, for in fact his title under the mortgage was as good after Robert's conveyance as before. Robert had no title, and could convey none.

The wrong consisted in defeating the remedy which the mortgage afforded, and was not confined to him who then held it, but extended to every one who had an interest in it. The plaintiffs had an inchoate right in the paper and all the remedies which it afforded or might afford, which right was consummated on the payment of the money.

Besides, we might, if necessary, regard this suit as if brought by Coleman in person, or that he is represented here by the plaintiffs, his assignees.

It is decreed that the defendant is liable to the plaintiffs to the extent of the value of the slave Stephen, at the time of his alienation of him, with interest thereon. And it is referred to the commissioner to ascertain the sum due the plaintiffs in virtue of said mortgage, with the value of said slave and interest as aforesaid. The defendant to pay the costs.

Grounds of Appeal.

The defendant appealed from the above decree, on the following grounds.

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*1. Because there was no proof that the defendant had notice of the mortgage previous to his purchase of the slave.

2. Because there was no sufficient proof that the defendant had notice of the mortgage, previous to his sale of the slave.

3. Because, at the time the defendant sold the slave, the complainants had no title to him, but only an equity to have the mortgage of him assigned to them upon their paying the money due for him. And, therefore, the defendant, in selling him, committed no wrong, legal or equitable, against the complainants; no wrong to their legal title, because, as yet, no title was assigned to them; nor to their equities, because they had not, as yet, paid the money, nor entitled themselves to the assignment. And because his equity was equal to theirs.

4. Because the mortgagee and complainants were both guilty of gross laches in not moving in the matter until fifteen months or more after the defendant had parted with the slave, and long after the bond had become due.

5. Because, as to the defendant, the assignment of the mortgage operated nothing more than an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor; of a mere right of action for a tort; such a right is not a proper subject of assignment, and will not be upheld either in law or equity.

6. Because the mortgage is not recorded, and is, therefore, void against the defendant, he being an innocent purchaser without notice.

7. Because Loper sold the slave to Myers before he executed a mortgage of him to Coleman—therefore when the defendant purchased from Myers, he purchased an unincumbered title, and that without notice that a mortgage was to be given.

8. Because the complainants (if entitled to any remedy) have a plain and adequate remedy at law.

9. Because Coleman's testimony should not have been admitted, and he should have been made a party complainant.

10. Because the decree is contrary to the evidence and to equity.

James T. Aldrich, for the motion.
Bellinger & Hutson, contra.

HARPER, Ch., delivered the opinion of the Court.

I think there is a misconception in supposing this a case in which a bill will lie for the specific delivery of a slave. The general principle on which such a bill may be sustained, as determined by the cases of Sartor

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v. Gordon [2 Hill Eq. 121,] *Trapier v. Glover* [2 Hill Eq. 528] and *Young v. Burton* [1 McMul. Eq. 255,] rests on these grounds: that when an owner has had possession of a slave, and has been deprived of it by the act of another, the general presumption is, that there may be some qualities in the slave which would render him of more value to the owner than could be compensated by the price of such a slave, estimated at his mere market value. So, where a party contracts for the purchase of specific slaves, it is presumed that he may have made his contract with a view to some particular qualities in the slaves themselves, for which ordinary damages would not be a sufficient compensation. Or, as in *Trapier v. Glover*, when one is entitled to slaves, by the gift or limitation of a friend, relation, or ancestor, there is very sufficient reason why he should have the slaves themselves, instead of any damages for their estimated value. A general expression is used in one of the cases, that

where a party states a defendant to be in possession of his slave, he states a case entitling him, *prima facie*, to the interference of this Court. And so it is, but it must be taken with the qualifications which I have suggested, from the context of the cases. An exception is made in the cases, when it appears that, without any view to peculiar qualities, there is a contract for slaves, to be sold again, as merchandize.

The same reason applies, and more strongly, in the case of a mortgagee of slaves. He is not supposed to know any thing of the peculiar qualities of the slaves, except that he might form an estimate of the market value of such slaves, and certainly not to have the same attachment, or knowledge of their character and qualifications, as the owner, who has been in possession of them, and has been deprived of it.—In this Court, the mortgagee, though having the legal title, is not considered, in any manner, as the owner of the slaves; as, in a Court of Equity in England, the mortgagee of land is not considered the owner. He is regarded as having taken a pledge or security for his debt, with no view to the possession of the property itself. His object is merely the recovery of his money.

Nor do I think this can be regarded as a bill for the foreclosure of a mortgage. Certainly bills are entertained for the foreclosure of mortgages of personal property—somewhat unnecessarily, it might seem, as the mortgagee might seize the property and sell it, to satisfy his debt. But the ground on which Equity entertains such a bill is, that the property may be sold under the direction of the court—that if it falls short of satisfying the debt, the mortgagee may have a decree for the residue, or, if there

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should be a surplus, that it may be *awarded to the mortgagor, and so put an end to litigation.—If the mortgagee should sell, himself, there would be, in case of deficiency, an action at law to recover the remainder of the debt; or, if there should be a surplus, the mortgagor might sue for it. Equity makes an end of these matters. But it was never supposed that the Court could be called upon to act the part of a bailiff, to put the property in the mortgagee's possession, that he might sell it by his own act—still leaving the mutual rights of action, to which I have adverted. If this were a bill for a foreclosure of a mortgage, Loper would be a necessary party to it, as being the original debtor, liable in the first instance, against whom the complainants would be bound to exhaust their remedy, before proceeding against the property in the possession of his

vendee. But the allegation of the bill is, that the negro has been sold and carried out of the State; though, from subsequent evidence, it seems that this may not have been the case. A specific delivery, then, according to the showing of the bill, would have been impracticable, whether for the purpose of making the sale to satisfy the mortgage debt, or otherwise. Then it is plain, that the only remedy was by an action of trover at law.—The sale, by one in possession of a chattel, is, of itself, a conversion, as against the true owner, without any demand on his part. This Court does not entertain an action of trover, though it may award the value of property which has been destroyed or removed.

There is one ground, however, on which the complainants may, to a certain extent, be relieved; though the ground can hardly be said to be taken in the pleadings, unless under the prayer for general relief, nor even in the argument. I feel that there is some irregularity in the Court's taking notice of a ground which has not been made or urged, yet it is within its competency to do so, and the Court is always unwilling to expose parties to protracted litigation, or see them defeated of a fair demand. If we should dismiss the bill, the complainants' action of trover would be barred by the Statute of Limitations. But there is a principle of Equity, that if a stranger, in possession of my property, undertakes to sell it, and delivers it accordingly, it is at my option either to pursue the property in the hands of the holder, or to affirm the sale, as the act of a voluntary agent, and recover the proceeds in his hands. This might be, where the sale was made in good faith, the vendor believing himself to be the owner. But in this case there is no doubt that the defendant had notice of the complainants' claim, if not before, yet a few days after his purchase. He sold, as he

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expresses in his answer, "to *disconnect himself with the property." This seems to have been under a notion, that by selling the slave he might rid himself of responsibility to the complainants. But this would not be so at law, nor, on the principle I have stated, is it so in Equity.

It is ordered and decreed that the defendant, U. M. Robert, pay to the complainants the sum of four hundred dollars, with interest from the time of the sale to Powell, in September, 1842, as for money received to their use.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

Decree confirmed, in the result.

I Strob. Eq. 344

GEORGE J. MYERS, Ex'or. v. MARY H. ANDERSON et al.

(Columbia. May Term, 1847.)

[Wills **614**.]

Where testator, by his will, gave certain slaves to his son, "so long as he may or does live," and after his death to be equally divided between his two daughters "during their natural lives," and after their deaths "to be the absolute property of the issue of their bodies for ever," the Court held, that after the death of the son, the daughters took only a life estate, and that upon their deaths, respectively, their issue took as purchasers.

[Ed. Note.—Cited in *McLure v. Young*, 3 Rich. Eq. 576, 577; *Danner v. Trescott*, 5 Rich. Eq. 358; *Markley v. Singletary*, 11 Rich. Eq. 398; *McIntyre v. McIntyre*, 16 S. C. 294, 295, 296; *Fields v. Watson*, 23 S. C. 55; *Fuller v. Missroon*, 35 S. C. 330, 14 S. E. 714; *Simms v. Buist*, 52 S. C. 558, 560, 30 S. E. 400; *Clark v. Neves*, 76 S. C. 489, 57 S. E. 614, 12 L. R. A. (N. S.) 298; *Williams v. Gause*, 83 S. C. 268, 270, 65 S. E. 241.

For other cases, see Wills, Cent. Dig. § 1399; Dec. Dig. **614**.]

[Wills **495**.]

All the authorities agree, that if the limitation be to the heirs of the body, or issue, and to their heirs, this constitutes them purchasers: as it shows an intention to give them an estate, not inheritable from the first taker, but an original estate, inheritable from themselves as a new stock of descent.

[Ed. Note.—Cited in *Danner v. Trescott*, 5 Rich. Eq. 362; *Fields v. Watson*, 23 S. C. 46.

For other cases, see Wills, Cent. Dig. §§ 1061-1064; Dec. Dig. **495**.]

[Deeds **123**.]

If the estate limited to heirs of the body or issue, be of a quality, or be given to be enjoyed in a way incompatible with the idea that they are to hold it in indefinite succession, (as if it be given to them as tenants in common, or to be equally divided between them,) this takes it out of the rule in *Shelley's* case; and the immediate heirs, or issue, take as purchasers.

[Ed. Note.—Cited in *Fields v. Watson*, 23 S. C. 56; *Simms v. Buist*, 52 S. C. 561, 30 S. E. 400.

For other cases, see Deeds, Cent. Dig. § 420; Dec. Dig. **123**.]

[This case is also cited in *McIntyre v. McIntyre*, 16 S. C. 297, and *Simms v. Buist*, 52 S. C. 554, 30 S. E. 400, and distinguished therefrom.]

Before Johnston, Ch., at Marion, February, 1847.

Johnston, Ch. This is a bill filed by the ex'or of Silas Anderson, who died in March, 1845, for the settlement of certain questions hereafter to be stated.

The testator's will bears date the third of October, 1844, in which, by way of providing for an afflicted and idiotic son, he bequeaths as follows:

"Thirdly, I give and bequeath unto my son, Robert Lewis Anderson, the following negroes, viz: Nell and her children, Ben, Chap, Hannah, Jane, Daphne, Willis, Joe, Loft, Stepney, and Bruerton, which several ne-

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groes I give and bequeath *unto my said son, (Robt. L. Anderson,) so long as he may or

does live. And after his death, I will and bequeath the said Nell and her children, (which she now hath, as before named, or which she may hereafter have,) to be equally divided between my two daughters, Mary E. Brown and Margaret S. Brooks, during their natural lives, and after the death of the said Mary E. Brown and Margaret S. Brooks, to be the absolute property of the issue of their bodies, forever. And I do hereby appoint my beloved wife, Mary H. Anderson, the sole manager of my said son, Robert L. Anderson, and to keep the said Robert L. Anderson, and the said negroes, Nell and her children, so long as she, my beloved wife, may or does live."

Mary E. Brown died about a month after the testator, leaving a husband, (who administered to her,) and five children, which husband and children are defendants in the case.

Then about two months thereafter, the said Robert L. Anderson, (the afflicted son of the testator,) also died.

No assent to the legacy of said slaves had been given by the executor, who had not as yet fully possessed himself of the assets of his testator, nor ascertained his debts.

The following claims are set up, and to be adjudicated in this suit:

1. Mary H. Anderson, testator's widow, claims the negroes for the term of her life.

2. Margaret S. Brooks, and the administrator of Mary E. Brown, contend that by the terms of the will, an absolute title to said negroes vested in the said Margaret S. and Mary E., upon the death of Robert L. Anderson.

3. The children of Mary E. Brown contend that they took as purchasers upon the death of their mother.

1. The claim of Mary H. Anderson, the widow, appears to me to rest upon very slight foundation. The words of the testator imply a mere intention to give her the custody of her son and his negroes to manage them for his advantage, without conferring any beneficial interest on her. And this is more satisfactorily shewn by the fact that, in other clauses of the will, she is amply provided for by the gift of ten slaves, and a life estate in "all my (testator's) possessions of land."

2 and 3. There is great doubt respecting the legal interpretation of the will, as it relates to the quantity of interest vested in Mrs. Brooks and Mrs. Brown. It is contended that upon the death of the first life-tenant, (Robert L. Anderson,) they took between them an absolute title to the property in question, by way of vested remainder.

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*There is no doubt that the bequest to them is a good vested remainder; the only question is as to the quantity of interest given to them by the will.

If obliged by the rules of law to extend in

perpetuity the interest of these legatees, which is expressly given for life, and to declare that the interest which is given to their issue expressly "to be their absolute property," is no interest at all;—that the absolute property is not in the issue to whom it is given, but in the mother, to whom it is not given, but on the contrary expressly withheld: if I am obliged by the rule in Shelley's case to do this, I shall feel that I am sacrificing the intention of the testator, as to which there can be no mistake.

The argument here has not given me the opportunity to judge whether I am compelled by the authorities to go so far, and as, whatever may be my decision, the case will go up to the Court of Appeals, I shall conform my decree to the manifest intention of the testator, and declare that Mary E. Brown and Margaret S. Brooks take only a life estate, and that upon their deaths, respectively, their issue take as purchasers.

It is ordered, that a writ of partition do issue, to divide the said slaves with their increase into two equal shares, one of which is to be allotted to Margaret S. Brooks for life, with remainder over to the issue she may leave living at her death, and the other to be equally divided among the children of Mary E. Brown.

The costs to be paid out of testator's estate.

The defendants, Brooks and Brown, appeared from this decree, on the ground that the limitation to the issue of Mary E. Brown and Margaret S. Brooks is void and that on the death of Robt. L. Anderson, they took an absolute estate in the negroes bequeathed to them.

G. W. & J. Dargan, for the motion.
M'iver, contra.

JOHNSTON, Ch. delivered the opinion of the Court.

All the authorities agree, that if the limitation be to the heirs of the body, or issue, and to their heirs, this constitutes them purchasers: as it shows an intention to give them an estate, not inheritable from the first taker, but an original estate, inheritable from themselves as a new stock of descent. (4 Kent's Com. 221.) The authorities also agree, that if the estate limited to heirs of the body, or issue, be of a quality, or be given to be enjoyed in a way incompatible with the idea that they are to hold it in indefinite succession, (as if it be given to them as tenants

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in common, or to be equally divided *between them:—this takes it out of the rule in Shelley's case; and the immediate heirs, or issue, take as purchasers. (4 Kent's Com. 221, 229, 230.) It appears to the Court, that the testator in this case, by the gift to the issue, not only of the property, or slaves, but of the absolute property in them, (a term im-

porting the quantity of interest intended to be given)—has as effectually given them the fee, (so to speak,) as if the bequest had been to the issue and their heirs; and that the gift of the absolute property, or fee, rebuts the idea that he intended it to go in an indefinite succession.

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN, Ch., CALDWELL, Ch., and HARPER, Ch., concurred.

Decree affirmed.

I Strob. Eq. 347

THOMAS McDOWEL and Wife v. ALEXANDER H. CHAMBERS et al.

(Columbia. May Term, 1847.)

[*Frauds. Statute of* 103; *Husband and Wife* 29.]

The court overruled the objection to a deed of marriage settlement, that the schedule of the property was inserted in pencil—holding that all which is required is, that it be in writing, and that this is complied with, though the writing be in pencil, and not in ink.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 193; *Dec. Dig.* 103; *Husband and Wife*, Cent. Dig. § 160; *Dec. Dig.* 29.]

[*Evidence* 414.]

The operation of a deed is from the time of its delivery, and not from the date of the instrument. The date is no part of the deed, and proof may be made that the execution took place on a day different from the date inserted in the deed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1858; *Dec. Dig.* 414.]

Before Johnson, Ch., at Fairfield, June, 1846.

Johnson, Ch. The complainants, in contemplation of marriage, entered into an agreement, which was intended to secure to the separate use of the wife, then Martha E. Luter, all the property of which she was possessed, and to protect it against the creditors of the husband, who was then insolvent, and the covenants of the deed were calculated to effectuate these objects. James C. Neil, being the person nominated the Trustee, and the conveyance being to him, the intention to settle all her property is expressed, but there is no schedule accompanying it, and a blank was left in the body of the deed for the purpose of inserting the description; that was done in pencil before its execution; but when it was put in the hands of Mr. Elliott, to be recorded, he, with the consent of the trustees, retraced the pencil marks

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with a pen, and *on inspection, it appeared to have been accurately done. It bears the date of the 3d of November, 1841, and was not recorded in the office of the Secretary of State until the 8th of February, being more than three months after its date, but it is alleged in the bill, that it was, in truth, executed on the 30th of November, and that inserting the

3d was done by mistake. The defendants are creditors of the husband, and have caused executions to be served on the property, and the bill prays for a perpetual injunction restraining all further proceedings thereon.

The defence rests upon the grounds, 1st. That the deed was void, as to creditors, not having been recorded within three months, (the time limited by law) after its execution. 2d. For want of a schedule, or other suitable description of the property.

There is no evidence at all, as to the mistake in the date of the deed. John F. Young, a merchant of Winstonsborough, the only witness examined to the point, only proves that there was a charge in his books to the wife, in the name of Martha E. Luter, of the date of 1st December, 1841, and thinks she was not married at the time. He had heard of the marriage, and the settlement; that might well have happened, and yet the deed might bear its true date; that is conclusive as to the rights of these parties, and it is unnecessary to consider the other question.

It is ordered and decreed that the bill be dismissed.

The complainants appealed, on the following grounds:

1. Because the Chancellor mistook the evidence in regard to the registration of the marriage settlement, it being clearly proved, and conceded by the defendant's counsel, that the deed was recorded within three months.

2. Because, even if the deed were not recorded, it would be good against creditors of the husband existing prior to the marriage.

3. Because the decree is utterly contrary to the law and the evidence.

Boyce, for the motion.

JOHNSTON, Ch., delivered the opinion of the court.

The court is satisfied that the objection to the deed, on account of the schedule of property being inserted in pencil, is not well taken. All that is required, is that it be in writing; and this is complied with, though the writing be in pencil, and not in ink. (See Story, Prom. Notes, 14; 5 Barn. and Cresw. 213.) Then, as to the registration. The proof

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is *beyond doubt, that it was made within three months from the execution of the deed. Young, an attesting witness, says it was executed "the last day of November, or the first of December," "a few days before the marriage." This is supported by Neil, who says that the marriage took place about the 3d or 4th of December, and that the deed was executed but a few days, (certainly not a week) before; and that after it was registered in the office of Mesne Conveyances, he is sure he took it to the Secretary's office, for registration there, within three months from its execution, having been advised that it must be recorded there within that time. The

operation of the deed is from the time of its delivery, and not from the date of the instrument. The date is no part of the deed; and, according to our own case of *Barmore v. Jay*, [2 McCord 371, 13 Am. Dec. 736], proof may be made that the execution took place on a day different from the date inserted in the deed. The proof here is very satisfactory, as to the true time of the execution. And, indeed, upon inspecting the deed, the whole matter is explained. The deed and probate were drawn out "the ——— of November." Before it was executed, the blank was filled up in pencil with the figures "30." But upon the instrument being handed to Mr. Elliott, the register of Mesne Conveyances, for recording, (which, according to his memorandum on the deed, was on the 3d of December,) he filled up the blank with "3d" instead of "30th," which has occasioned the whole difficulty. The Act requires the registration to be made within three months of the delivery of the deed, and has been fully complied with in this case. It is ordered and decreed, that the decree appealed from be reversed, and that the defendants be perpetually enjoined from enforcing their claims against the property mentioned in the deed; which is hereby adjudged to have been duly executed and regularly recorded; and that the defendant, Chambers, pay the costs of suit.

HARPER, Ch., DUNKIN, Ch., and CALDWELL, Ch., concurred.

Decree reversed.

I Strob. Eq. *350

*MARTIN and WALTER et al. v. THOMAS EVANS, Sen., et al.

(Columbia. May Term, 1847.)

[Execution \hookrightarrow 288.]

Where one purchased land at Sheriff's sale, and the sale was afterwards declared void, and the land ordered to be resold, the purchaser was held liable for the rents and profits, from the time of his purchase to the time of the resale, subject only to a deduction for the improvements which he had made.

[Ed. Note.—Cited in *Bath South Carolina Paper Co. v. Langley*, 23 S. C. 145.

For other cases, see Execution, Cent. Dig. § 825; Dec. Dig. \hookrightarrow 288.]

[Ejectment \hookrightarrow 143.]

The only advantage a bona fide possessor, who supposes himself to be the actual owner, has over a mala fide possessor, is, that on recovery by the rightful owner, Equity will allow him to set off the improvements, made by him, against the rents and profits which have accrued since his possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 504; Dec. Dig. \hookrightarrow 143.]

[Ejectment \hookrightarrow 127.]

A right to land essentially implies a right to the profits accruing from it.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 438-443, 453; Dec. Dig. \hookrightarrow 127.]

On appeal from an order of His Honor, Ch. Johnston, made Feb. 1847, refusing to

overrule an order made by His Honor Ch. Dunkin, at Marion, February, 1846.

In October 1842, William Evans purchased at Sheriff's sale, certain real estate of Thomas Evans. Shortly afterwards a bill was filed by the execution creditors, to set aside the sale. In February 1844, a decree was pronounced, setting aside the sale, and ordering, also, that the land be resold by the Sheriff for their benefit, or in satisfaction of their claims, and that William Evans be refunded any sums which he had actually paid on his purchase. Thomas Evans having in the mean time taken the benefit of the insolvent debtor's law—it was further ordered that the complainants have leave to make his assignee a party, and to apply for such further order or orders as might from time to time be deemed necessary. This decree was affirmed by the Court of Errors in May 1845.

At Marion, February 1846, His Honor, Ch. Dunkin, made the following order.

"On motion of Harlee, complainant's Solicitor, Ordered, that it be referred to the Commissioner to ascertain and report the value of the rents of the lands, ordered to be resold by the Court in this case, as also of the House and Lots in Marion Village, from the time of the purchase by William Evans, in October, 1842, to the time of the re-sale of the same by the Sheriff, under the order of this Court.

At February Term, 1847, the Commissioner submitted the following report:

"The Commissioner, to whom it was referred to ascertain and report the value of the rents of the lands, ordered to be re-sold by the Court in this case, as also of the house and lots in Marion village, from the time of the purchase by William Evans, in October, 1842, to the time of the re-sale of the same

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*by the Sheriff, under order of this Court, begs leave to report:

"The defendant, William Evans, urged at the reference, that he was not accountable for rents at all, and objected to the Commissioner's taking an account,—which objection I overruled, upon the ground, that the order was imperative, and left me no discretion, and that this objection should have been made to the Court, which ordered the reference, instead of allowing the Order to be made without opposition.

I find the tracts of land referred to, to be known, familiarly, as the Alabama, Gasque, Legett, Lambert, Steam Mill, and Hay's tracts, the annual value of the rent of which I find to be as follows:

Gasque tract	\$150 00
Alabama "	150 00
Legett "	20 00
Lambert "	12 50
House and Lots	275 00

I cannot, from the testimony, assign any value to the rent of the Steam Mill, and Hay's tracts.

I find that the defendant has put improve-

ments upon the house and lot, and the Gasque tract, to the value of two hundred and thirty dollars, (\$230.) I find further, that the defendant, William Evans, has never been in the actual possession of any of the said land except the Gasque tract, and the House and lots.

The defendant, in February, 1843, was enjoined and required to give bond in the penal sum of twenty thousand dollars, conditioned not to dispose in any manner of any of the above named tracts, until the further order of the Court. The defendant being thus compelled to retain the possession, I am of opinion that he should be allowed, in deduction of rent, the value of such improvements as were necessary, and enhance the value of the property, more especially, (this being a proceeding on the part of creditors,) as they obtained a proportionate advancement in the price of the property, from these improvements upon the re-sale. I would therefore recommend that the defendant be allowed the above named sum, out of the rents of 1843.

I am of opinion that the defendant should not be charged with the rent of the lands from October, 1842, to January, 1843, as land for agricultural purposes, for this period, can certainly be of no value to the party in possession. The lands were re-sold in September, 1845, before the crops were gathered, and the result of the labors of the year went into the hands of the purchaser. I am, for

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this, and the reason *above stated, therefore, of opinion, that no rent for this period of eight months should be charged to the defendant.

"I have, however, charged the defendant with the value of the rent of the house and lots, from October, 1842, to January, 1843, and from January, 1845, to September, 1845, and have charged him with interest to September, 1845, upon the amount of the value of the rents of each year, from the 1st of January, in the succeeding year.

"Basing the calculation upon these principles, i. e. charging the defendant, William Evans, with the rent of the house and lots only, in 1842 and 1845, and allowing him a deduction for the improvements made in 1843, I find, under the order of reference the value of the rents to be fourteen hundred and twenty-four \$7-100 dollars, (\$1,424.87.)

"If, however, the Court should be of opinion that there should be no deduction made for improvements, then, I find the amount to be fifteen hundred and seventy 64-100 dollars, (1,570.64.) If the defendant is to be charged for the whole time, without reference to the seasons, at the rates fixed upon, he will be chargeable with the sum of nineteen hundred and fifty 4-100 dollars, (1,950.04.)

"And if he be allowed for the improvements, and charged for the whole of the time at the same rates, then the amount will

be eighteen hundred and four 67-100 dollars, (1,804.67.)

"Without reference, then, to the abstract proposition of the defendant, William Evans's accountability for rent, at all, which I did not consider, (not viewing it a question open for the decision of the Commissioner,) I recommend that he be charged, as above, with the sum of fourteen hundred and twenty-four 87-100 dollars, (1,424.87.)

"All which is respectfully submitted.

"R. B. Boyleston, Commissioner."

Upon the hearing of the report, Mr. Miller moved the Court for leave to enter the following order:

"On motion of C. W. Miller, solicitor for William Evans, it is ordered that an order of this Court, made at the last sitting of this Court, in February, 1846, referring it to the Commissioner to report upon the value of the rents and profits of the land ordered to be re-sold by the Court in this case, be rescinded."

On hearing counsel the motion was refused by Chancellor Johnston, Feb. 12, 1847.

His Honor, Chancellor Johnston, then made the following order:

"On motion of Harlee, complainants' solicitor, it is ordered, that the report of the

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commissioner, on the rents and *profits of lands, (ordered to be re-sold,) be confirmed, and that the defendant, William Evans, pay to the Commissioner of this Court the sum of fourteen hundred and twenty-four 87-100 dollars, according to the recommendation of the said report.

"And it is further ordered that the said sum, when collected, be distributed among the judgment creditors of Thomas Evans, pro rata."

From this order the defendant, William Evans, appealed, and moved the Court of Appeals to reverse the order of the Circuit Court, made at February sitting, 1846, ordering the Commissioner to report the value of the rents and profits of the real estate, ordered to be re-sold, from the sale in 1842 till the resale in 1845, on the grounds:

1. That the defendant, William Evans, was not bound to account for the rents and profits, after his purchase, in the year 1842, because the bill does not pray for such account, and because, on decreeing him to be refunded the purchase money, on setting aside the sale in 1842, no interest was ordered to be refunded, and because he is not bound, on any principle, to pay rent.

2. That the Chancellor held this last objection to be excluded, after the said order was made. The Circuit Court, at the present sitting, having overruled a motion to rescind the order above referred to, the defendant appeals, and will renew his motion to rescind, in the Court of Appeals, on the ground—

That the said order was made without no-

tice to the defendant, and to his surprise, and was an administrative order, within the power of the Circuit Court to rescind the same, and that the Circuit Court should have rescinded the said order. The defendant will move the Court of Appeals to reverse the order confirming the report of the Commissioner, at the present sitting of the Circuit Court, on the ground—

That the defendant, William Evans, is not liable, on any principle of law or equity, to pay the rents and profits reported against him in the said report.

Miller, for the motion.

Harlee, contra.

DUNKIN, Ch., delivered the opinion of the Court.

On the 3d October, 1842, William Evans purchased at sheriff's sales certain real estate of his brother, Thomas Evans. Immediately, or very soon afterwards, a bill was filed by the execution creditors, to set aside the sale. A decree was pronounced in February, 1844, setting aside the sale, in which it was adjudged, among other things, that

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the land *should be re-sold by the sheriff, and the proceeds be appropriated by him to the discharge of the legal liens against the defendant in the executions, and that the sheriff should refund William Evans any sums which he had actually paid, on account of his purchase, in October, 1842. Thomas Evans having, in the meantime, taken the benefit of the insolvent debtor's law, it was ordered that the complainants have leave to make his assignee a party, and "to apply for such further order or orders as might, from time to time, be deemed necessary." This decree was affirmed by the Court of Errors in May, 1845. At the February sittings, 1846, of the Circuit Court, at Marion, the Commissioner was ordered to ascertain and report the value of the rents of the real estate, from the time of the purchase by William Evans to the time of the resale by the sheriff, under the order of the Court. The Commissioner made his report in February, 1847, setting forth the value of the rents, so far as it could be ascertained; stated that the defendant, William Evans, had put improvements on the Gasque tract, and the house and lots in the village, the value of which improvements, he recommended, should be allowed to him; and that he had never been in the actual possession of any other of the tracts. It does not appear that any exceptions were filed to this report, but a motion was made to rescind the order of reference of February, 1846, which motion was refused by the Court, and the report of the Commissioner confirmed.

It seems only necessary to determine the general question whether the defendant, Wm. Evans, was accountable for the rents and

profits of the real estate, between the time of receiving the sheriff's title, under the sale of October, 1842, and the resale, in 1845, and whether an order to that effect could be made after the decree of February, 1844. In respect to the latter question, it may be remarked that, for the rents and profits the execution creditors of Thomas Evans had no lien, and in the distribution of them were entitled to no preference. It was, therefore, a proper precaution, that his assignee, under the insolvent law, should be made a party before an order to account, and leave was given by the decree to make him a party, and also to apply for such further order or orders as might be deemed necessary.

It is insisted, however, that William Evans is not liable to account for rents and profits, because, until the decree of the Court, he supposed himself the actual owner, and, although the sale was set aside, no moral fraud was imputed to him. But there is no authority for this position. "A right to land essentially implies a right to the profits ac-

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cruing from it."—"For what," says Lord Coke, "is the land, but the profits thereof."—Co. Litt. 46; Lyford's case, 11 Co. 46. The rule of the English Court of Chancery is, that equity allows an account of rents and profits, in all cases, from the time the title accrued, provided it does not exceed six years, unless under special circumstances, and under these special circumstances the account is confined to the time of filing the bill. 1 Madd. Ch. 72. In *Dormer v. Fortescue*, 3 Atk. 123, Lord Hardwicke observes, "Nothing can be clearer, both in law and equity, and from natural justice, than that the plaintiff is entitled to the rents and profits from the time when his title accrued." He afterwards says, "Where the title of the plaintiff is purely equitable, the court allows the account of rents and profits from the time the title accrued, unless under special circumstances," when the account, as has been stated, is restricted to six years, or the time of filing the bill.

The doctrine was very fully discussed in the Supreme Court of the United States, in *Green v. Biddle*, 8 Wheat. 1 [5 L. Ed. 547]. After an examination of the authorities, Mr. Justice Washington declares that the court held it perfectly clear, that the successful claimant was entitled to an account of rents and profits. He says, "We are not aware of any common law case which recognizes the distinction between a bona fide possessor and one who holds mala fide, in relation to the subject of rents and profits; and we understand Lyford's case as fully proving that the true owner of the mesne profits is equally valid against both. How far the distinction is recognized in a Court of Equity has been already shewn," namely, by restricting the account for rents and profits, under special

circumstances, to six years, or the filing of the bill.

In *Dellet v. Whitner*, Cheves Eq. 213, these principles are reiterated, and the advantage of a bona fide possessor—"one who supposes himself to be the rightful proprietor"—is stated, to wit, that Chancery will permit him to set off the value of any lasting, permanent improvements against the account for rents and profits, but never to exceed that account. Supposing the defendant to be a bona fide possessor, who not only supposed himself to be the true proprietor of the land, but who was ignorant that his title was contested, he is bound to account for the rents and profits, subject only to his claim for improvements.

It is hardly necessary to say that the creditors or the assignee of Thomas Evans stand in his place. No title passed by the sheriff's sale, which was declared void, and the defendant in the execution was still the

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rightful owner. The defendant, William Evans, has been allowed his discount for improvements to the premises, and has thus been permitted to occupy the most favorable position recognized by this Court.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

I Strob. Eq. 356

LEROY SECREST et al. v. WILLIAM McKENNA et al.

(Columbia. May Term, 1847.)

[*Specific Performance* ⚡12.]

Where defendant entered into a bond conditioned to convey a house and lot to complainant when he paid the purchase money, and the money was paid, but in the meantime defendant had incurred liabilities for complainant, as surety for the discharge of his duties as sheriff, the Court refused to decree a specific performance of the contract, and allowed the defendant to avail himself of his legal title to indemnify or reimburse himself for the sums due or paid by him as surety of complainant. Vide *Walling v. Aiken*, 1 M'Mul. Eq. 1.

[Ed. Note.—Cited in *McKenna v. Secrest*, 4 Strob. Eq. 166; *Lake v. Shumate*, 20 S. C. 33.

For other cases, see *Specific Performance*, Cent. Dig. § 28; Dec. Dig. ⚡12.]

[*Equity* ⚡66.]

The power to enforce the specific execution of contracts, is now universally conceded to this Court, as belonging to its extraordinary jurisdiction, founded entirely on the equity which a party has to have a literal fulfilment of his contract, which could not be obtained at law; but it is a settled principle of the Court not to grant merely equitable relief, without requiring of the party asking it, to do equity himself.

[Ed. Note.—Cited in *Lake v. Shumate*, 20 S. C. 30; *Lewie v. Hallman*, 53 S. C. 24, 30 S. E. 601.

For other cases, see *Equity*, Cent. Dig. § 188; Dec. Dig. ⚡66.]

This case came up on appeal from an order made by his Honor Chancellor Johnson, at Lancaster, June, 1846. The facts necessary to the understanding of the issue made, are very fully set forth in the following original decree, pronounced by the same Chancellor, at Lancaster, July, 1843.

Johnson, Ch. The complainants state in their bill, that in 1833 the complainant, Leroy Secrest, contracted with the defendant to purchase from him a house and lot in the village of Lancaster, at the price of \$3,930, for which he gave him his note, payable in three annual instalments, with interest from the date, and that defendant entered into bond, in the penalty of \$4,000, conditioned that he would make titles to the complainant, Leroy Secrest, for the same, when the money should be paid; that the said Secrest afterwards confessed judgment to defendant for the amount of the note, and in November, 1833, an execution was served out and lodged in the Sheriff's office of the district. That in pursuance of the contract of purchase, the said Leroy Secrest took possession of the property, and made improvements thereon at considerable expense. That he has fully paid and satisfied the whole sum

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*contracted to be paid for the purchase money, and that the defendant has notwithstanding refused to make him titles for the property. The prayer of the bill is, that defendant may be decreed to make him titles to the house and lot, according to the condition of the bond. Such is the case made in the bill, in behalf of complainant, Leroy Secrest, against the defendant. When I come to consider of the answer, it will be seen that the defendant refused to make the titles, on the ground that he was one of the sureties to the bond of the said Leroy Secrest, for the faithful discharge of the duties of the office of Sheriff of Lancaster District, to which he had been elected, and that he had broken the condition of the bond, in failing to pay over monies collected by him, for which defendant is responsible. And that the said Leroy Secrest is insolvent. But before entering on this, it may be proper to notice the case made by the bill in behalf of the other complainants, although the connexion between them is not readily perceived, and it certainly renders the whole case complex and incongruous. They state that in 1842, with a view to relieve the complainant, Leroy Secrest; from his pecuniary embarrassments, they endorsed a note for him, in the amount of \$2,000, which was discounted in bank, and on which he received the money. That to indemnify them against any loss which they might possibly sustain on that account, he gave them a promissory note, and a few days after (6th Jan. 1842) he made a confession, on which judgment was entered up, and execution lodged the same day. That within six months before the filing of the

bill, the whole of Leroy Secrest's property had been sold by the Sheriff, under another execution against him, and that after satisfying all the other judgments and executions against him, the sum of \$700.75 only remained to be applied to the satisfaction of their judgment, the balance remaining unpaid, and that the said Leroy Secrest has become insolvent. They are satisfied, if the Court should decree that defendant should convey the house and lot to the said Leroy Secrest, as then the lien of their judgment would attach on the property. But if the Court should not so decree, they pray that the property may be sold, and the proceeds applied to the satisfaction of the balance due on their judgment. The defendant admits, in his answer, that he entered into the contract to sell to plaintiff, Leroy Secrest, the house and lot, in the manner and upon the terms and conditions set out in the bill, and that he has received the whole of the purchase money, partly in voluntary payments made by him, and the balance out of the proceeds of the sales of his property by the Sheriff,

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referred to in the bill, his judgment being the oldest, and that he has refused to make titles to the house and lot, and justifies himself, under the circumstances hereinafter stated. The defendant and Andrew McIlwain, Hiram Twitty, J. Ingraham, and A. D. Johnston, have also filed their bill in this Court against the complainant Leroy Secrest, which came on and was heard at the same time with this, both the bills and the answers. They state in that bill that Leroy Secrest was elected Sheriff of Lancaster District in January, 1837, and that on the 20th of the same month they joined him in a bond as sureties for the faithful discharge of the duties of his office. That during his continuance in office, which terminated in 1841, he received, in his official capacity, large sums of money for divers suitors in the courts, which he has neglected to pay to the persons entitled, and has become insolvent and wholly unable to pay, in consequence whereof they, as sureties, are bound to pay the same. Defendant, McKenna, professes his entire willingness to convey the house to Leroy Secrest, when his liabilities as surety are removed, or if he shall be sufficiently indemnified against them. The object of that bill was to bring in all the official creditors of Leroy Secrest to prove their demands, for the purpose of saving the expenses of a multiplicity of suits, and the necessary order was made for that purpose. In his answer to that bill, Leroy Secrest substantially admits all the material allegations; his admission that he is in default in not paying over monies collected by him, is qualified, however, by the assertion that the amount is inconsiderable, without stating what it is, but believes it to be less than \$1,000, and avers that he has sufficient assets to pay the

whole amount of the official demands against him. The bills and answers in both cases contain much irrelevant and some impertinent matter, detailing, with great minuteness, the time, place, and circumstances of every thing that is stated, whether pertinent or not, but when divested of these, the plain case made and acknowledged on all hands is this:—defendant, McKenna, entered into a bond, conditioned to convey the house and lot mentioned in the pleadings, to complainant, Leroy Secrest, when he paid the purchase money. The money has been paid, but in the meantime defendant, McKenna, has incurred liabilities for Secrest, as surety for the discharge of his duties as Sheriff. Secrest, if not wholly insolvent, is in very doubtful circumstances, and it is insisted on the part of the defendant that he is in equity entitled to a lien on the house and lot, to reimburse him any monies he may be bound to pay on account of his liability. The complainant, Leroy Secrest, had a remedy

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against the defendant *in an action at law, on the bond conditioned to make titles, but for the purpose of obtaining more perfect relief, he has come into this Court to obtain a specific execution of the contract. The exercise of this power is now universally conceded to this Court, as belonging to its extraordinary jurisdiction, founded entirely on the equity which a party has to have a literal fulfillment of his contract, which could not be obtained at law. Now, it is a settled principle of the Court not to grant merely equitable relief, without requiring of the party asking it to do equity himself, to do what is morally right, of which many examples arising under this branch of the jurisdiction might be given. I will only, however, refer to the case of Walling v. Aiken, 1 McMullan's Eq. Rep., 1 where the doctrine is well considered in direct application to the question here, and is an authority binding on this Court. In that case there was a contract to convey lands, on the payment of a specified sum of money on a day certain, and on the day the money was tendered, but the party bound refused to make the conveyance, unless the party claiming would also pay certain other sums which he owed; and this Court refused to decree a specific performance, but retained the bill, and directed an account to ascertain what was the whole sum due, in order that provision might be made for its payment out of the sales of the land, if that should become necessary.—

Here, it is true, there is no present legal debt, but defendant has incurred a liability for complainant, Leroy Secrest, whether large or small is immaterial, and the great probability is, that he will have the money to pay, and his equity to be protected against it is as clear as if he had actually paid it. The bill will be retained until the account ordered on the bill filed by defendant, Mc-

Kenna, and others, against Leroy Secrest and creditors, before referred to, is taken; when that is done the Court will be in possession of all the facts necessary to enable it to do ample justice between the real parties. I have not been able to see how the other complainants would be benefited by any order which the Court has the authority to make in the cause. If, on the coming in of the report on the accounts, it should appear that defendant is under no liability on account of Leroy Secrest, and that he is not otherwise indebted to him, a specific execution of the contract to convey the house and lot will, of course, be decreed, and the lien of their judgment will attach. If they come as creditors of Leroy Secrest, praying that they may be paid out of any funds that may come under the control of the Court, the absurdity of it will be seen, when it is recollected that every other creditor has the

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same right, and that *if a party have occasion to come into this Court to establish a claim to property, or to recover money, the filing of his bill would be a signal to all his creditors to come in for a share of the spoils.

No question has, however, been made with regard to them, and I shall let the matter rest in the condition in which I find it.

Grounds of Appeal.

1. Because the written contract of purchase between the complainant, Leroy Secrest, and the defendant, William McKenna, does not constitute a mortgage or security at law, neither can it be set up as such in equity, nor was it originally intended as a security for any future liability that defendant might incur on account of complainant; and even supposing it to be regarded in the nature of a mortgage, and the complainant and defendant as mortgagor and mortgagee, all that the mortgagee would be entitled to is his money, which he has already got, in full, and the mortgage thereby virtually satisfied; and it differs in this respect from the case of Walling v. Aiken, as well as in another, viz: that there was no indebtedness or ascertained liability incurred by defendant on account of complainant, at the time of the last instalment of the purchase money, nor was there any objection urged by him that he would not receive it, unless complainant would also pay all liabilities that he might in future incur on his account: hence the Court should have decreed a specific performance.

2. Because the complainants, the judgment creditors of Leroy Secrest, in the event of a specific performance not being decreed to him, are first entitled to be paid out of the proceeds of sale of the house and lot, mentioned in the pleadings, in preference to other creditors; or, in any event, they are equally entitled to be paid rateably with defend-

ant, McKenna, and all other the official creditors of the said Leroy Secrest. Defendant, McKenna, on account of his having the legal title vested in him, is not more equitably entitled to the protection of this Court, because of his liabilities, than the other creditors of the said Leroy Secrest, and the Court should have decreed that the complainants should be first paid out of the proceeds of sale of said house and lot, or, at any rate, that they should be paid in rateable proportions with defendant, McKenna, and the other official creditors of Leroy Secrest.

J. Williams, for the motion.
Clinton, contra.

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*The case was heard on this appeal, December, 1844, and the circuit decree held to answer the questions made in all respects until the coming in of the Commissioner's Report.—The appeal Court making an additional order for the sale of the premises described in the pleadings. On the 21st November, 1845, His Honor, Ch. Dunkin, made an order requiring all the private judgment creditors to establish their demands before the Commissioner of Lancaster District; in accordance with which the Commissioner reported them in the order of their priority.

On the 25th June, 1846, His Honor, Ch. Johnson, ordered that it be referred to the Commissioner to enquire and report the amount of the sales of the house and lot referred to; also, the amount now recovered against McKenna, on account of his liability as one of the sureties of Secrest, late Sheriff of Lancaster District, as well as the amounts paid by the said McKenna.

The Commissioner made the following Report.

"The defendant, William McKenna, as one of the securities of complainant, L. Secrest, former Sheriff, has paid, on recoveries against him and his co-securities, one thousand five hundred and thirteen dollars 47 cts., of which sum sixty seven dollars, 08 cents, is the costs on those recoveries. The recoveries against the securities was at June Term, 1844, \$1,590.48 cents, besides interest and costs. At June Term 1845, \$1,427.17 cents, besides interest and costs. At June Term 1846, \$848.70 cents, besides interest and costs. These recoveries are against the defendant McKenna, together with A. McIlwain, H. Twitty, A. D. Johnson and John Ingraham. The sales of the house and lots is one thousand and fifty two dollars. Andrew McIlwain has paid on those above \$1,691. The sum of \$39.83 cents applied from sales of John Ingraham's property, and probably \$86 more may be applied from sales of Ingraham's property.

James H. Witherspoon, C. E. L. D.
25 June, 1846.

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The testimony was also reported.

On motion of Williams, complainant's Solicitor, His Honor Ch. Johnson ordered that the report of the Commissioner in this case, as to who are the private judgment creditors of Leroy Secrest, be confirmed.

And on motion of Clinton, Solicitor for defendant, McKenna, he ordered that the last report of the Commissioner in the above case be also confirmed.

He further ordered, that the Commissioner do pay over to defendant McKenna, the re-

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ported amount of the sales of the *house and lot, viz: one thousand and fifty-two dollars, deducting the amount of commissions on sales, and the tax costs of Commissioner.

Complainants, James F. Secrest, Thomas W. Huey, James P. Crocket, and Minor Clinton, appealed from the above last mentioned order made by his Honor Chancellor David Johnson, ordering that the Commissioner do pay over to defendant McKenna, the reported amount of the sales of the house and lots, viz: one thousand and fifty-two dollars, deducting the amount of commissions on sales and the tax costs of Commissioner, upon the following ground:

Because the Chancellor should have ordered that the proceeds of sales of the house and lots be paid over by the Commissioner to complainants, and the other private judgment creditors of Leroy Secrest, whose claims have been established, according to their priority of lien.

J. Williams, for the motion.
Clinton, contra.

DUNKIN, Ch., delivered the opinion of the Court.

Since the original decree of Chancellor Johnson was pronounced, the house and lot have been sold, by the Commissioner, under the decree of this Court, for \$1,052; and according to the report of the Commissioner, made in June 1846, the defendant, Wm. McKenna, has already paid, under recoveries had against him, as surety of Sheriff Secrest, \$1,513.47.—The only question is, whether this Court shall in the exercise of its discretionary power, decree a specific performance of the contract, and divest McKenna of his legal title, or permit him to avail himself of his legal title, in order to indemnify or reimburse himself, for the sums thus paid as surety of Secrest. A majority of the Court concur in the judgment of the presiding Chancellor, that the case cannot, in principle, be distinguished from Aiken ads. Walling, and the appeal is accordingly dismissed.

CALDWELL, Ch., concurred.

JOHNSTON, Ch., absent from indisposition.

Appeal dismissed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—NOVEMBER AND
DECEMBER TERM, 1847.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN.
" J. J. CALDWELL,
" G. W. DARGAN.

I Strob. Eq. *363

*JAMES C. BROWN, Trustee, and SUSAN G.
BROWN, v. JABEZ G. BROWN and
CHARLES J. BROWN.

(Columbia. Noy. and Dec. Term, 1847.)

[Trusts \hookrightarrow 92½.]

A trustee who purchased land for the benefit and at the request of his cestui que trust, but took the titles in his individual name, and afterwards sold off portions of it and made titles and took the securities for the payment of the purchase money, also in his individual name, and who had admitted the fiduciary nature of the transaction in an answer to a former bill, and in a letter to one of the purchasers of a portion of the land, was not allowed afterwards to deny the trust, or to avail himself of the Statute of Limitations, or that of "Frauds and Perjuries."

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 141; Dec. Dig. \hookrightarrow 92½.]

[Trusts \hookrightarrow 17, 18.]

It is not necessary that a trust should be created in writing, in order to prevent the bar of the Statute of Frauds and Perjuries; it is sufficient if it be manifested, and proved by some writing signed by the party, &c.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 15; Dec. Dig. \hookrightarrow 17, 18.]

Before Dunkin, Ch., at Barnwell, February, 1847.

The facts of the case are sufficiently set forth in the following circuit decree.

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*Dunkin, Ch. The defendant, Jabez G. Brown, was the trustee of Mrs. Susan G. Brown (wife of the other defendant, Charles J. Brown) under two deeds described in the pleadings. In February, 1845, the complainant, James C. Brown, was substituted as

trustee in the place and stead of Jabez G. Brown. The object of this bill, filed on the 12th Nov. 1845, is to obtain an account of the transactions of the former trustee, J. G. Brown. The defendant submits his readiness to account; and the only question which it seems necessary to determine, preparatory to the reference, is as to the liability of the defendant to account for the proceeds of certain portions of the Belfast plantation sold by him, and also for the value or rent of about five or six hundred acres of the same tract, lying below the Lower Three Runs, and in the occupation of the defendant. In order to understand the principal matter in controversy between the parties, it may be necessary to state, that in 1835, Mary Carr, the mother of Mrs. Brown, conveyed the Duck Savannah plantation to Jabez G. Brown, in trust for her daughter, to her sole and separate use, and on other trusts set forth in the deed. On the 8th January, 1838, J. G. Brown, the trustee, at the request of Charles J. Brown and his wife, sold the Duck Savannah place to Dr. C. K. Ayer, for six thousand two hundred dollars (\$6,200)—two thousand in cash—balance in one and two years, with interest from date. On the 8th February, 1838, the defendant, Jabez G. Brown, purchased, from the executor of Thomas G. Lamar, a plantation on Savannah river, called Belfast, or Lamar's Mills, containing about nine thousand acres of land, for eight thousand dollars (\$8,000)—two thousand dollars in cash—the balance in one, two and three years, with interest from the date. The conveyance of the entire tract

was made to Jabez G. Brown, individually and absolutely.

The allegation on the part of the complainant, Mrs. Brown, is, that the sale of the Duck Savannah plantation, and the purchase of Belfast, were substantially contemporaneous transactions, and made at the instance and by the request of herself and her husband; that Belfast containing more land than was required for the trust estate, the title was taken in the name of the trustee individually, in order to enable him, with greater facility, to make titles to such portions as might be sold off to meet the instalments of the purchase money. That the defendant was to retain the tract of five or six hundred acres below the Lower Three Runs absolutely, on accounting for the value thereof, at the rate at which the whole was purchased. It is difficult to condense the answer of the defendant, without the hazard

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of doing him injustice. He *admits, however, that the sale of Duck Savannah plantation was made at the request of the parties, and that a short time afterwards he purchased, in his own name, the Lamar Mills, but denies that the whole of the Lamar Mill place was purchased with trust funds. He denies that he ever agreed to take the pine land place of about five hundred acres, at the price of the purchase thereof. "He admits that he did cultivate some of the land mentioned in the said bill, for the space of about two years, but the said cultivation of the said land was of little value, and that this defendant, himself, cleared the said land; for all of which this defendant is willing and ready to account." The defendant also insists on the benefit of the Statute of Frauds and Perjuries, and the protection of the Statute of Limitations. It appeared that immediately after the purchase of the Belfast or Lamar Mills plantation on Savannah river, the complainant, Mrs. Brown, with her husband and family, removed to it, and have always since resided there. Within a few months after the purchase, and during the winter and spring of 1838, about four thousand acres of the tract were sold to four different persons, J. Harley, J. J. Harley, J. Furse and J. Furse, Jr. for an aggregate amount of about \$8,950. The transactions were negotiated, surveys made, &c. almost exclusively by Charles J. Brown, the husband of the complainant. But the titles executed by the defendant, Jabez G. Brown, and the securities for the purchase money taken in his name.

In January, 1840, a petition was filed in this court, in the name of Charles J. Brown and Susan G. Brown, his wife, setting forth the sale to Dr. Ayer, and that with four thousand dollars of the consideration money, the trustee "had purchased for them a plantation on Savannah river, commonly known as Lamar's Mills, with about 5400 acres of

land lying in the district aforesaid." The petition prays for a confirmation of the sale to Dr. Ayer, and that Jabez G. Brown may execute a deed to the petitioners, declaring that he holds the plantation on Savannah river subject to the uses declared in Mary Carr's deed, and that the balance of purchase money to be received from Dr. Ayer may be invested in negroes, &c.

To this petition, signed by the petitioners, is appended the following, viz: "I do hereby consent and agree to comply with and perform the prayer of the foregoing petition, should the same be sanctioned by this honorable court," signed "J. G. Brown, test J. J. Ryan." On the 15th January, 1840, an order was made in conformity with the prayer of the petition, and a declaration of trust,

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(dated 15th August, 1840, but *proved and recorded 6th June, 1842,) was accordingly executed by the defendant.

It is difficult to reconcile this transaction with some of the allegations in the defendant's answer. He does not respond to that part of the bill which charges that the purchase of the Belfast plantation was made at the request, and for the benefit, of the cestui que trust, and that the conveyance was taken to him individually for the purpose of facilitating subsequent sales of portions thereof, but he avers, not only that the title was taken in his own name, but that the vendor "traded with him in his private capacity, and not as trustee." If by this statement the defendant meant to affirm that the deed from the executor of Lamar expressed the true character of the transaction, that it was a purchase on his individual account, and not in his fiduciary relation, it is inconsistent, not only with the acknowledgment and declaration in January, 1840, but with that part of his answer which, while it denies his agreement to take the five hundred acres of pine land at the price mentioned, admits his occupation of a portion of the premises, which he cleared and cultivated, and "for all which he is willing and ready to account."

The defendant in his answer further states, (after reciting what took place in January, 1840, in relation to the 5,400 acres) that "he, the defendant, has since sold nearly all the remainder of the said Lamar Mills place to various persons for various amounts, with the knowledge of the said Charles J. Brown and Susan G. Brown, and without objection on their part;" and that "he is advised that they have no right to call him in any way to account for the proceeds of the sales of the said balance thereof."

As has been stated, so far as the court can gather from the testimony, this is an entire mistake of fact, and a mistake in an important particular. The sales of the remainder of the Lamar Mill tract, after selling off the 5400 acres, were not subsequent

to or since the proceedings in January, 1840, but were completed eighteen months prior to those proceedings; and the 5400 acres, with the tract of five or six hundred acres occupied by the defendant, were all that then remained unsold. The charge of the bill is, that it was under the promise and assurance of the defendant, that he would account for the sales already made, that application to the court was made in January, 1840. The answer of the defendant on this point, is argumentative rather than explicit, and submits that any "such supposed agreement" would be invalid under the pro-

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vision of the Statute of Frauds and *Perjuries. To obviate this objection, the complainant gave in evidence a letter from the defendant to Maj. James Furse. This latter individual was one of the purchasers of a portion of the Lamar Mill tract in May, 1838. He had executed his note, \$1,375, to the defendant in his individual name for the purchase money, and judgment had been rendered on the note; the letter bears date 27th January, 1845, and is as follows:

"Dear Sir—I have no doubt, from an entry I saw in the Sheriff's books yesterday, that an attempt will be made to delude you, and by way of putting you on your guard, I hereby forwarn you not to pay the judgment I obtained against you as trustee for Mrs. Susan G. Brown to any one but myself or the Sheriff, for if you do I shall hold you responsible under the judgment, as that judgment was obtained against you in my name. I keep a copy of this letter as a notification to you, and I hope you will acknowledge the receipt of this. Respectfully your friend," signed "J. G. Brown," addressed "Major James Furse—Present."

Within a fortnight after the date of this letter the Court of Equity for Barnwell District was in session—on a petition presented on behalf of Mrs. Susan G. Brown, the trustee was changed, and James C. Brown the complainant substituted for the defendant Jabez G. Brown. A bill of injunction was then filed by the new trustee, against the former trustee, setting forth the sales of the several portions of the Lamar mills tract on account of the trust estate; that the securities had been taken in the individual name of the defendant J. G. Brown, who had obtained judgments on them or some of them, and that he had assigned part of one of the judgments for his own private debt. The prayer of the bill was for an injunction against the defendant and against the Sheriff. The answer of the defendant, Jabez G. Brown, was sworn to in the usual form on the 11th February and was filed on the 12th February, 1845. He admits that the complainant had been substituted for himself as trustee of Mrs. Susan G. Brown. "Admits that the lands mentioned in the said bill were sold to the persons therein named, at and for the prices specified, but this defendant most

positively affirms that the notes taken by him in his individual name was in strict accordance with the request of Susan G. Brown and her husband Charles J. Brown." The defendant goes on to affirm that "one of the purchasers, J. Furse, Jr., had paid to Mrs. Susan G. Brown nearly four hundred dollars on his note while the note was in the defendant's possession; which clearly proves"

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(continues the answer), "that this defendant has always considered the said notes as belonging to the trust estate." Defendant admits that he "obtained judgments on the notes in his own name, but that his compliance with the request of his *cestui que trust* in the manner of taking the notes, rendered it impossible for him to have done otherwise." Defendant admits that he "made a partial assignment to William J. Harley for \$367 of one of these judgments," but avers that he "was in advance for the trust estate to a large amount;" and that "he thought it nothing but just that he should in some manner reimburse himself out of the proceeds of these notes, and accordingly gave the assignment," &c.—The defendant concludes his answer by submitting to the Court the manifest injustice "that he should be harrassed and run to great expense in defending every sort of cause or complaint that the said Susan G. Brown, or her trustee, should please to institute against him, when all their objects might have been attained under the petition for his removal at the present Court."

It was stated at the hearing, that under the bill and answer of Feb., 1845, an order for injunction had been granted, and that the fund was impounded in the hands of the Sheriff.—No copy of the decretal order was placed in the possession of the Court. The rule is considered as satisfactory as it is well settled, that "what the parties have once had an opportunity of litigating, in the course of a judicial proceeding, they shall not draw into question again, but that what might properly have been put in issue shall be concluded to have been put in issue and determined." *McDowall v. McDowall*, *Bailey's Equity*, 330. But in the litigation of Feb., 1845, the defendant leaves nothing to inference—he indignantly repels the charge that he had assumed any individual interest in the sales of the lands, and throws back the suggestion of the *cestui que trust*, that it was in consequence of any neglect of duty on his part that the fiduciary character in which he acted did not appear on the face of the papers. It is inconsistent with the established principles of this Court that he can be now permitted to assume a position which he has thus repudiated, and to invoke the aid and protection of the statute to consummate a purpose, such as it was enacted to prevent, and which the defendant so solemnly, and no doubt so conscientiously, disavowed.

The Court can perceive no such evidence of an agreement on the part of the defendant to purchase or retain the Lower Three Runs tract as would be obligatory upon him, especially against the positive denial of the answer. The rents and profits whilst in his possession must be the subject of inquiry

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*before the Commissioner, and so of the other subordinate matters embraced in the pleadings.

It is ordered and decreed that it be referred to the Commissioner to take an account of the transactions of the defendant, Jabez G. Brown, as trustee of Mrs. Susan G. Brown, upon the principles of this decree, including therein the proceeds of the sales of so much of the Belfast plantation as were disposed of by him. Parties to be at liberty to apply for such further orders pending the account as may be deemed necessary for the security of the fund, or the interests of those concerned therein. And final order being suspended until the hearing of the Commissioner's report on the account.

Grounds of Appeal.

The defendant, J. G. Brown, moved to reverse so much of the Chancellor's decree as relates to the lands sold by the defendant, that is the Lamar lands other than the plantation, on the following grounds, viz.:

1. Because there was not sufficient proof of any agreement to purchase said lands for the *cestui que trust*—nor would such agreement have been valid—nor was there any proof that a dollar of the funds of the trust estate was invested in the purchase of those lands. On the contrary, the proof was clear and explicit—nay, it appeared by the records of the Court, and is so stated in the decree—that of the proceeds of the Duck Savannah sale, (the only source whence the defendant could have obtained trust funds) four thousand dollars (\$4,000) were invested in the plantation on Savannah river, and the balance, by order of the Court—at the instance of the *cestui que trust*—was invested in negroes.

2. Because the decree (it is respectfully submitted) is predicated on a mistake of facts as to the cultivation of land by defendant, as to the petition filed in 1840, and as to the bill for injunction filed in 1845—as to which last, so far from it having been “stated at the hearing that under the bill and answer of February, 1845, an order for injunction had been granted”—it was (we most respectfully submit) expressly stated by the defendant's counsel, not gainsayed by the opposite counsel, and proved by the records of the Court, that the injunction prayed for by the bill of February, 1845, was refused, and at February term, 1846, the bill itself was dismissed.

3. Because, if an agreement to purchase, and the application of trust funds, had been

clearly and fully proved, the *cestui que trust*—it is respectfully submitted—would have been entitled to nothing more than a due proportion of the purchase, or a lien for the amount so invested, and having, under the

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*sanction of the Court, received a due proportion, and more than a due proportion, of the purchase, she is not (it is respectfully submitted) entitled to any more, either under the doctrine of resulting trusts or otherwise.

4. Because the defendant—it is respectfully submitted, was entitled to the protection of the statute of limitations.

5. Because the defendant—it is respectfully submitted, was entitled to the benefit of the statute intended to prevent frauds and perjuries.

6. Because on the case, as made by the bill, answer, exhibits and proofs, the decree—it is respectfully submitted—ought to have been in favor of the defendant, and the bill dismissed—so far as relates to the lands in dispute.

Owens, Bellinger and Hutson, for the motion.

Patterson and Bauskett, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The principle on which the appellant insists is very well settled. In order to prevent the bar of the Statute of Frauds and Perjuries, although it is not necessary that the trust should be created by writing, it must be manifested and proved by writing—the acknowledgment must be “by some writing signed by the party,” &c., *Steere v. Steere*, 5 J. C. R. 1. The letter of the defendant to Furze states, in so many words, that the judgment was obtained by him “as trustee for Mrs. Susan G. Brown,” and in his answer to the complainant's former bill, he not only admits the trust, but indignantly repels the insinuation that he had, at any time, disavowed his fiduciary relation.

It is ordered and decreed, that the appeal be dismissed.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

Appeal dismissed.

I Strob. Eq. 370

R. J. GAGE, Ex'r of John Rogers, v. MARY A. E. J. ROGERS.

(Columbia. Nov. and Dec. Term, 1847.)

[*Executors and Administrators* 42.]

Where the marriage settlement transferred to the husband the use and occupation, as well as all the proceeds arising from the real and personal estate of the wife, during their joint lives, and, in case the wife should die first, leaving issue, directed the property to be divided between the husband and the issue, according

to law—reserving, in the meantime, the legal title in a trustee of the wife: and the wife died in February, and the husband in July, of the same year, after having bequeathed to his daughter, the only issue of their marriage, all

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*the estate of which his wife was possessed at the time of their marriage, and directing that she should be suitably maintained and educated out of the proceeds of the same, and after having planted a crop with his own, and the negroes of the trust estate—the Court adjudged to the executor the crop severed before the last day of December, of the year in which the testator died, subject to be charged with the maintenance and education of the daughter, and the rent and hire for the use of her share of the land and negroes.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 284; Dec. Dig. ☞ 42.]

[*Husband and Wife* ☞ 161.]

The executor is not entitled to have the money reimbursed, which his testator advanced in his lifetime, to purchase claims against the property secured to his wife by a marriage settlement.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 635; Dec. Dig. ☞ 161.]

[*Executors and Administrators* ☞ 456.]

The estate of a testator is liable for the costs of a suit brought by the executor against a legatee of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1950; Dec. Dig. ☞ 456.]

Before Caldwell, Ch., at Union, June, 1847.

Caldwell, Ch. John Rogers and Ann Fincher made a marriage settlement on the 2d of June, A. D. 1836, and immediately afterwards intermarried. By the settlement it was agreed that the said Ann Fincher transfers to the said John Rogers the use and occupation, as well as all the proceeds arising from the real and personal estate whereof the said Ann is now possessed, during the joint lives of the said Ann and John, reserving the right and title of the said real and personal property in her, the said Ann, by and with the consent of him, the said John, in William H. Gist, as trustee, or any other person hereafter agreed upon, by her, the said Ann, as trustee for her, the said Ann; and it is further stipulated and agreed upon, should she, the said Ann, die before the said John, after having issue, or child or children, of this intended marriage, then the real and personal property, with the increase, is to pursue the provisions of the law in such cases made and provided, or any other property that the present may be exchanged for. And it is further agreed, that at the death of her, the said Ann, she, the said Ann, is to leave by will or deed, to the present children of him, the said John, an amount equal to the sum that the said John may have to expend in purchasing up the interest of the heirs of Jesse Fincher, deceased, as will shew by his last will; provided the said Ann die without child or children living, at the time of her death, by this intended marriage.

The defendant is the only issue of said marriage, and her mother died in February, A. D. 1838, and her father died in July following. The testator, on the 28th of June, before his death, made his will, by which, among other things, he devised and bequeathed as follows:

Item 2d. "I give, devise and bequeath unto my daughter, Mary Ann E. J. Rogers, all

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the property, both real and personal, which her mother, my late wife, had and was possessed at the time of our marriage, together with the increase of the negroes, and also one negro girl, named Matilda; but if my said daughter should die without leaving a child, living at her death, then all the above property to be equally divided among my sons, James W. Rogers, John R. Rogers, George W. B. Rogers, William M. Rogers, Ira J. Rogers, and Lemuel M. H. Rogers, or such as may be living at her death."

Item 5th. "I wish and direct that my daughter may be raised and educated in a manner suited to her rank and condition in life, and the necessary expenses be defrayed from the proceeds of the property devised to her."

Several of the relations of Ann Fincher's former husband were entitled, at the time of her intermarriage with testator, to an interest in the land and negroes included in the marriage settlement, which was purchased partly by her before her marriage with testator, with money borrowed of him, and after their marriage by him, as appears by her notes to him before, and the receipts of the legatees (of her former husband) after their marriage. The plaintiff is the only executor that has qualified, and submits in his bill, that a fair construction of the testator's will, in connexion with and explained by the marriage agreement, would only give defendant one sixth of the property embraced in the settlement, that being all that her mother was possessed of at the time of its execution, and that the estate of his testator is entitled to the remainder, and the estate of defendant is properly chargeable with whatever was advanced to buy up the interest of the legatees in the property possessed by his wife, with a proportionate part of the profits arising therefrom, since it has been in the possession of her guardian, G. S. Noland, who claims of the plaintiff an account of the crop raised in 1838, on the plantation included in the marriage settlement. The plaintiff presents two questions, 1st, Whether the estate of his testator is entitled to have the money reimbursed, which was advanced by his testator to purchase the claims of and to the property possessed by his wife. 2d. Whether he is liable to account to the guardian of the infant, Mary A. E. J. Rogers, for any part of the crop raised in 1838, and if so, what part. The answer of the defendant, by her guard-

Jan. G. S. Noland, generally admits the facts stated, but relies upon the intermarriage as satisfaction of all debts between the parties, or connected with the trust estate: defendant submits that on the death of her mother she became entitled to two-thirds of the property conveyed in the marriage settlement, and

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that she *is also entitled to two-thirds of the crop of that year, as her mother died in February, 1838; and finally insists that she is entitled to the whole crop of the trust property, by virtue of the deed and of the will of testator. It appeared from the evidence that John Rogers paid Thomas and Jesse P. Fincher \$1,646, for their interest in the property after the marriage.

The intermarriage of John Rogers and Ann Fincher not only suspended, but annulled, all their pre-existing contracts, except their marriage settlement; as the husband becomes liable to pay his wife's debts, his right as a creditor to receive, would neutralize his liability to pay it; it is inconsistent and absurd, that an individual should be indebted to himself. The settlement provided, that if she survived him, and should die without leaving child or children, living at the time of her death, she should leave, by will or deed, his other children, (alive at the marriage) an amount equal to the sum that he expended in purchasing up the interest of the heirs of Jesse Fincher, deceased, but as these events have not happened, the trust estate cannot be subjected to such claim. The testator had an adequate inducement to purchase their interest, as he was entitled, under the deed, to the use, occupation and proceeds of the estate of which she was possessed, during their joint lives, and he may have expected reimbursement from the crops for what he expended; independently of this consideration, there was nothing to restrain him from disembarassing the property for the benefit of the defendant. On the death of the mother, in February, 1838, the daughter became entitled to two-thirds, and the testator to the other third of the property, as tenants in common. There was no partition of it in his life time, and the whole of it continued in his possession until his death, in July following. As she was entitled to two thirds of the property, it follows that she would also be entitled to the same proportion of the rents and profits of it, and the executor must account for them in that year.

By the fifth clause, the testator directed that the defendant "be raised and educated in a manner suited to her rank and condition in life, and the necessary expenses be defrayed from the proceeds of the property devised to her," and the question arises, does the other third of the crop of 1838, go to the devisee or the executor? The extent of the testator's debts, (which were provided to be paid, by the first clause, out of any money

he had on hand, or which might be collected from debts due him) could not control the construction of the fifth clause, but may be

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resorted to as indicative of his knowledge of his affairs, that the fund appropriated would be sufficient to pay his debts, and that neither the crop nor any other part of his property would have to be broken in upon, for the payment of debts. Proceeds is commonly defined issue, rent or produce, and has a sufficient general signification to include the growing as well as any future crop. When a tenant in fee devises land, the growing crop passes to the devisee, and the executor is excluded from the emoluments; even when a devise is made before sowing, and the devisor afterwards sows, and dies before summer, the devisee shall have them and not the executor. The rule is different between the executor and the heir, and the distinction is founded on the presumed intention of the devisor in favor of the devisee, but this may be rebutted by words which show an intent that the executors should have it. (Williams on Ex. 455; Com. Dig. B. G. 2 vol. 142; 3 Coke's Eliz. 61; 2 Gill. L. Ex. 560; 6 East, 604; 8 East, 343; [Brailsford v. Heyward] 2 Des. Eq. R. 24.)

Here there is nothing to contradict, but much to confirm, the intention that may be presumed from the nature and condition of the property, and the provisions of the will. It was argued, that the A. A. of 1789, P. L. 496, 6 Stat. of S. C. 111, controlled the proceeds, and that the executor was entitled to them; but it was not the object of the Act to deprive one in the possession of land and slaves, of the power to dispose of the crop—the statute was intended to prevent the loss of the crop, and any injury to the estate (by the death of the owner after the first of March) that had frequently occurred under the existing law, by which the slaves employed in the crop were liable to be withdrawn and sold, at a season of the year when their services might be indispensable to its cultivation, and when their price would not be enhanced, and no one would be willing to take charge of the crop or to rent the land. The slaves thus employed are put upon the footing of lands leased for life; the crop is expressly made assets, subject to debts, legacies and distribution, which distinctly recognizes the power of its being disposed of by will.

It is therefore ordered and decreed, that the trust property embraced in the marriage settlement is not liable for the amount the defendant's father paid out, in purchasing up the interest of the legatees of Jesse Fincher, deceased. It is further ordered and decreed, that the plaintiff, as executor of John Rogers, deceased, do account for and pay over to the guardian of the defendant, the proceeds of the property appraised in

the year of our Lord, one thousand eight hun-

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dred *and thirty-eight, with interest after one year from the testator's death. The costs to be paid out of the testator's estate. [Coddell v. Widow. Heirs etc.] 3 Des. E. R. 366; [Gillon v. Turnbull] 1 M'C. Eq. R. 148.

The complainant appealed from the foregoing decree, and moved the Court of Appeals to reverse the same in the following particulars.

1. Because the estate of John Rogers should have been re-imbursed the money advanced to purchase up the claims on the estate of Jesse Fincher, deceased.

2. Because complainant, as executor of John Rogers, was entitled to the proceeds of the crop raised in 1838, and if not the whole, to one-third part thereof.

3. Because defendant should have been ordered to pay half the costs.

Dawkins, for the motion.

JOHNSTON, Ch., delivered the opinion of the Court.

This Court is entirely satisfied with the decree of the Chancellor, so far as it is drawn in question by the first and third grounds of appeal, and leaves the decree to speak for itself on those points. But we are of opinion it should be modified in other respects.

By the terms of the settlement, the joint usufructuary interests of Rogers and wife were determined in February, 1838, when the wife died; and the trust estate became instantly distributable between Rogers and the defendant, Mary, in the proportions of one-third to the former and two-thirds to the latter. Rogers, the father, with the lands and slaves lately belonging to the trust estate, and (as it is stated here and admitted) with some of his own slaves, proceeded to plant the crop of 1838. We must regard this crop as his own, and pitched on his own account. So far as the joint property of himself and his daughter were employed, it is the ordinary case of a tenant in common making use of property belonging to himself and his co-tenants, and accountable to them for the use of their shares. Then, regarding the crop as belonging to Rogers, who died in July, it would certainly have fallen to his representative as assets of his estate, under the Statute of 1789, (5 Coop. Stat. 111, § 23) if he had made no will. It depends, therefore, upon the terms and effect of the will which he did make, whether the crop is diverted from this destination.

The 2d clause of his will, giving to his daughter "all the property, real and personal, which her mother had and was possessed of at the time of her marriage, together with the increase of the negroes,"

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certainly is no express gift of the *crop

growing on the land; and it could only pass with the land, in virtue of the common law authorities quoted by the Chancellor. Certainly, by the common law, not only corn and grain of all kinds, but anything of an artificial and annual profit, that is produced by labor and manurance, passed to the devisee of the land, (and also to the dowress) though not to their heir. Co. Litt. 556, and see 1st Wm's Ex'ors, 453, notes m, n, o, p. The distinction in favor of the devisee was founded upon a presumption of an intention on the part of the testator that he who takes the land should take the crops which belong to it; because every man's donation shall be taken most strongly against himself; though this presumption might be rebutted by words in the will shewing an intent that the executor should have the emblements. 1 Wm's Ex'ors, 455; Gilb. Ev. 214.

But we think that the principle carrying the annual crops with the land to the devisee, is overruled by the statute before referred to, § 23, which enacts, "that if any person shall die after the first day of March in any year," the slaves employed by him in making a crop shall be continued on the land until the crop is finished, "and such crop shall be assets in the executor's or administrator's hands, subject to debts, legacies, and distribution, (taxes, overseer's wages, &c. being first paid.) And the emblements of the lands which shall be severed before the last day of December following shall, in like manner, be assets in the hands of the executors or administrators. But all such emblements, growing on the lands on that day, or at the testator's or intestate's death, if that happens after the said last day of December, and before the first day of March, shall pass with the lands."

The fifth clause of the will has been relied on as a gift of the crop to the daughter. But our opinion is, that regarding the crop as embraced under the word "proceeds," the utmost that can be made of the words of the will, is that the testator intended to charge the rearing and education of the daughter upon the annual income of the property given her, including the income or crop of the current year. To this extent we are willing to go; and it is a construction as favorable to the daughter as we feel at liberty to adopt.

It is ordered, that the decree be modified, so as to adjudge to the plaintiff, as ex'or of John Rogers, the growing crop of 1838, severed before the last of December of that year, as assets, charged, however, with the maintenance and education of the defendant, Mary A. E. J. Rogers, for the residue of said year to be ascertained by the Commissioner, on reference.—And it is also referred to the

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Commissioner to ascertain what *should be allowed her for the testator's use of her

share of the land and negroes in making said crop. In other respects the decree is affirmed.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

Decree modified.

I Strob. Eq. 377

CAROLINE A. BUSH, per pro. amf, v. SAMUEL B. BUSH, JOSEPH NEILSON et al.

(Columbia. Nov. and Dec. Term, 1847.)

[Judgment ⇨565.]

Although a trustee, who had recovered a judgment in an action of trover, against the purchaser, for the value of certain slaves of the trust estate, which had been sold by the Sheriff, had, upon their being then levied on as the property of the purchaser, under judgments prior to his own, filed a bill for an injunction, and for the specific delivery of the slaves, and the bill had been dismissed, under the decision in *Norrill v. Corley* [2 Rich. Eq. 288, note] but without prejudice, and, on appeal, the decree of dismissal had been confirmed; yet the Court, upon a bill being filed by the cestui que trust, perpetually enjoined the sale of the slaves, and decreed their specific delivery, to be held subject to the provisions of the trust deed.

[Ed. Note.—Cited in *Duke v. Palmer*, 10 Rich. Eq. 386.]

For other cases, see Judgment, Cent. Dig. § 1018; Dec. Dig. ⇨565.]

[Trusts ⇨134.]

It is an acknowledged principle of this jurisdiction, that the power of the trustee over the legal estate or property vested in him, exists only for the benefit of the cestui que trust. As a general rule, he can do no acts as legal owner which prejudice the rights of the cestui que trust; and no sale or other disposition of the property, even to a purchaser for valuable consideration, can be sustained, if the purchaser had notice of the trust; nor will a judgment against the trustee, though at law a lien upon the estate, affect the right of the cestui que trust in this Court.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177; Dec. Dig. ⇨134.]

[Trusts ⇨348.]

The aid of this Court is afforded to the cestui que trust, not only against the trustee, but against all claiming any benefit from his acts.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 513; Dec. Dig. ⇨348.]

[Judgment ⇨565.]

The dismissal of a former bill is no bar to a new bill, where the decree of dismissal was, in terms, directed to be without prejudice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1018; Dec. Dig. ⇨565.]

[Equity ⇨176.]

After the defendant's pleas in bar have been overruled, he is still entitled to leave to answer the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 412; Dec. Dig. ⇨176.]

[For subsequent opinion, see 3 Strob. Eq. 131, 51 Am. Dec. 675.]

Before Dunkin, Ch. at Barnwell, February, 1847.

Dunkin, Ch. The state of the pleadings admits the correctness of the allegations made by the complainant. On the 12th August 1835, her father, Benjamin Foreman, conveyed by deed to her brother, David Foreman, two female slaves Sophey and Sukey, in trust for the sole and separate use of the complainant during her natural life, not sub-

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ject to the control or contracts of any husband she might take; and on her death, for the use of any child or children she might leave living.

The complainant subsequently intermarried with Samuel B. Bush, one of the defendants: and on 6th November, 1843, the Sheriff, under certain executions against Bush levied on Sophey and a child named Bill, after the execution of the deed, and sold them to the defendant, Neilson, who, as well as the creditors of Bush and the Sheriff were fully apprised of the existence of the deed of August, 1835. Neilson having taken possession of the slaves was sued in trover, by David Foreman, the trustee, and judgment was subsequently, to wit:—Spring Term, 1846, entered for the plaintiff, for about eight hundred dollars damages. After the rendition of the judgment in trover the Sheriff levied on the slaves (together with an after born child, Edward,) as the property of Neilson, under executions prior in date to the judgment of the trustee, who had not required a bond from the defendant under the Trover Act of 1827. On the 17th April, 1846, Foreman, the trustee, filed a bill to enjoin the proceedings under these executions against Neilson, and for a specific delivery of the slaves. The cause was heard by Chancellor Johnston who made the following decree—"Were I at liberty to exercise my own judgment, I should give the complainant relief, but I must be governed by the case of *Norrill v. Corley*, decided by the Court of Appeals at Columbia, December, 1828, which seems to conclude me until reversed. It is ordered and decreed that the bill be dismissed." On appeal the following judgment was pronounced, viz: "The case of *Norrill v. Corley* is decisive of this case; and although, if the question were now presented for the first time, that decision might not be made, the Court is not prepared to overrule it. The decree dismissing the bill must, therefore, be affirmed; but, as the plaintiff may desire to seek a remedy in some other form of proceedings, it is dismissed without prejudice."

It is hardly necessary to say that the terms of this decree are conclusive on the defendant's second plea in bar. The dismissal of a former bill is no bar to a new bill, where the decree of dismissal was in terms directed to be without prejudice. *Coop. Pe. 270*. But this is the bill of the cestuique trust, whose rights are recognized

only in this tribunal, and the only inquiry is as to the effect on those rights of the judgment in trover. The plaintiff avers that "she and the slave Sophy are about the same age, were reared together from infancy, that consequently their sympathies and attachments towards each other are more than or-

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dinarly exist between master and *slave, and that her value in money would be no compensation for her loss." Both in *Rice v. Burnett* [1 Speers, Eq. 579, 42 Am. Dec. 336] and *Iorr v. Hodges*, 1 Speers Eq. R. 593 the Court of Errors, while they affirm the legal title of the trustee, declare that a Court of Equity is the only proper forum to define as well as to enforce the rights of the trust in personal property.

After the execution of the deed from the plaintiff's father, in August, 1835, the legal title to the slaves was in the trustee—the equitable interest in the plaintiff. It is an acknowledged principle of this jurisdiction that the power of the trustee over the legal estate or property vested in him, exists only for the benefit of the cestuique trust. As a general rule, he can do no acts as legal owner which prejudice the rights of the cestuique trust; and no sale or other disposition of the property, even to a purchaser for valuable consideration, can be sustained, if the purchaser had notice of the trust. See 2 Story Eq. 1477. Nor will a judgment against the trustee, though at law a lien upon the estate, affect the right of the cestuique trust in this Court. *Finch v. Winchelsea*, 1 P. Wm's 278. Neither the fraud nor the folly, neither the ignorance nor the laches, of the trustee, will be permitted to prejudice the cestuique trust, unless the presumption of those rights interfere with innocent third persons. The aid of this Court is afforded, not only against the trustee but against all claiming any benefit from his acts. From August, 1835, until November, 1843, the complainant was in undisputed possession of the slaves. It has been judicially ascertained that until March, 1846, the legal title was in her trustee.—*Norrill v. Corley and Foreman v. Neilson*, 2 Rich. Eq. 288, determined that, by the recovery of the judgment in trover, without satisfaction, the legal title of the plaintiff is transferred to the defendant. Chancellor Kent, following Shepard's Touchstone, had held that there must be satisfaction in order to transfer the property—the law doth give him (the defendant) the property of the goods, because he hath paid for them—but in *Norrill v. Corley* (as has been stated) the Court held as the better opinion the determination of the Court of King's Bench in *Adams v. Broughton*, viz: "that the property was entirely changed by the judgment obtained in trover, and the damages recovered were the price thereof." The principle, or foundation, of both decisions is that

the plaintiff, by his form of action, has elected to take damages as a satisfaction for the trespass, or conversion. The latter decision holds that the judgment of the Court completes the election and fixes the rights; the former that the plaintiff must reap the fruits of his judgment, before the transfer is perfected.—If the trustee had sold the slaves

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to Neilson for eight hundred dollars, and received the money for them, the principle is quite familiar that Neilson, being aware of the deed, took subject to the trust. If he had bargained for the negroes, and received the defendant's bond in payment, the defendant having no notice whatever of the deed, can there be any doubt of the authority of the Court to arrest the transaction, enjoin the recovery of the bond, and cancel the bill of sale, or declare the purchaser a trustee? But it is admitted that Neilson was cognizant to the plaintiff's rights. He has obtained the legal title of the trustee, but he has paid nothing for it. Neither he nor his creditors have any equitable claim whatever to oppose the just rights of the plaintiff. Giving to the judgment in trover all the effect demanded for it, it seems to the Court to amount to no more than a sale by the trustee of trust property, and is subject to the incidents of all such transactions.

It is ordered and decreed, that the defendants be perpetually enjoined from selling the slaves described in the pleadings, and that the same be delivered up to the complainant, to be held subject to the provisions of the deed of the 12th August, 1835, and that Neilson account for the hire since they came to his possession.

It is further ordered, that the trustee David Foreman, be perpetually enjoined from enforcing the judgment in trover, obtained against the defendant Neilson.

The defendants, Joseph Neilson and N. G. W. Walker, gave notice, that at the next sitting of the Appeal Court in Columbia, a motion would be made to reverse the decree of his Honor the Chancellor, in the above stated cause, on the following grounds, viz:

1. Because the Chancellor overruled the pleas filed by the defendants: Whereas, it is respectfully submitted, that the matters and things set forth in the said pleas, were sufficient to bar the complainant's claim; that the said pleas ought to have been sustained and the bill dismissed.

2. Because the principle of the decree is, that the verdict in trover, though a bar to a bill filed by the trustee (as was decided heretofore) is not a bar to a bill filed by the cestui que trust; whereas, it is respectfully submitted that the principle is erroneous and not sustainable; and the defendants insist that it is not competent for the Chancellor to arrest or neutralize the said verdict, which had irrevocably vested the title of the ne-

groes in the defendant Neilson, and extinguished the equitable rights of the cestui que trust, not by private sale or agreement to buy, but by the force and effect of the principle, transit in rem judicatam.

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*3. Because his Honor, the Chancellor, has predicated his decree in behalf of the cestui que trust, on the verdict in favor of her trustee, as having judicially ascertained that until March, 1846, the legal title was in her trustee—whereas, it is respectfully submitted, that if the recovery in the said suit at law is unavailing to protect the defendants, it is equally unavailing to aid the complainant, who must either affirm or disaffirm the act of her trustee; since whatever title was judicially ascertained by the recovery in March, 1846, was by the same recovery vested in the defendant, Neilson. That is to say, if the cestui que trust is to be regarded as a party to the proceedings at law, or represented in it, she is bound by it, and her right in the negroes vested by the verdict in the defendant, Neilson; if no privity existed between the cestui que trust and the plaintiff at law, it is *res inter alia acta*, and she can derive from it neither prejudice nor benefit. And even if the slightest analogy existed between a private sale and a judicial proceeding, (*contra invitum*) the defendants object that the verdict in trover should be used in such a way as to estop them from denying complainant's title, and yet they be deprived of the benefit of that verdict, which, if good for any purpose, is good for all.

4. Because the Chancellor has decreed against the defendants on the merits, without permitting them to answer—whereas, it is respectfully submitted, that even if the pleas are not sustainable, the defendants, according to the rules and practice of Chancery, have a right to answer, since pleas are put in, *ante litem contestatam*—pleas only why the defendants should not answer—nor in the pleas, nor in the facts of filing the pleas, nor in any part of the case, save in the neutralized verdict, is there the slightest admission of the correctness of the allegations made by the complainants; or that Neilson, or the selling sheriff, or the creditors of Bush, were fully (or at all) apprised of the existence of the deed of Aug. 1835. It is therefore most strenuously insisted, that the defendants were entitled to answer, even if their pleas had been correctly overruled; more especially, when the solicitors aver, as they do aver *bona fide*, that they have other substantial grounds of defence.

5. Because the decree (it is respectfully submitted) is against law (on a legal question) and contrary to the principles, practice and rules of this court.

Bellinger & Hutson, Def'ts. Sol'rs.

The complainant gave notice, that on the hearing of the appeal in this case, a mo-

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tion would be made to amend the *circuit decree, so as to make the defendant, Walker, accountable and liable to the complainant for the hire of the slaves in question, since the time he took possession of them.

Patterson, Compl'ts. Sol'r. The legal title is not in question. The complainant never had, nor does she now claim, a legal right to the slaves in dispute. Her claim is purely equitable, and can only be recognized and protected in this court. It is immaterial to the complainant whether the legal title be in Neilson or in Foreman, the trustee. If in the former, it is subject to the same trusts which attached to it while in the latter.—The rule is, that every one who takes the legal title without the payment of a valuable consideration, or even for a valuable consideration, if with notice, is bound by the trusts. A trustee cannot dispose of the trust estate in any way to the prejudice of the cestui que trust, unless it be to a *bona fide* purchaser without notice. If the legal estate be in Neilson, it is not pretended that he paid any consideration for it, and notice of the trust is admitted. He is surely in no better condition than a purchaser for valuable consideration with notice. In the case of the Attorney General v. Lady Downing, *Wilmot's Notes*, 21 & 22, the legal title, by the death of the trustee before the testator, descended to the heir at law, yet the estate was held to be subject to the trusts of the will. "I take it," said the Chief Justice, "to be a first and fundamental principle in equity that the trust follows the legal estate wheresoever it goes, except it come to the hands of a purchaser for a valuable consideration without notice. I never heard of any distinction made, nor has any case been cited to prove, that a trust fit and proper to be executed against a trustee, should be sundered to fall to the ground, and remain unexecuted against the heir at law, where there was no trustee. The lapse of the legal estate never has the least influence upon the trusts to which it is subject. Trust estates do not depend on the legal estate for an existence. A Court of Equity considers trusts as distinct and substantive interests, standing on their own basis independent of the legal estate"—"the legal estate is nothing but the shadow which always follows the trust estate, in the eye of a Court of Equity."—*Mansell v. Mansell*, 2 Peere Wm's. 681; 2 Story's Equity, sections 976, 977; *Willis on Trusts*, 64, 121; 2 *Mad. Ch. Practice*, 125; *Lewin on Trusts and Trustees*, 205, 206, 207, 573, 604, 607, 610.

Suppose Foreman, the trustee, to have committed a breach of trust by prosecuting the action at law, the rights of the complainant, who was not a party to that suit, and who is

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*moreover a femme covert, and incapable of

concurring in a breach of trust, are not thereby affected. Lewin on Trusts and Trustees, 64.

It is a maxim in this Court, that equity follows the law, but by this we are not to understand that the law is to be followed implicitly and invariably. The object or business of a Court of Chancery is to allay and mitigate the rigor of the law; to supply its deficiencies, and even to supersede its rules, when necessary to the ends of substantial justice; 7 Dun. and East, 663. Without some such jurisdiction, by whatever name it may be designated, the general application of the abstract technical and arbitrary rules of the common law to the transactions of society would often result in the most revolting injustice; and however settled and fixed the principles of equity may be, in their application regard must be had to substantial justice in each particular case. It is a mistake to suppose that the difference between these Courts is merely as to the mode of pleading, trial and relief. "The doctrines of this Court ought to be as well settled, and made as uniform almost, as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case." 2 Swanston, 414.

The slaves in dispute were conveyed on the most sacred trust a parent can create, viz: the maintenance of a daughter and her issue; and it would be repugnant to every principle of justice to permit this trust to be defeated by a very questionable rule of law, without any meritorious consideration whatever; and that in a case within the acknowledged jurisdiction of this Court.

Copy of Pleas.

The State of South Carolina, Barnwell District. In Chancery.

The several plea of Joseph Neilson to the bill of complaint of Caroline A. Bush, suing by David M. Dunbar, her next friend.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's said bill alleged to be true, in such manner and form as the same are therein set forth, doth plead in bar thereunto, and for plea saith, that on or about the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, the said David Foreman, the trustee to the said deed mentioned in the said complainant's said bill, (a copy of which said deed is filed by the said complainant, as exhibit A.) did commence his

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action of trover against this defendant for the recovery of damages for the conversion of the said slave Sophy and her child, and that on the thirtieth day of March, in the year of our Lord one thousand eight hundred

and forty-six, did recover in the said action a verdict for the sum of seven hundred and seventy-five dollars, which said verdict still remains unreversed and in full force and effect; and this defendant avers that at no time during the pendency of his said action, nor at the time of the commencement thereof, did the said David Foreman cause this defendant to enter into bond for the forthcoming of the said negro. And this defendant doth further aver that the said bill now exhibited against this defendant, is for the same matters and concerning the same slaves as the said action of trover by the said David Foreman, wherein the said David Foreman did recover against this defendant the sum of seven hundred and seventy-five dollars; and therefore this defendant doth plead the said former action and verdict in bar to the said complainant's new bill, and humbly prays the judgment of this Court whether he shall be compelled to make any other or further answer thereto, and humbly prays to be dismissed with his reasonable costs in this behalf most wrongfully sustained.

And this defendant doth further plead in bar to the said bill, and for other and further plea thereto saith, that on or about the tenth day of April, in the year of our Lord one thousand eight hundred and forty-six, the said David Foreman, trustee as aforesaid, did file his bill in this Honorable Court against the said N. G. W. Walker and this defendant, wherein and whereby the said David Foreman did, among other things, pray that a writ of injunction should issue against and to the said N. G. W. Walker, to restrain him from selling the said slaves, Sophy and her child, by virtue of writs of fieri facias in his office against this defendant, and that the said slaves should be ordered to be delivered up by the said N. G. W. Walker and this defendant, to the said David Foreman; to which said bill the said N. G. W. Walker and this defendant put in their several answers; that the said cause came to a hearing, and the said bill of the said David Foreman was dismissed; which decree was affirmed upon an appeal. And this defendant doth aver that the said bill now exhibited by the said complainant against this defendant is for the same matters as the bill before exhibited by the said David Foreman against this defendant and the said N. G. W. Walker, which said bill hath been dismissed and is finally concluded and ended, and therefore this defendant doth plead the said former bill, answers and decree in bar

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to the said complainant's new bill, and humbly prays the judgment of this Honorable Court whether he shall be compelled to make any other or further answer to the said complainant's said bill; and this defendant prays to be hence dismissed with his reason-

able costs and charges in this behalf most wrongfully sustained, and so forth.

Bellinger & Hutson, Def'ts Sol'rs.

DUNKIN, Ch., delivered the opinion of the Court.

On the matters discussed in the decree the Court is satisfied with the judgment of the Chancellor. But on overruling the defendant's pleas in bar, they were entitled to leave to answer the bill. It will then be

time enough to consider the subject of the complainant's appeal.

It is ordered and decreed, that the defendant's pleas in bar be overruled, and that they have leave to file their answer within thirty days hereafter, and that the decree of the Circuit Court be modified accordingly.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

Decree modified.

APPEALS IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF ERRORS OF SOUTH CAROLINA

WITHIN THE TERMS INCLUDED IN THIS VOLUME.

I Strob. Eq. *387

*OLLEY MATTISON v. MARY MATTISON.

[*Equity* ⌘1.]

The powers of the Ecclesiastical Courts have never been conferred upon, nor have they ever been exercised by, the Court of Equity in this State; by the terms of the Statute, its jurisdiction is confined to cases of Chancery cognisance in Great Britain.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 1; Dec. Dig. ⌘1.]

[*Marriage* ⌘60.]

The Legislature of South Carolina have delegated to no Court the authority to declare a marriage null and void, and they have never themselves exercised the authority.

[Ed. Note.—Cited in *Bowers v. Bowers*, 10 Rich. Eq. 554, 73 Am. Dec. 99; *Davis v. Whitlock*, 90 S. C. 237, 240, 241, 73 S. E. 171, Ann. Cas. 1913D, 538.

For other cases, see *Marriage*, Cent. Dig. § 127; Dec. Dig. ⌘60.]

[*Marriage* ⌘60.]

The distinction between the authority to declare a marriage null and void, and to grant a divorce, has no sanction either in reason or authority.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 125-128, 130-135; Dec. Dig. ⌘60.]

[This case is also cited in *Keys v. Norris*, 6 Rich. Eq. 397, without specific application.]

On appeal from the decree of Dunkin, Ch., at Anderson, June, 1846, and by the Appeal Court referred to the Court of Errors, at Columbia, December, 1847.

Dunkin, Ch. This was a suit of nullity of marriage. It is described as being instituted by the complainant against Mary Clements, falsely calling herself Mary Mattison, to have a marriage, in part solemnized between them, declared to be null and void in law.

The allegation is that the complainant, being addicted to habits of intemperance, was married to the defendant, in the Spring of 1840, while in a fit of delirium tremens. This bill was filed on the 11th of November, 1845, and the prayer is that the said marriage may be "decreeed to be null, void, and

of no effect whatever, and the complainant fully absolved from all the legal effects and consequences of the said marriage ceremony."

At the opening of the case, the Court expressed a strong *impression that it had not jurisdiction to entertain the proceeding, or grant the relief sought. Subsequent examination and reflection have served only to confirm this impression.

It is admitted that, in England, cases of this character belong exclusively to the Ecclesiastical Courts. Collaterally, it may be the duty of a Court of Chancery, or of Common Law, to inquire into, and determine, the validity or invalidity of a marriage, as of any other contract. But this is when the question arises in the administration of their ordinary jurisdiction. Such was the case of *Foster v. Means*, Spears' Eq. 574 [42 Am. Dec. 332].

Rhame v. Rhame, McCord, Eq. 197, [16 Am. Dec. 597], was a bill for alimony. Mr. Justice Nott, conceding that such cases belong to the Ecclesiastical Courts, regards alimony as an exception, both from the settled practice of the Court in South Carolina, and from necessity. But it was in that case ruled that "the jurisdiction of the Court must be limited to the allowing of alimony," and to such orders as are necessarily incident to the effectual execution of such a decree.

This Court has no more authority to entertain a suit for nullity of marriage than to grant a divorce, or decree a restitution of conjugal rights. By the terms of the statute, its jurisdiction is confined to cases of Chancery cognisance in Great Britain. In some of the States, as in New York, the Court of Chancery has, by statute, the sole jurisdiction over the marriage contract in certain specified cases, and that may possibly warrant the inference that the Legislature has thereby recognised this Court as the proper organ for such a jurisdiction. But so im-

portant have the Legislature of South Carolina always deemed this authority, and so delicate the exercise of it, that they have never delegated to any judicial tribunal, nor have they exercised, themselves, the right of interference with the matrimonial contract. So far as the rights of property were involved—so far as protection to the person was necessary, the powers of the Courts are ample, and require no enlargement; but as to the inviolability of the contract itself, the silence of the Legislature is the best evidence of the sentiment of the public. "Nolumus leges mutari."

It is ordered and decreed that the bill be dismissed.

Grounds of Appeal.

The complainant moved the Court of Appeals in Chancery to reverse the decision of the Chancellor in this suit, on the following grounds:

1st. Because, there being no Ecclesiastical Courts established in South Carolina, the

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relief prayed for in complainant's bill belongs, from necessity, to the Chancery jurisdiction.

2d. Because it is the peculiar province of the Court of Chancery in South Carolina to grant relief against fraud, and to set aside agreements and contracts procured by fraud or imposition, or which were, in other respects, null and void.

3d. Because the alleged marriage of complainant, being entered into whilst in a state of insanity, was a nullity, and the Court of Chancery has the right to restrain the defendant from assuming the complainant's name, passing as his wife, and harassing him with groundless actions and suits for alimony, maintenance, &c.

4th. Because the decree was in other respects contrary to law and equity.

Waddy Thompson, for the motion. We claim the jurisdiction of this court on various grounds. In England, it has concurrent jurisdiction with the Ecclesiastical Court. We have no Ecclesiastical Court, and if this court has no jurisdiction none other has. This court protects lunatics and idiots. It has quia timet power. It will adjudicate to avoid multiplicity of actions, to perpetuate testimony, and to award maintenance or alimony. Chancery Courts, in England, exercised this jurisdiction anterior to the existence of Spiritual Courts. The court is not asked to set aside a contract of marriage, but to decide that no contract did ever exist. In this case there was the form, but not the vitality of a contract. *Foster v. Means*, 1 Spears' Eq. 571. Without a sufficient share of reason, the contract is not valid. *T—v. Murray*, 1 Bland. Ch. 479. If the complainant had sold land in the state he was, the court would have pronounced the contract void. Marriage, in our State, is a civil

contract, and one of the most importance; should it be without a remedy in our courts? We seek to have this declared no contract, but one of fraud. In *Imer v. Width*, 3 Johns. C. C. 69, a minor's marriage was annulled. *Hinlap v. Grocher*, 1 Hopk. C. C. 478, is a leading case in which the whole doctrine is reviewed—a marriage in this case was declared void, consent having been obtained by duress.—In 1 Hopk. C. C. 557, it was said the court could not dissolve marriage for physical impotence, but for fraud in the contract. *Perry v. Perry*, 2 Page, 506. The marriage is not dissolved, but no marriage ever was made. Where there is a right, some tribunal must enforce it. This is a civil contract; we seek not to have a marriage annulled for incompetency or disability. In *Wightman v. Wightman*, 4 Johns. C. C. 343, lunatics and idiots are under the protection

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of the Civil Courts, where there is no Ecclesiastical Court. 2 Iredell, 470, and 3 Iredell, 98. The marriage of a lunatic is void, *Scott v. Chappel*, 5 Page 43.—In this case, fraud annulled the marriage. All civil contracts are void for fraud. In States where divorces are granted, these cases do not come within the statutes granting divorces, but are based on the ancient laws of English Chancery jurisdiction in similar cases. This court is the guardian of lunatics, minors, &c. The rights of many are involved in this question; are they to be without remedy? Necessaries are sued for by the wife, &c. &c. &c.; and this court should prevent the multiplicity of suits. The complainant wishes the testimony to be perpetuated and under the quia timet power of the court.

Whitner, contra. What is to be the judgment of the court in a case of this kind? What its form, and how carried into effect? This is a contract by parol. There is nothing tangible to act upon. The parties are not before the court. Other rights have already attached; creditors, &c. are to be satisfied. They have their rights. They are not here, and cannot be reached by any judgment of the court in this case. No point is made in the bill to perpetuate testimony; it is simply to dissolve, or have declared null, this marriage. The bill alleges that a marriage has been entered into, and prays that it be vacated; and still the counsel asks that the marriage should be declared null. This is a distinction without a difference. If this court is to enquire into marriage contracts, litigation will be endless. There has been no fraud practiced in this case.

Perry, for the motion. In our country, a marriage contract is a civil contract, and if fraudulently entered into, is a nullity; and why should not this court entertain jurisdiction and declare it a nullity? Does not policy require it? This will prevent a multiplicity of actions, preserve the testimony, &c.

(Mr. Perry here read the argument of counsellor Sampson, in a case in 1 Hopkins, 487, and adopted it as his own in the present case; and in reference to the practice in our own courts in cases of alimony, cited) *Rhame v. Rhame*, M'Cord's Ch. 197, and *Printer v. Printer*, 4 Dessau. 53. In 1 Rich. Eq. 127, the court assumed jurisdiction, because there was no jurisdiction elsewhere. In 2 Eq. Rep. 204, the court assumed jurisdiction from analogy to the practice in England in cases of divorce. In *Wightman v. Wightman*, 4 Johs. C. C. it is said the nullity of the marriage of a lunatic should be declared by this court. In England, they have Ecclesiastical Courts to notice these matters, but we have no such courts, there-

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fore this court has jurisdiction; 3 *Iredell, 98; (North Carolina;) vide *Maddox Chancery*, 385, note C. as to there being no Ecclesiastical Court here. This bill has been answered, and the defendant has put himself in court, and cannot complain of want of jurisdiction. As to creating litigation, it is an objection incident to all cases of fraud.

DUNKIN, Ch., delivered the opinion of the Court.

The zeal with which this appeal has been urged, and the importance of the question involved, may render it proper to elucidate, by some further observations, the principles propounded by the decree.

A Court of Chancery was first established in South Carolina in 1721. By the tenth section of the Act it is provided "that the said Court shall proceed, adjudge and determine in all causes brought into the said Court, as near as may be, according to the known laws, customs, statutes and usages of the Kingdom of Great Britain, and also, as near as may be, according to the known and established rules of his Majesty's High Court of Chancery in South Britain." By the first section of the Act of 1791, it is declared that the laws, then of force, for establishing and regulating the Court of Chancery within this State, shall be and continue of force in this State, until altered or repealed by the legislature thereof, subject, nevertheless, to such alterations, amendments and restrictions as are thereafter directed.

It would seem, then, only necessary to inquire whether, by the known usages and practice of the Court of Chancery in England, or by force of any special statute of South Carolina, the Court of Equity has jurisdiction of this cause. In England it is well settled that the cognizance of matrimonial causes belongs exclusively to the Ecclesiastical Courts. For a short time, during the Protectorate of Cromwell, when the spiritual courts were closed and the civil law was silenced, the Court of Chancery took cognizance of cases of alimony, but on the re-establishment of the Courts Christian, after

the restoration, a demurrer to a bill of alimony was sustained.—Such had been the usage of Westminster Hall in 1721. No Court of Chancery in England, no judge of a Chancery Court, has ever, at any time, in the most disturbed condition of civil society, undertaken to pronounce a marriage null and void, or to take cognizance of such matter. Nearly a quarter of a century ago the Supreme Court of this State, in *Rhame v. Rhame*, advert to the practice of the English Court of Chancery, as well as to that of South Carolina, in relation to matrimonial causes, and it is there declared that the case of alimony

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has *always been regarded as an exception, and that "the jurisdiction of the Court must be limited to the allowing of alimony." This would seem to be the natural end of the investigation, as well as a satisfactory answer to the argument from necessity. If, twenty years since, it was judicially announced that the Court of Equity has no cognizance of matrimonial causes beyond the allowance of alimony, and a necessity existed for more extensive authority, legislative interference would have supplied the defect, and, following the example of other States, would have vested the judicial tribunals of the country with this new and perilous power. The silence of the Legislature is conclusive—regarding the sacred nature of the marriage contract as a matter of public interest, they will neither interfere with it themselves, nor delegate to others the power to dissolve it. The distinction between the authority to declare a marriage null and void, or to grant a divorce, has no sanction either in reason or authority. The same general principle which would authorize Courts of Equity to declare a contract void for want of consent, would require them to interfere in cases of fraud or misrepresentation, and declare the contract no longer obligatory on one party when the other had refused to perform the duties imposed by it. But no Court, either in England or in the United States, has ever declared a marriage null and void in its inception which did not, at the same time, assume, as a necessary incident, the authority to divorce the parties, in England a mensa et thoro, in our sister States a vinculo. *Wightman v. Wightman*, 4 J. C. R. 343, is the only decision brought to the notice of the Court in which is affirmed the inherent authority of Chancery to declare a marriage null and void in a suit between the parties themselves. *Ferlat v. Gojon*, 1 Hop. R. C. R. 487, rests on *Wightman v. Wightman*. Able decisions from North Carolina were cited, but in those cases, the jurisdiction of the Court is expressly based on special Acts of the Legislature. In *Wightman v. Wightman*, the language is plain and unequivocal. "All matrimonial, and other causes of ecclesiastical cognizance," says the Chancellor, "belonged originally to the temporal courts; and when the spiritual

courts cease, the cognizance of such causes would seem, as of course, to revert back to the lay tribunals." After adverting to the statutes of New York, the Chancellor proceeds, "Divorces a vinculo, says Lord Coke, are causa metus, causa impotentiae, causa affinitatis, causa consanguinitatis, &c. These cases, and that of lunacy, are not within the statute giving to this Court jurisdiction concerning divorces." He then proceeds to affirm, and to shew, in his own words, that the

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Court of Equity "is com*petent, not merely collaterally, but by a suit instituted directly, and for the sole purpose, to pronounce a divorce in such cases." This is distinct and intelligible, and the process of reasoning (assuming the truth of the premises) sufficiently strong in reference to the judicial system of New York. Chancellor Kent does not place the jurisdiction of the Court on its ordinary authority in reference to ordinary contracts, but he boldly assumes the position that the Court of Chancery in New York has jurisdiction, independently of the statute, "of all matrimonial and other causes of ecclesiastical cognizance," and that it may grant a divorce for any of the causes enumerated by Lord Coke. It is hardly necessary to say that the reasoning is inapplicable to South Carolina. The powers of the Ecclesiastical Courts have never been conferred upon, have never been exercised by, the Court of Equity in this State. Our path is in a more humble and limited sphere. Whether wisely or unwisely, the Legislature has thought proper to withhold these powers. They have delegated to no Court the authority to declare a marriage null and void, and they have never themselves exercised the authority. Cases of individual hardship have occurred, and will occur; but the observation of a different policy in other States, as well as the experience of our own, has served only to confirm the conviction that it is better to tolerate occasional suffering than to jeopardize the peace of society, and open a wide door to fraud, imposition and other immorality.

The motion is dismissed.

JOHNSTON, Ch., CALDWELL, Ch., and RICHARDSON, J., O'NEALL, J., EVANS, J., WARDLAW, J., WITHERS, J., and FROST, J., concurred.

Motion dismissed.

I Strob. Eq. 393

WM. B. VILLARD and Wife et al. v. ANN M. ROBERT et al.

[*Executors and Administrators* ⇐460, 466.]

Two executors converted part of their testator's goods into money, and died; an administrator de bonis non of the testator was then appointed, with whom the personal representatives of the deceased executors accounted, and

from whom they took a receipt and discharge in full, &c.—the Court allowed this to be a full and sufficient bar to an account prayed by the legatees of the testator against the representatives of the executors, for the same matter—holding that the administrator de bonis non was fully competent to demand and compel an account from the representatives of his predecessors in office.

[Ed. Note.—Cited in *Enicks v. Powell*, 2 Strob. Eq. 206; *Rhame v. Lewis*, 13 Rich. Eq. 318; *Kaminer v. Hope*, 18 S. C. 576; *Strickland v. Bridges*, 21 S. C. 25; *Chick v. Farr*, 31 S. C. 479, 10 S. E. 176, 390.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1975–1986, 1993–1996; Dec. Dig. ⇐460, 466.]

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[*Executors and Administrators* ⇐120, 460.]

*The administrator de bonis non is entitled to all the unconverted goods of the testator, and although the proceeds of those converted go by legal right to the personal representative of the executor, to be administered by him as parcel of the executor's estate; yet in equity, he is to answer, out of the estate, for all the trusts upon which the executor held the money, and the administrator de bonis non is entitled to demand the account and receive the money.

[Ed. Note.—Cited in *Gary v. People's Nat. Bank*, 26 S. C. 545, 2 S. E. 568, 4 Am. St. Rep. 733; *Shell v. Boyd*, 32 S. C. 363, 11 S. E. 205; *Redfearn v. Craig*, 57 S. C. 545, 35 S. E. 1024.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 486, 1984; Dec. Dig. ⇐120, 460.]

Note.—The above embodies the decision of the Court of Errors on the only points submitted to them. On their certifying back their opinion to the Court of Appeals, that court approved of the following additional points, ruled by his Honor, Chancellor Johnston, on the circuit.

[*Vendor and Purchaser* ⇐231.]

Notice will not be implied from the recording of a deed, which was not required to be recorded, and which was recorded at such a distance of time from its execution as would have been a void registration as to any deed required to be recorded.

[Ed. Note.—Cited in *Arthur v. Screven*, 39 S. C. 80, 17 S. E. 640.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 537; Dec. Dig. ⇐231.]

[*Executors and Administrators* ⇐304.]

It is no devastavit in executors to permit a slave of their testator to go into possession of his widow, with whom her only child lived, and who was co-legatee with her of the slave.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1243; Dec. Dig. ⇐304.]

[*Tenancy in Common* ⇐13.]

Where husband and wife were in possession of slaves, liable to partition between them and an infant daughter of the wife, by a former marriage, who lived with them—there having been no overt acts or claims, signifying an intention to test the validity of a title afterwards relied on—the Court held that their possession was the possession of the infant, their co-tenant, and, regardless of the lapse of time, ordered a writ of partition to divide the slaves, in accordance with the will under which they were co-legatees.

[Ed. Note.—Cited in *Frost v. Frost*, 21 S. C. 511.

For other cases, see *Tenancy in Common*, Cent. Dig. § 29; Dec. Dig. ⇐13.]

[*Executors and Administrators* ⚭ 111.]

The Court refused to allow the counsel fee, paid by one called to account as administrator de bonis non, to be charged against the estate which he represented, when it was incurred by him for his own exclusive benefit, and to sustain interests adverse to the legatees who sought the account.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 462; Dec. Dig. ⚭ 111.]

[This case is also cited in *Napier v. Gidiere*, 3 Strob. Eq. 196, without specific application.]

This case came up on appeal from the decree of Johnston, Chancellor, at Gillisonville, February, 1846, and one of the grounds of appeal was submitted to the judgment of the Court of Errors, at Charleston, January, 1847.

The Chancellor explains the case in the following circuit decree:

Johnston, Ch. This is a bill, filed the 19th of January, 1844, by Wm. B. Villard and Harriet, his wife, formerly Harriet McKenzie, and Wm. M. Bostick, the trustee of their marriage settlement, against the defendants, Ann M. Robert, executrix of Jno. H. Robert, deceased, Ulysses M. Robert, administrator of Wm. H. Robert, deceased, (which John H. and Wm. H. Robert were the executors of Daniel W. McKenzie, the father of the plaintiff, Harriet,) and against the defendant, Isaac A. E. Chovin, the administrator de

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bonis non cum *testamento annexo of the said Daniel W. and formerly husband of his widow, Eliza, the mother of said plaintiff Harriet.

The bill states that, on the 10th of August, 1815, one John Robert made an absolute deed of gift to his granddaughter, Eliza Bostick, afterwards wife of the said Daniel W. McKenzie, but then a femme sole, of a certain female slave, Nancy, of whom possession was delivered to the donee, and retained by her until her marriage.

That the said Eliza Bostick intermarried with the said Daniel W. McKenzie the — of February, 1821, and carried the said slave and her increase with her into his possession, which possession he retained until his death, which took place the — of —, 1826.

That at his death he left his said wife, Eliza, and one child by her, the plaintiff, Harriet; and a will, dated the 8th of March, 1826, by which, subject to an annuity of 150 dollars to his mother, Elizabeth McKenzie, he devised and bequeathed to his said wife, Eliza, and his said daughter, Harriet, then an infant, all his estate, real and personal, "to be fully and peaceably enjoyed by them during the minority of his said daughter, or until she marries. In that event, the whole of his estate to be equally divided between them."

That John H. and Wm. H. Robert, named in the will as executors, qualified, &c. the 8th of May, 1826, and possessed themselves

of the estate; sold part of it, and invested the sum of \$2,333.65 at interest, to raise the annuity for their testator's mother, which annuity they regularly paid until their death.

That testator's widow, the co-legatee and mother of the plaintiff, Harriet, intermarried with the defendant, Isaac A. E. Chovin, the — of September, 1828.

That one of the executors, John H. Robert, (the testator of the defendant, Ann M. Robert,) died the 4th of July, 1835, and Wm. H. Robert, the other executor, (and testator of the defendant, Ulysses M. Robert,) died shortly afterwards, and in the same year; and that the said Isaac A. E. Chovin, on the 18th of December, of the same year, took out letters of administration de bonis non, with the will of the said Daniel W. McKenzie annexed, and reduced the personalty of his estate into his possession, including the fund aforesaid, vested for raising the annuity of the testator's mother; which fund, together with other large sums of money, the amount unknown to the plaintiffs, the bill charges he received from the said representatives of the former executors.

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*The bill also charges that he also obtained possession (but at what time the plaintiffs do not know) of the slave Nancy and her issue then in esse, and has them now in possession, and refuses to partition them with the plaintiff, Harriet.

It is further stated in the bill, that the annuitant, the testator's mother, died the — of August, 1838, having received all arrearages on her annuity up to the time of her death.

That Eliza, the mother of the plaintiff, Harriet, and wife of defendant Chovin, died the — of March, 1843; the said plaintiff being still a minor and unmarried; and the estate of her father, the said Daniel W. McKenzie, having never been partitioned.

That the said plaintiff, Harriet, was married the 2nd of November, 1843, to her co-plaintiff, Wm. B. Villard, and on the same day, but previous to the nuptials, executed a deed of marriage settlement, by which, and upon the trusts therein mentioned, she assigned and conveyed to her other co-plaintiff, Wm. M. Bostick, all her rights and estate, present and expectant.

The bill seeks an account from the defendants, Ann and Ulysses Robert, of the administration of the former executors, whom they represent, respectively; and from the defendant, Chovin, an account of his administration, &c., and of the income and profits of the slave Nancy, and her issue: of whom partition is also sought.

The two first-named defendants, admitting the will and death of the said Daniel W. McKenzie, and the executorship of the said John H. and William H. Robert, plead that they came to an account, separately,

with Chovin, the administrator de bonis non, paid him the balances found due upon said accounts, and took his receipt and discharge in full, &c., and that as to the other matters stated in the bill they are strangers to them.

Chovin, by his answer, admits the will and death of McKenzie, the administration of John and William Robert, and their deaths in 1835, and the administration on their estates. That he married the widow of McKenzie in September, 1828, found her in possession of Nancy, of whom he took possession, supposing her to be her absolute property, and having no notice of any claim to the contrary: That the executors, so far from interposing any claim, never inventoried said slave as belonging to the estate of their testator, and permitted his possession, from his marriage in 1828, till their deaths in 1835, without molestation or question.

He also admits that he took out administration as successor to the executors, as stat-

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ed in the bill; came to a settle*ment with the personal representatives touching the estate of McKenzie, and received from them the sum of \$2,468.45; which is all of the assets of that estate he ever received: out of which he paid the annuity of testator's mother, up to her death in 1838; and by expenditures for the education and clothing of Mrs. Villard, and by a trifling appropriation of interest to his own account, the fund has been disbursed, except a balance of about \$200; and that he is ready to account, &c.

All the defendants plead and rely on the statute of limitations and lapse of time, &c.

At the hearing, a copy was produced from the registry of mesne conveyances for Beaufort, of the deed from John Bostick, of the 10th of August, 1815. The deed purported to convey the slave, Nancy, to the donor's grand-daughter, Eliza, as stated in the bill; and in the same deed was also conveyed another slave, Sam, to his grand-son, Benjamin R. Bostick: "but if it should so happen, that either my grand-son, Benjamin R. Bostick, or my grand-daughter, Eliza Bostick, should die, without leaving lawful issue, the negroes, so given in this deed, to revert to and belong to the survivor, and his or her heirs, forever."

It was proved that the slave, Nancy, was in possession of the donee before her marriage with McKenzie, and in the possession of McKenzie from the marriage till his death.

She was at the sale of his estate by his executors, but was not sold by them. The executors did not include her in their inventory. At the sale they said she did not belong to the testator's estate, but was secured to Mrs. McKenzie by deed, and if she died without children, would go over to others.

Chovin was at the sale, according to witness's recollection, doing writing for the executors. Witness was not clear in this impression. The executors, after the sale,

said the slave did not belong to their testator.

Upon Chovin's marriage, he got possession of Nancy, and has retained it ever since. She now has several children.

Some years ago, but the witness cannot fix the time—rather thinks it was since 1840, Chovin got the deed from the witness, who had it in possession.

It appeared in evidence that this deed was recorded, as before stated, the 9th of February, 1818, by the then Register, Covise. Chovin was Register afterwards for several years. These latter facts were proved by way of fixing him with notice of the deed, and that the property must have belonged to McKenzie, and was subject to the provisions of his will.

And, by way of negating the idea that

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Chovin received or *held Nancy, or her issue, as the exclusive property of his wife, or adversely to the plaintiff, Harriet, a deed was given in evidence, executed, by way of marriage settlement, by himself and his said wife, the 13th of September 1828, before their intermarriage, professing to convey certain slaves, then belonging to her, and to assign all the interest which she might acquire in her father's estate, to trustees, upon trusts therein expressed. In this deed it is recited that, "whereas, the said Eliza A. McKenzie, at the date of sealing and delivering these presents, is entitled to and possessed of eight negro slaves, named Betty, Harriet, Anny, Mary Ann, Lizzy, John, Richard, and Henry, and will be entitled to some share, interest, and portion in the estate of her father, Richard Bostick," &c. This enumeration does not include Nancy or her issue, nor does the deed refer to any interest she had or might have in her late husband's estate. So much for Nancy and her issue.

With regard to the account rendered by the representatives of the deceased executors to Chovin, administrator de bonis non, &c. it appeared at the hearing, that on the 2d of May, 1836, Ulysses, the administrator of Wm. H. Robert, came to a settlement with Chovin, as administrator of McKenzie, and paid him the sum of \$2,022.18, the balance found to have been in the hands of said Wm. H. as executor of McKenzie, and took a receipt from him for that sum, "in full for all the assets of the estate of Daniel W. McKenzie, which came to the hands of the said Wm. H. Robert, as executor of the said Daniel W. McKenzie, (or which have come to the hands of the said U. M. Robert, as administrator aforesaid, since the death of the said Wm. H. Robert,) as more fully appears from the books and returns of the said Wm. H. Robert." And that the administration accounts of the said John H. Robert were referred by his executrix, Ann, and the administrator de bonis non, Chovin, to the arbitrament of Messrs. DeTreville and Colcock, and the um-

pirage of Mr. DeVaux, who awarded the sum of \$175.87, with interest from July 1, 1836, to be paid to the latter by the former, as the balance with which her testator was chargeable, and that on the 18th of December, 1836, she paid him the sum of \$446.25, and took his general release, dated the same day. There is a report of the commissioner in the case, and exceptions, to which I shall attend hereafter.

I shall take up, in the first place, the question, whether the plaintiff, Wm. M. Bostick, in virtue of the marriage settlement between Villard and wife, vesting her property in him as trustee, is entitled to parti-

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tion of the slave Nancy, *and her increase, now in the possession of the defendant, Chovin, as part of the estate of McKenzie.

There is a preliminary question here, which was argued at the bar, and it is, whether, if the defendant, Chovin, has acquired such a right in this property as to preclude the plaintiff, Harriet, from any interest in it, whether, in that case, the executors would be liable for its value, as for a devastavit or neglect of duty. What I have to say on that is, that according to the view I take, Chovin has not acquired an exclusive right, and therefore the question stated becomes unnecessary; in the next place, that if it were otherwise, this question could not arise under this bill, which makes no such charge against the executors; and thirdly, that I do not think any devastavit was committed by them.

The grounds upon which the executors of McKenzie omitted to inventory Nancy, (for it appears she had no issue at that time, nor until she came into the possession of Chovin on his marriage) are apparent. From a misconstruction of the deed of John Robert, they supposed that the limitation of the property over to Benj. R. Bostick, in the event of Mrs. McKenzie's dying without issue, prevented their testator from acquiring any interest in it, whereas, (supposing the limitation good) the slave and her issue vested in the donee, and of course in her husband, subject only to be divested on the happening of the contingency, which in fact never happened.

But it was no devastavit in them to permit the negro in question to go into the possession of the widow of the testator, with whom her child and co-legatee lived. The will, which they were to execute, expressly declared that the legatees were entitled to the full and peaceable enjoyment of their common property, until the daughter should come of age or marry. If the executors had claimed the slave Nancy for the estate, and detained her from the legatees, they might have been compelled to deliver her into their possession. Can it make any material difference, that the effect of that assent which

they might have been compelled to give, was produced by their non-interference?

The slave Nancy was already in the hands of one of the legatees; the legatees were entitled to the enjoyment, and the period of division was yet far off. The executors did not need the property to pay debts, nor to raise the annuity fund: and what excuse could they have made for detaining this property from the hands of the legatees? One of these was an adult, the other an infant, living with her, and if they had deliv-

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ered *the property (which was not yet to be divided, but to be enjoyed,) they must have delivered it into the hands of the adult.

To a creditor the executors might have been responsible for allowing the possession to the legatee, Mrs. McKenzie, in case of insufficiency of other assets to pay his debts; but to a legatee entitled to a division, it could be no ground of complaint, that property was delivered to another, his companion in interest in that property.

The only loss which could have accrued, would be, if that other took and held possession in reference to a claim opposed to, or exclusive of, his co-legatee, so as to oust him. But in this case, I have no evidence of that sort. We have no evidence that Mrs. McKenzie ever claimed this property in any other character than its real character—parcel of her husband's estate. She had possession and she retained it, or rather was not disturbed in it; but there is no witness who says that she retained it because it was her's, or because the executors thought so, or that she knew what their opinion was; or if she did, that she concurred in it; or designed to appropriate the slave to herself. On her part there was possession, which was continued; but, as to any change in the character of the possession, which is the material point—the evidence speaks not a word.

And so of Chovin, when he married Mrs. McKenzie. It is easy for him to say now that he took the slave to be the property of his wife, and always so claimed it. But where is the evidence that he ever did so claim it? I cannot find it. If he means that he so regarded it in his own mind, no one can dispute or disprove that, any more than he can prove it. But there was no overt act amounting to an ouster, or calculated to put the infant on her guard, or on the assertion of her rights, even if her infancy had not been a sufficient protection to her. She had this protection, however. Born of parents who were not married till 1821, she could not be of age until 1842, and her bill was filed within two years afterwards.

It will be observed that I do not impute notice of Chovin from the registration of the deed. There is not sufficient evidence of actual notice, though his calling upon B. R.

Bostick for the deed, is rather calculated to raise a suspicion that he knew something of its contents before. Notice will not be implied from the recording of a deed which was not required to be recorded, and which was recorded at such a distance of time from its execution, as would have been a void registration as to any deed required to be recorded. It would be rather hard to imply that

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because Chovin subsequently became *Register, he must, of course, be acquainted with all the papers, lawfully or unlawfully, in his office, when he came into it.

Neither do I attach so much importance to the marriage settlement which he and his wife executed, as the counsel opposed to him did at the hearing. It does not purport to settle all the negroes Mrs. McKenzie owned, but only enumerates those intended to be settled, and the omission of Nancy is, therefore, no conclusive proof that she was omitted merely because Mrs. McKenzie did not claim her as her own.

I found my decision upon this alone; that Chovin and his wife were in possession of slaves liable to partition; and that their possession was the possession of their cotenant, unless they, by overt acts or claims, signified an intention that it should not be so regarded, and thereby gave occasion to test the validity of the adverse claim upon which they relied. And there is no such evidence in the case.

The next question is, whether the account stated between the administrator de bonis non and the representatives of the first executors, and particularly the release to the executors of John H. Robert, are a bar to the account now claimed of them by the plaintiffs.

The rule is undoubted, that where the account has been stated between proper parties, it is a bar to a general claim for an account afterwards. If there be errors, or any other matters which are a ground for impeaching the account which has been had, the bill must be for opening the account, in order that it may be corrected; and the errors must be set out in the bill, and established, before the accounting party shall be put to account a second time. This is not done here, and, therefore, the only question in this case is, whether Chovin, the administrator de bonis non, was competent to make the settlements and execute the release which he did. If he had authority to demand the account, and to receive the money, he had authority to give the evidences of acquittance which he executed: and, therefore, the question is narrowed down to this: had he authority to demand and compel an account from the representatives of his predecessors in office?

I put the question thus, not doubting, at the same time, that whatever authority he may have had, if he exercised it fraudulently; as, for example, if there was collusion

between himself and those with whom he settled, the act would not be binding on his cestui que trust, although binding on himself. But in that case, the fraud, and not the want of authority, being the ground on which the Court must interfere, the fraud must be stated in the bill. There is, how-

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ever, *no surmise of fraud in this bill; nor was there any at the hearing.

I take the settlement, therefore, for a fair one, and depending altogether on the legal ability of Chovin to make it:—and regard it with this inference in view, that if he was competent to make it, it binds the legatees and all other parties interested in the estate.

Was he competent? Undoubtedly an administrator de bonis non is the proper person to receive all the assets of the testator remaining unchanged in the hands of the first executor at the time of his death: and this is not disputed.—But in this case, that which was received by Chovin was not assets in specie, but assets which had been converted into money.

The question then is, was Chovin a proper party to receive this money? Could he have sued for it?

I think he could have maintained a suit for it, and, therefore, it was properly paid to him. I am of the opinion that an administrator de bonis non may sue for and recover not only specific assets belonging to his testator, but money, the substitute of them, for the purpose of paying his testator's creditors, or his legatees, or accomplishing any other purpose indicated in his will remaining to be accomplished; or in case the deceased be an intestate, he is a proper officer to receive the property or funds of his estate, to be applied as the law directs.

We have a case, decided with great ability, which looks the other way. I refer to *Smith v. Carrere*, (1 Rich. Eq. 123.) But the point now under discussion was not necessarily involved or decided in that case.

That was a bill by the distributees of an estate, against the administrator of the administrator, who had converted the whole of the personalty into money, and died, with a balance in his hands, having paid all the debts, but having paid nothing to the distributees. The bill expressly averred that there were no creditors unsatisfied. The defendant demurred, upon the ground that an administrator de bonis non was a necessary party, and should be made a party; and the Court overruled the demurrer. The decision was right.—It goes the length that, in such a case, the distributees may sue; and that if they do sue, they shall not be delayed for want of an administrator de bonis non. And why had they not a right to sue as distributees, and receive the money, when it was admitted by the demurrer, that there were no debts, and, of course, no persons entitled to the fund sued for but distributees? Nothing

remained but distribution, and why not

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*make it? And why require the senseless ceremony of introducing an administrator de bonis non, when all he could do in the case admitted would be, to stand by and see the distributees receive their money? (9 Mod. 299, case 112.)

But that case does not say—the case, I mean, does not require it to be said—that if an administrator de bonis non had filed that bill, he could not have sustained it. And if such an administrator had sued and obtained a decree, would it do to say that it would have been no protection to the party against whom it was pronounced? or that he would have been liable to another suit and another decree, and to pay the money a second time to the distributees? And if called on by such an administrator, who might compel him by a decree to pay to him, would it not be as little consonant to justice, to declare that his accounting, under such circumstances (where he could not refuse to account)—should not be an equal protection?

It is not, therefore, the point necessarily decided in *Smith v. Carrere* from which I differ, but the opinion expressed by the Court upon points not necessarily involved in the decision. And while I say this, truth compels me to avow that at the time that opinion was delivered, although prevented by severe illness from being in Court, if I had been there I should have concurred in it. For I was of the same mind. But subsequent reflection, arising from incidents that have since struck me, have satisfied me that I should have erred, in so doing.

The argument for the doctrine, that an administrator de bonis non cannot recover, from the representative of the first executor, funds in his hands arising from assets of the testator, goes very far back, and is made to rest on a doctrine which is now little better than a legal fiction. "Before the statute of distributions, the executor was entitled to the whole personal estate, subject to the payment of debts and legacies. When, therefore, he sold or converted any portion of it, this was understood to be a seizing or taking possession in his individual right; just as an executor may now assent to his own legacy. The goods were said to be administered, and no longer in his possession as executor. If he failed to retain enough to meet the claims of creditors and legatees, he was liable for a devastavit, as of his own personal debt." This being taken as a postulate, it is then said: "It is certain the rule of law has not changed since the statute."

The question is whether, before that statute, the administrator de bonis non might not have recovered the funds necessary for the payment of debts and legacies. Although the first executor, in virtue of his conver-

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sion of the assets, might *be liable directly to

the creditors and legatees as for a devastavit, is it certain that the conversion operated as an administration, so far as to deprive the administrator de bonis non of the right to claim the fund for administration in the payment of debts and legacies? If not paid to or recovered by the creditors or legatees, might he not receive the fund and disburse it? And if he could not before the statute, still is not the idea that the executor's conversion may be regarded as an act of administration, by way of assenting to his own legacy, negatived by the statute, which takes the surplus from him? I have not access to many of the cases quoted; particularly to the cases of *Coleman v. McMurdo*, (5 Rand. 51) and *Hagthorpe v. Hook*, (1 Gill and Johns. 270.) But in such as are accessible to me, I do not find enough to satisfy me that the administrator de bonis non could not recover funds of the description alluded to. Certainly no such decision has been pointed out in the English books, much less in our own.

The whole argument seems to rest on this, that the representative of the deceased executor is made liable to creditors and legatees, directly; and therefore, it is assumed, there is not and never was a remedy for the latter, indirectly, through the administrator de bonis non. Does this follow?

Let us look to the statutes which instituted this direct remedy for them.

The statute 30 Charles II, ch. 7, (1 Brev. Dig. 328, sec. 8; Pub. Laws, 84,) reciting that there is no remedy, by the common law, against the executors or administrators of executors de son tort, to recover debts due by the first testator, although his assets, interfered with and wasted by the executor de son tort, were ample to pay them; enacts that his, (the executor de son tort's,) executor or administrator shall be liable and chargeable (of course for the debts) in the same manner as he himself would have been.

The statute 4 and 5 William and Mary, ch. 24, (Pub. Laws, appendix 14,) continuing and explaining this statute, refers to its title as "An Act to enable creditors to recover their debts from the executors or administrators of executors in their own wrong;" and "forasmuch as it hath been doubted whether the said Act did extend to executors or administrators of any executors or administrators of right, who, for want of privity in law, were not before answerable, nor could be sued for the debts due by the first testator or intestate." extends the provisions of the former statute to this case also.

Now, admitting that these statutes, by an equitable construction, may give a direct remedy, not only to creditors but to legatees, what is there in them to supersede the neces-

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sity *for, or duties of, an administrator de bonis non? And, especially, what is there in them to exclude him from acting, if, by law,

he might otherwise act? Whatever assets might have been left by the executor, or the executor de son tort, in specie, it is confessed, would be deliverable to him, and could be delivered to no one else; and why not allow him to take the whole estate into his hands, and close the administration in an orderly manner?

It is asked, in reference to the preamble to the statute of Charles, "If the administrator de bonis non might have had an account, and recover for the assets wasted or converted by the executor de son tort, how could it be said, in the statute, that the creditors of the persons whose estates had been wasted were without remedy? He, (the administrator de bonis non,) would be bound to pay their debts, and would be personally liable if he did not."

This is well put. But may it not be replied, that the creditors, "for want of privity," as the statute says, were without that direct remedy, which it was the intention of the statute to give them? Might it not be desirable to give them the privilege of proceeding immediately, and for themselves, against those in possession of their debtor's funds, without being delayed or subjected to the chance of disappointment, by having to depend on the fidelity or diligence of the administrator de bonis non to collect the fund, and the further delay, perhaps, of having to bring him to account for it when collected? Is it not to be supposed that before that statute there was no power in the administrator de bonis non to demand the funds of his testator, situated as contemplated by the statute? But supposing the preamble to mean what is contended for, the amount of it is, that in the contemplation of him who drew the statute, the law was as stated; and instances have sometimes occurred, even in England, where Parliaments have given a mistaken legal opinion.

I admit, however, that in the construction contended for, this preamble is strong evidence of the state of the law at that time. It is not conclusive, however, and certainly it is less conclusive of the state of the law in after periods. And we have pretty clear proof, in times following, that it was otherwise than represented in the statute.

It has been said that the preamble of the statute is confirmed by the absence of all authority to the contrary, and it is stated that one of the Judges in *Coleman v. McMurdo*, after reviewing the authorities, said, "To meet this formidable array, what is there on the other side? Not one single case; not the dictum of a single Judge; not the asser-

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tion of *an elementary writer, that the administrator de bonis non, either at law or in equity, can support an action, or a bill for an account, against the representative of a delinquent executor or administrator."

It is understood that in the authorities commented on in that case, there was neither

case, dictum, nor assertion of any elementary writer, that an administrator de bonis non could not sue in the case stated. At least in the cases and authorities quoted in *Smith v. Carrere*, supposed to have been of those referred to in *Coleman v. McMurdo*, according to my view of them, there are none to that effect.

I think it was a mistake to assert that there is no authority for the ability of the administrator de bonis non to claim, in the case supposed. On the contrary, I think there is authority enough to clear up a point admitted to be doubtful.

In the first place, the analogies are in favor of his taking the whole estate as successor to the first executor. In all other cases of succession among executors, the successor takes the whole. He who comes after another appointed *durante absentia*, or *durante minore ætate*, is entitled to take the whole out of his hands.

Thus in *Brightman v. Keighly*, (Cro. Eliz. 43.) J. S. made the defendant Keighly his executor while he was under age. The Ordinary appointed A. and B. administrators *durante minore ætate*, who obtained possession of £600 of testator's assets. Keighly, upon coming of age, proved the will and then released A. and B. from all actions. Upon an action of debt, brought by the plaintiff against Keighly, as executor of J. S. held that he was liable, as for assets, for the precise sum in the hands of the administrators *durante minore ætate*, whom he had released.

Glass v. Oxenham, (2 Atk. 121.) Testator, by will, appointed his daughter executrix upon her attaining age, and that another should be executor during her minority. The daughter came of age and although it appeared in the case that the executor *durante minore ætate* had collected in the greater part of the personal estate the daughter alone was made a party defendant to the suit.

Lord Hardwick—"This is a bill brought to charge £3,000, charged upon the whole estate, real and personal, for the benefit of testator's widow. Therefore you must have the representative of the whole personal estate, that is, the executor *durante minore ætate*, and for want of him the case must stand over.

"If the daughter had received all the testator's personal estate from the hands of the

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executor *durante minore ætate*, *upon an account between them, the objection for want of parties had been overruled."

Further in *v. Pate*, (3 Atk. 603.) The question was whether an administrator *durante minore ætate* was a competent witness after determination of his administration.

Lord Hardwick. "It is true, he represents the testator whilst his administration subsists, but when determined has nothing more to do. Such an administrator cannot sue,

that is certain, nor can he be called to account but by the executor, and whatever he may do during his administration, is not answerable to any other person; and if an action be brought at law against the executor, he might be introduced as a witness for the executor."

"After he had possessed himself of effects, if you bring him before the Court without the executor, he may demur for that cause. But as this Court will allow you to follow assets into any hands, if you will, by proper charges, show he has not accounted to his executor, but fraudulently and by collusion detains any part, there is no doubt you may maintain such a bill against an administrator *durante minore ætate*."

These cases shew that the successor succeeds to the whole, is entitled to the whole, and is the party to represent the whole, unless a part remain still in the hands of the predecessor.

It is so, also, in case of two executors. If one of them dies the whole administration devolves on the survivor, and the representative of the deceased executor must fully account to him.

But there is still other evidence.

In the goods of Joseph Hall (1 Hag. 139) an action was brought by the administrator *de bonis non*, suing in the name of the Arch Bishop of Canterbury, against the executors of the original administrator, for the balance of the intestate's effects; and the ecclesiastical court, as a matter of course, and of familiar practice, upon application, ordered the administration bond to be furnished in support of the action; security being given to indemnify the Arch Bishop against costs.

In the compilation of Judge Grimke (page 216) I find the note of a case which I have not the means of verifying, but I refer to it as proof that "supposing the administrator of an executor has possession of the goods of the testator, he cannot be called to answer for a legacy given by the will. In that case there should be the administration *de bonis non* set up, and he might then call him to account in a Court of Equity."

But it is a matter for very deep consideration that the law has ever been understood as

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I state it, in South Carolina; *and however it may have been regarded elsewhere, that has been the accepted law here.

The very point was ruled by the whole Court in *Gill v. Douglass* (2 Bail. Rep. 387.) That was an action brought by the escheator of Lancaster, to recover a balance due by defendant's intestate on his administration of the estate of one Clancy, who had died intestate, but without next of kin.—Curia, per Harper, J. "The administrator of an administrator certainly does not represent the original estate; and the assets found in his hands constitute a debt to the legal repre-

sentative of the first intestate. The legal representative is an executor or administrator. The escheator stands in the situation of a distributee. Certainly a distributee cannot sue the debtor of his intestate at law, and this Court has determined that he cannot sue, even in equity, for his estate, unless an executor or administrator be made a party."

Such I find upon inquiry to have been the general impression of the profession, and by them inculcated upon the community; and that the settlements of estates have been made in reference to it; and that the supposed decision (fortunately not a decision on this point) in *Smith v. Carrere*, took them by surprise and excited general anxiety. The interests to be affected by disturbing the accepted professional opinion are incalculable; and after all that can be said, the only good that could be effected would be to conform the law to a fiction, for it is a fiction that the executor's conversion is to be regarded at this day as a full act of administration.

As to the authorities collected (1 Wm's. Ex'ors. ch. 2, 594, 5,) referred to in argument, they prove nothing to the point. No doubt all the assets of the batch remaining in specie at the death of the executor, being things capable of recognition, should be delivered over to the administrator *de bonis non*. But money remains with the executor's representative, and so of every other thing that cannot be distinguished from the rest of his property; and so of bonds, notes and other contracts made or taken by him; these are inforcible, according to the practice of courts, only in the name of his representative. But all this does not prove that the representative is not accountable, out of his testator's estate, to the administrator *de bonis non*, any more than it proves that he is not accountable to the creditors or legatees of the first testator.

Upon the whole, I am persuaded that it would be unwarrantable and pernicious, at this day and in this State, to hold that an administrator *de bonis non* has not a right to recover whatever balance may have been in the hands of the executor of his testator.

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*The rule is plain and uniform and intelligible to all, which makes no distinction between assets in specie, and those which are not; and the simplicity of the practice which arises from it is one of its great recommendations. The contrary rule leads to complexity, to multiplicity of suits, and delay, without subserving any valuable end, or being called for by justice.

I shall now attend to the report of the Commissioner.

The two first exceptions of the representatives of the deceased executors, stand upon grounds embraced in the opinion I have just delivered, and are sustained. Their 3d exception does not apply, unless their account

were opened, which I have refused to do, and is, therefore, overruled.

The exception of the plaintiffs is because the Commissioner has allowed Chovin one half his counsel fee in this case; and is sustained, because it was an expenditure for his own exclusive benefit, to sustain interests adverse to the plaintiffs, and no part of it should be charged to them or on their property in dispute.

There is a personal account raised by Chovin against Mrs. Villard, the items of which are appended to the report, but not apparently allowed or disallowed by the Commissioner. Though no exception is put in to that, I feel at a loss as to confirming it. It is for expenditures far exceeding the income of the funds in his hands belonging to the infant. It is probable that the profits of the negroes were the fund thus applied. I shall therefore leave this account, with the hire of the negroes, out of the decision; reserving them for further enquiry before the Commissioner, if the parties desire it.

It is ordered, that the rest of the report be confirmed.

That a writ of partition issue to divide the slave Nancy and her issue now in esse equally between the defendant, Chovin, and the plaintiff, Harriet Villard; assigning her share to the plaintiff, Wm. M. Bostick, the trustee under her marriage settlement, to be held by him upon the trusts thereof.

And that the bill as to the defendants, Ann M. and Ulysses M. Robert, be dismissed, at the costs of the plaintiff.

And that all other costs be paid by the defendant, Chovin.

Grounds of Appeal.

The complainants appealed from so much of the decree of his Honor Chancellor Johnston, as dismissed their bill against the executrix and administrator of the former executors of McKenzie:

Because, it is respectfully submitted that Chovin, the administrator de bonis non, could not require an account from the representatives of the former executors of McKenzie, and

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*the complainants' suit was, therefore, properly instituted against them.

Martin, for complainants.

The defendant, J. A. E. Chovin, appealed from the decree of his Honor Chancellor Johnston in this case, and moved the Court of Appeals to reverse the same, on the following grounds:

1st. Because the possession by the defendant, Chovin, of the slave Nancy, from 1828 to 1835, during the lifetime of the executors of McKenzie, was adverse to them, and gives him a good title in law against the complainants.

2d. Because the counsel fee paid by Chovin ought to be allowed as a good charge against the estate he was representing, as he was

called to account as administrator de bonis non, and his fee was paid for services rendered to him in that capacity.

3d. Because Chovin ought not to be made to pay costs.

4th. Because the decree is, in other respects, contrary to law, equity and evidence.

Colecock, Solicitor for Chovin.

JOHNSTON, Ch., delivered the opinion of the Court.

John H. Robert and Wm. H. Robert, the executors of McKenzie, converted part of their testatrix's goods into money, and died. Chovin became the administrator de bonis non of McKenzie, and the personal representatives of the deceased executors came to an account with him touching the said executors' administration; paid him the balance found upon such accounting, and took his acquittance and discharge.—The legatees of McKenzie subsequently filed their bill, praying that the representatives of the executors be decreed to account to them for the same matter: to which the latter pleaded the account and settlement with Chovin and his discharge in bar; and the question has been sent from the Court of Chancery to this Court, for its judgment, whether the facts pleaded are a sufficient bar to the account prayed.

Neither the correctness nor the fairness of the settlement above stated, is questioned by the legatees, in their bill, and the transaction is binding on them, if Chovin, the administrator de bonis non, was competent to demand the account and receive the money. The question, then, is narrowed down to the competency of Chovin to do these acts: and the opinion of this Court is, that he was fully competent. This opinion has not been formed without an attentive consideration of the numerous authorities, English and American, that have been quoted in argument; but it must be acknowledged that we have been more influenced by the uniform and recog-

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*nized practice in our own State, than by any other consideration. The practice of allowing the administrator de bonis non to demand and recover the proceeds of specific assets converted by his predecessor, has prevailed extensively among us, and was never questioned, until *Smith v. Carrere*. And this, of itself, would be a sufficient reason, in the eye of this Court, for the judgment it now delivers. For the loss and disappointment to parties who have made settlements upon faith in the prevailing usage would be incalculable, if a different rule were suddenly adopted. But the practice to which I have referred is not only supported by its antiquity and prevalence in this State, but is recommended by considerations of its superior convenience. If, therefore, it were less supported than it is by principle and authority, the Court would feel very reluctant to overrule and abrogate it. But it is not without foundation in prin-

ciple and authority, as I shall endeavor to shew. It is admitted on all hands that, as between the administrator de bonis non and the representative of the deceased executor, the former is entitled to all the specific assets of the testator, unconverted by the executor. They are his by legal right. On the other hand, it is admitted that the proceeds of converted assets go, by legal right, to the representative of the executor, to be administered by him as parcel of the executor's estate, and not to the administrator de bonis non of the first testator. But the question is, 1. Whether the representative of the executor is not to answer out of his estate, for all the trusts upon which the executor held the money: and, 2. Whether the administrator de bonis non may not demand that account.

We are now in Equity, and must determine these questions according to the principles and practice of that jurisdiction; and it is conceived that whether we look to the one or the other, the answer must be in the affirmative. From the time that Equity assumed the control of executors, upon the ground that they are trustees of the assets which come to their hands, it has never been satisfied with any rule less extensive than this: that the trustee shall not be allowed to retain any benefit to himself, in the subject matter of the trust, in derogation of the rights of those recognized by the law, for the time being, or by the court, as having an interest in the trust property. The executor's liability or accountability has always been co-extensive with the rights of those having an interest in the trust, as those interests are recognized or ascertained by the law existing at the time. To apply this principle: as is said in *Smith v. Carrere*, 1 Rich. Eq. 125, "before the Statute of Distributions the execu-

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tor was *entitled to the whole personal estate, subject to the payment of debts and legacies. When, therefore, he sold or converted any part of it, this was understood to be a seizing or taking possession in his individual right, as an executor may now assent to his own legacy. The goods were said to be administered, and no longer in his possession as executor." The amount of what I have quoted is this: that before the Statute the executor, being exclusively entitled to the surplus, was not accountable for it; and in this state of the law, his conversion was an act of administration, so far as it operated an assent of the surplus to himself, as legatee. But the case is yet to be produced, to the effect that if he converted the whole estate, he had entirely administered it, or was not accountable for debts or legacies. But after the surplus was taken from the executor, it would be very surprising if the court had failed to apply its own principle, and to vindicate the rights of those to whom the surplus was given, in the same way as it had

previously interposed for creditors or legatees—by compelling an account.

These observations are intended for a specific purpose.—They may serve to exhibit the relation which an executor bears to the proceeds of goods converted by him. He holds them in trust. The legal right to the money is in him, but he is accountable, as a trustee, in respect to it. Although, in cases where the party interested in it may proceed against him at law for his devastavit, it is regarded as a debt; yet it is a debt contracted by a breach of trust: and, where Equity has jurisdiction of the case, it looks entirely to the fiduciary character of the executor, and grants its remedy by compelling a full execution of all the trusts reposed in him. His conversion or devastavit will not be regarded as an administration, but just the opposite. Strangers, to whom he may have sold the goods in his hands for a fair equivalent, and without notice, will hold them by the legal title transferred by the executor, but the executor, who must necessarily receive the price with notice of the trusts attached to the things sold by him, will be held a trustee, as to the price received. And so of the executor's representative. He must answer, out of his testator's estate, for his testator's breach of trust. As is said in *Prince v. Morgan*, 2 Cha. Ca. 217, cited in *Smith v. Carrere*, 1 Rich. Eq. 127, "Although, by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here."

But these observations need not be protracted. It is admitted on all hands that the representatives of the executors, Jno. H. and Wm. H. Robert, were accountable in

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equity for *the money into which the executors converted the property of their testator. The only contest is whether they were accountable to the administrator de bonis non, or only to the legatees. I proceed, therefore, to the second inquiry. 2. Whether the administrator de bonis non might not demand the account. One of the arguments for his incompetency to do so, is derived from the phraseology of the statute 30 Ch. 2, ch. 7, recited in the decree: and that it may not incumber the decision, I shall take it up, at once, and endeavor to dispose of it. This statute says, A. D. 1669, "Whereas, the executors and administrators of such persons who have possessed themselves of considerable personal estates, of other dead persons, and converted the same to their own use, have no remedy," (are not liable) "by the rules of the common law, as it now stands, to pay the debts of those persons whose estate hath been so converted by their testator or intestate, which hath been found very mischievous, and many creditors defeated of their just debts, although their debtors left behind them sufficient to satisfy the same,

with a great overplus. For remedy whereof, be it enacted, that all and every, the executors and administrators of any person or persons who, as executor or executors in their own wrong, or administrators, shall, from and after the first day of August next ensuing, waste or convert any goods, chattels, estate or assets, of any person deceased, to their own use, shall be liable and chargeable in the same manner as their testator or intestate would have been, if they had been living." This statute has been extended to the representatives of rightful executors or administrators, by the stat. 4 and 5 W. & M. ch. 24, as stated in the decree. In reference to this statute of Charles it has been objected: "If the administrator de bonis non might have had an account, and recover for the assets wasted or converted, it could not be said that the creditors of persons whose estates had been wasted, were without remedy. He would be bound to pay their debts; and would be personally liable if he did not." 1 Rich Eq. 126. But the statute, as I conceive, does not assert that the creditors were without remedy. The obvious import of the passage is that the representatives of the devastating executor were not liable at common law—or (if it be a more agreeable interpretation) that the creditors of the wasted estate were without remedy at common law in the case stated in the statute. The statute speaks altogether of the creditor's remedy at law, and intends to extend it to the case described by the legislature; and this it might well do, though there existed a well recognized remedy for the creditor, by cir-

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cuity, through the administrator de bonis non in equity. We shall better understand this if we attentively consider the law applicable to the case put in the statute, as it stood before the statute was passed.

In the life of the devastating executor the creditor of his testator had a remedy at law against him. By meddling with the goods of the debtor, he made himself his executor, and liable to the creditor as such. The course was for the creditor to sue him as executor, and establish his demand against the deceased debtor. The judgment went for the whole debt; to be satisfied de bonis testatoris, so far as the executor had come to the possession of such goods. But if the executor did not satisfy the judgment to this extent, the creditor might, by a proper proceeding, suggesting a devastavit, entitle himself to a judgment against him personally, and to be levied de bonis propriis, to the extent of his devastavit. This was the creditor's remedy at law. But if the devastating executor died either before or after the creditor obtained his judgment de bonis testatoris, but before obtaining judgment against the executor himself, the creditor had no remedy at law (as the statute asserts) against his representative

He could not sue this representative upon his original demand, because he did not represent the original debtor, and was therefore not the proper person to defend the action, and if judgment had already been obtained, establishing the debt, yet this representative was not liable to be sued for it. His function was to pay the debts of his testator. But unless judgment had been obtained against the latter, in his lifetime, he owed no debt, in the case stated, and therefore his representative was not answerable at law out of his estate. And as to the devastavit, it was regarded by the law courts as a tort which died with the wrong doer. The statute gives the creditor a remedy at law in these circumstances; in which jurisdiction he was in like circumstance (as the statute correctly asserts) without remedy, and the remedy given is very limited. Unless he has established his original demand in the lifetime of the first executor, he cannot bring suit on it against the executor's administrator, because he does not represent the first testator, and is therefore not the proper person to contest claims upon his estate. But if he has established his demand in the time of the executor, he may (perhaps, without having proceeded to judgment against the executor himself, though this has been doubted,) go against his estate in the hands of his representative, on the ground of the executor's devastavit.

This is the extent of the creditor's remedy at law: a remedy still insufficient where

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the debt remains to be established, *in which case he needs the aid of the administrator de bonis non to recover the funds necessary to satisfy his demand.

It is a complete misapprehension to suppose that, because the statute gives the creditor a direct remedy, under special circumstances, he was wholly without remedy through his trustee, before the statute was passed: or that when the statute expressly declares that his defect of remedy was at law, it meant that he had none in equity. Having disposed of this objection, I proceed to enquire more directly into the capacity of an administrator de bonis non to demand an account of wasted assets from the representative of the devastating executor.

In the case before us, it appears that Wm. H. Robert was the survivor of the two executors, and, according to all the authorities, he might have called the representative of his deceased companion to account for all the funds, converted and unconverted, in his hands at his death. It would be a surprising anomaly if the same law which would have entitled him to this account as representative of the testator, should, owing to the mere accident of his dying before the account was taken, deny to the administrator de bonis non (equally a representative of the

testator) the right to demand the same account.

There is a great variety of ways in which this question may be tested: and as an examination of them all would draw out this opinion to a very inconvenient length, I shall select only one or two.

It is admitted that the administrator *de bonis non* is entitled to all the unconverted goods of the testator. Suppose that without knowing that any of them had been converted, he had called for an account and delivery of these goods.—They were held in trust by his predecessor; and he, the successor, is entitled to them to fulfil the trusts now devolved on him. Would it be any answer to a trustee legally entitled to the specific trust property, to tell him that his right is defeated by the breach of trust of the former trustee, and that, owing to that breach of trust, he shall have neither the trust property nor its equivalent?

Another view arises from the position which this Court always assigns to the representative of the testator, in all suits for the recovery and distribution of his estate. Unless under very special circumstances, as where he who is to be rendered responsible is entitled to the administration, and will not administer, and other special cases,—equity never undertakes to get in or distribute an estate, unless a representative of the testator, alike representing him as creditor

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and as debtor, and *standing as a trustee for all the parties interested in his property, is before the Court. And where the trust has been divided, or there has been a succession among the trustees, unless the whole fund has been placed in the hands of the existing representative before the Court, all the other trustees must be brought in with him, so that, through him, the funds may be assigned to their ultimate destination, in complete satisfaction of the interests of all the parties, and in complete execution of all the trusts recognized in the case. Debts and legacies, and all other duties of administration, are made to centre eventually in him: and if by circuity, any other person standing in such fiduciary relation as enables the Court to take notice of him, is to be made responsible, that other is to be placed by the side of the personal representative, to enable him to meet and discharge the ultimate responsibility. Thus equity treats the administrator as an unity, and disposes of the estate in one suit. To this effect are some of the cases quoted in the decree. To these may be added the case of *Tyler v. Bell*, (2 Mylne and Craig, 89;) and *Ponel v. Graham*, (1 Hare Rep. 482.) These were both of them cases in which parties claiming as distributees or legatees attempted to obtain satisfaction of their interests, without the intervention of a personal representative of the decedent. But

it was adjudged that without his intervention the suit could not proceed.—To the same point may be cited our own cases of *Davis v. Rhame* (1 McCord Eq. 195;) *Gregory v. Forrester*, (Ib. 324;) *Farley v. Farley*, (Ib. 506;) *Bradford v. Felder*, (2 McC. Eq. 170;) and other cases. See also, *Daniel's Practice*, 246; and *Holland v. Prior* (1 Mylne and Keene, 237.) If a personal representative is a necessary party in suits by the legatees, (as unquestionably he is, except as in *Smith v. Carrere*, where the existence of debts is negatived, and like special cases,) he must be competent to receive the fund distributable to legatees, wherever there is a possibility of debts remaining to be paid.

Thus far, we have proceeded on general reasoning. Depending upon the inference from the preamble to the statute of Charles, (which I think has been answered,) and upon the words by which an administrator *de bonis non* is commissioned, and upon some few vague generalities, a member of the Court, in *Coleman v. McMurdo* (5 Rand. Rep. 58) demanded "what is there on the other side? Not," he continues, "one single case, not the dictum of a single judge, not the assertion of an elementary writer, that the administrator *de bonis non*, either at law or in equity, can support an action, or file a bill for account, against the representative of a delinquent executor or administrator."

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*This would have been more impressive if there had been found either case, dictum or elementary authority for the incapacity of the administrator *de bonis non* to sustain suits or actions in such cases.

But what shall we say to the case of *Tyler v. Bell*, (2 M. & C. 89,) already referred to, for another purpose? The husband of an administratrix was considered to have possessed himself of a large sum of money due to the estate, and to have become liable to make good to the next of kin of the intestate, the assets received. The husband, thus liable as administrator, died, having constituted his wife, (the administratrix,) his executrix, who received of his assets more than sufficient to answer the demands of the next of kin: Held that this was payment to the personal representative of the first decedent, and discharged the husband. And one of the illustrations with which the Lord Chancellor enforced his judgment, is this, "Suppose" (says he) "there had been two administrators, or two executors of M. M. Moscrop, and the one had died, and the bill had alleged that the representative of the deceased executor had accounted with the surviving executor for all the estate which his testator had received.—This (he adds) is a common allegation, to avoid the necessity of making the executor of a deceased executor a party.—By Mrs. Tyler's receiving assets of Mr. Tyler, sufficient to pay what he had received of M. M. Moscrop's estate, the whole of that estate is at home, in

the hands of the administratrix of M. M. Moscrop."

In *Phelps v. Sproule*, (4 Sim. 318,) it appeared Phelps made his will, and appointed J. S. Oliver his executor.—Without renouncing or proving the will, J. S. Oliver received assets of Phelps. J. S. Oliver then died, having appointed Betsey Oliver his executrix, and she also administered to the estate of Phelps. Betsey Oliver then died and appointed Sproule her executor, who proved her will; and Prior took out administration to Phelps, the first testator. The bill was, among other things, for an account of Phelps's personal estate, possessed by J. S. and Betsey Oliver, and that the purchase money of the freehold estate, which Phelps had contracted for, might be paid out of it. Sir Lancelot Shadwell said, "The right to call for an account fell upon Prior, who was the administrator de bonis non of Phelps."

The same case, in a subsequent stage of it, is reported (1 Mylne & Keene, 231.) The defendant Sproule, put in a plea in bar, which in substance stated "that he, the said Sproule, had come to a full, true and final account with Prior, in respect to the personal estate

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and effects of Phelps, come to *the hands of J. S. Oliver, Betsey Oliver and himself, Sproule; "and that on taking and finally balancing such account, it appeared, as the fact was, that there was justly and truly due to the estate of Phelps the sum of £471 7s. 1d. and no more, which he, Sproule, duly paid to Prior, and took his discharge," &c. The Vice Chancellor allowed the plea, and the plaintiff appealed. The Lord Chancellor reversed the decision, not on the ground, however, that the release of the administrator de bonis non was not valid, if fairly obtained, but on the special ground, that it was charged in the bill to have been obtained by fraud and collusion, which was not denied by the plea. The plea was accordingly amended; and the plaintiff declined to prosecute the suit further. It can hardly be pretended that the account in this case did not involve, at least to some extent, the proceeds of converted assets. We have few express adjudications of our own upon the subject. That of *Gill v. Douglass*, quoted in the decree, is one, however, precisely to the point.

In *Easterling v. Thompson*, (Rice Rep. 346,) administration had been taken out on the estate of Duncan McCol. The administrator died, and administration was taken out on his estate, and administration de bonis non granted on the estate of Duncan McCol. The suit was prosecuted by creditors of Duncan. The Court said, "Upon the death of an administrator his administrator is not accountable to the creditors of the first intestate. Their remedy is against the administrator de bonis non—whose duty it is to have an account from the administrator of the first administrator." The case shews a

devastavit on the part of the first administrator. In *Wright v. Davis*, (2 Hill 567,) an administrator, after converting the assets, died, and administration was taken out on his estate. This latter administrator held the funds of his intestate for several years, when an administrator de bonis non to the first intestate was appointed, who, in conjunction with the distributees of the first intestate demanded an account. In taking the account, the point was made and determined, that the administrator of the administrator was not liable for interest until the administrator de bonis non was appointed; inasmuch as before his appointment, there was no person legally authorized to receive the money and give a discharge.

I have not time to go over the eleven reported cases, cited in argument, in which the account for converted assets was demanded by the administrator de bonis non, and decreed against the representative of the first executor or administrator, without objection. This is evidence of the settled professional opinion and practice in this State. The case

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before *us is evidence of the same opinion and practice. Every one of the persons engaged in making the settlement for the parties belonged to the bar. The recollection of every Judge on this bench is stored with instances of such settlements. It was not considered safe for the executor's representative to settle with any one else than an administrator de bonis non. The practice extends back beyond our own times, and within our time has been as nearly uniform as any practice can be.

When a decision is called for, which, when made, can operate only prospectively, the Court may feel greater liberty in departing from opinions previously entertained. But when the adjudication is to operate retrospectively, it becomes us to pause, especially when the interests at stake are of great extent. When we take into consideration the number of settlements which have taken place similar to those before us—involving large estates—and in the preservation of which settlements not only the trustees themselves, but their sureties, are interested, it is believed that few decisions which the Court could make would be fraught with greater mischief than one invalidating the settlement before us.

And this is not the only consideration of a prudential character. As stated in the decree, the prevalent practice is recommended by its convenience. In this State, where there is a prescribed order of administration, and creditors of the same rank are to be paid rateably, it would be hardly possible for trustees, answering for different parts of an estate, and acting separately, to so administer it that each trustee should be safe, and each creditor get his exact proportion, especially in cases of insolvent estates. The remedy is,

that the whole estate be concentrated in one representative, and be distributed through him. We have not sufficient evidence that our practice is erroneous to induce us to change it, and deprive ourselves of its advantages.

It is ordered that it be certified to the Court of Appeals in Equity, as the opinion of this Court, that the account and settlement between the representatives of the executors of McKenzie and Chovin, the administrator de bonis non of said McKenzie, pleaded as a bar to the account sought in the bill against the said representatives is a sufficient bar thereto.

DUNKIN, Ch., CALDWELL, Ch., O'NEALL, J., WARDLAW, J., FROST, J., WITHERS, J., and EVANS, J., concurred.

RICHARDSON, J., doubted.
Decree affirmed.

*420

*On the opinion of the Court of Errors on the point submitted being certified back, the Court of Appeals in Equity pronounced the following decree.

JOHNSTON, Ch. The Court of Errors having, in answer to the question in this case, sent to them by this Court, certified their opinion to this Court, that the bar set up in the answers of Ann M. Robert and Ulysses M. Robert is sufficient to preclude the account prayed in the bill against them; and this Court being satisfied with the decree upon all the points adjudged by the Chancellor—

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN, Ch. and CALDWELL, Ch. concurred.

Decree affirmed.

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[END OF VOLUME 1 STROB. EQ.]

REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE
COURT OF APPEALS AND IN THE COURT OF
ERRORS OF SOUTH CAROLINA

DURING THE YEAR 1848

By JAMES A. STROBHART

STATE REPORTER

VOLUME II

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON
1849

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1917

*

CHANCELLORS OF SOUTH CAROLINA

DURING THE PERIOD COMPRISED IN THIS
VOLUME

HON. JOB JOHNSTON,

“ B. F. DUNKIN,

“ J. J. CALDWELL,

“ G. W. DARGAN.

¹ The Chancellors sitting together form the Court of Appeals in Equity—sitting together with the Law Judges, they form the Court of Errors.

The dissenting opinions in the cases of *Jaggers v. Estes* and *Moon v. Moon*, were not received until the 7th May, when the book had gone to press. They are, therefore, given in an Appendix, although thereby the publication of the volume is somewhat delayed.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA—JANUARY AND
FEBRUARY TERM, 1848.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN,
" J. J. CALDWELL,
" G. W. DARGAN.

2 Strob. Eq. *1

*WILLIAM E. & HENRY BAILEY, Executors of Rene Godard, v. EFFINGHAM G. WAGNER et al.

(Charleston. Jan. and Feb. Term, 1848.)

[Wills ⚡767.]

The testator, after making a bequest of slaves, sold one of them in his life time—*held* that the sale was, pro tanto, an ademption of the legacy.

[Ed. Note.—Cited in Rogers v. Rogers, 67 S. C. 173, 45 S. E. 176, 100 Am. St. Rep. 721.

For other cases, see Wills, Cent. Dig. § 1986; Dec. Dig. ⚡767.]

[Husband and Wife ⚡31; Wills ⚡483, 730.]

Testator made a bequest of \$8000, to the children of his grandson, such part of which, as might be necessary, to be applied in payment of a loan which had been made for the benefit of their mother's separate estate—the surplus to be invested for their benefit, &c. The loan having been satisfied by other means during the life time of the testator, the Court directed the whole amount of the legacy to be invested by the executors for the benefit of the children, and the capital to be transferred to their guardian, as soon as one should be appointed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 183; Dec. Dig. ⚡31; Wills, Cent. Dig. §§ 1014, 1792; Dec. Dig. ⚡483, 730.]

[Wills ⚡482.]

A legatee to whom Insurance stocks had been bequeathed, which had subsequently depreciated in the life time of the testator, *held* not to be entitled to any thing more than the stocks as they stood at the time of the testator's decease.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1012; Dec. Dig. ⚡482.]

[Wills ⚡497, 524.]

Testator made a bequest "to the children of his grandson," to be paid one year after his death—*held* that only such children as were in

esse at the death of the testator, and such as were born within one year after his death, and were alive at that time, were entitled to take.

[Ed. Note.—Cited in Robinson v. Harris, 73 S. C. 477, 53 S. E. 755, 6 L. R. A. (N. S.) 330.

For other cases, see Wills, Cent. Dig. §§ 1086, 1117; Dec. Dig. ⚡497, 524.]

*2

[Parent and Child ⚡3.]

*Where the father was unable to maintain his infant children, and they were the recipients of considerable legacies, the Court ordered a proper allowance to the father, for their maintenance and education, its disbursement to be accounted for annually before the Commissioner.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 55; Dec. Dig. ⚡3.]

[Wills ⚡753.]

When the things which form the subject of a bequest are capable of individuality, and have been enumerated by the testator—then the legacy is specific.

[Ed. Note.—Cited in McFadden v. Hefley, 28 S. C. 323, 5 S. E. 812, 13 Am. St. Rep. 675.

For other cases, see Wills, Cent. Dig. § 1939; Dec. Dig. ⚡753.]

[Wills ⚡587.]

The property in question proving to be more than was enumerated in the will, as "the residue of my estate," *held* that the residuary legatees were entitled to all the personal estate which might turn out not to have been well bequeathed to others.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1281; Dec. Dig. ⚡587.]

[Wills ⚡753.]

[Cited in Logan v. Cassidy, 71 S. C. 204, 50 S. E. 794, to the point that a testator appropriated specified personal property to raise a certain sum for the payment of legacies, "the surplus, after paying the legacies, if there should be any," to be divided among certain of his grandchildren. *Held*, that this surplus was a specific legacy.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1941; Dec. Dig. ⚡753.]

[Wills ⚡756.]

[Cited in *Logan v. Cassidy*, 71 S. C. 204, 205, 207, 50 S. E. 794, to the point that an enumeration in a residuary devise of the property composing the residue which is bequeathed equally to specified persons, with a direction that certain articles, if sold, shall be made up at a specified value, does not make the devise specific.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1952; Dec. Dig. ⚡756.]

Before Dunkin, Ch., at Charleston, July Sittings, 1847.

The bill was filed by the executors of the late Rene Godard, deceased, for the purpose of having the trusts of his will declared, and the rights of the legatees ascertained. It very fully and succinctly states the whole case.

To the Honorable the Chancellors of said State:

Humbly complaining, your orators William E. Bailey and Henry Bailey, executors of the last will and testament of Rene Godard, Esq., deceased, shew to your Honors—That the said Rene Godard, being possessed of a considerable estate, by his last will and testament, duly executed, bearing date the 30th day of October, which was in the year of our Lord 1843, gave and disposed as follows, that is to say—

“Deo optimo maximo.”

“I, Rene Godard, of the city of Charleston, State aforesaid, do make and publish this, my last will and testament, which I write with my own hand, now that I am sound in mind and body, to guard against events that might hinder me from making it with as much judgment, composure, and reflection, as I can at present do, hereby revoking, cancelling, annulling, and making void and of no effect, any and all Testaments anterior to the present.

“I give and bequeath to my grand-daughter, Maria Louisa Wagner, my house and lot of land situate in Meeting street, my house and lot on East Bay street, my interest, viz—one fourth, in the lot and building in State street, known as the Union Insurance Office; my servants, John, George, Samuel, Edward, Bonnite, Annette, Sophie and Hannah, with the future issue of the females—also, my furniture, beds, beddings, plate, china, &c. &c., as the whole may be at my death: the personal estate to be delivered over to her immediately, and the landed estate free of interest one year after, the whole then to be hers, her heirs and assigns, forever, free from the control of any husband she may marry.

“To my grandson Effingham Godard Wagner, I give and bequeath my house and lot in Cumberland street, and the bond of Mr. George Trenholm of seven thousand five

*3

hundred *dollars, or the like sum in money

if it should have been paid, the above house and bond to be delivered over to him free from interest one year after my death, and then to be his, his heirs and assigns forever.

“To my grandson Francis Henry Wagner, I give and bequeath fifty shares in the capital of the Charleston Insurance and Trust Company, the bond of Mr. Victor Durand of five thousand dollars, and a certificate of city five per cent. stock of fifteen hundred dollars, or the same amount in money, in case they should have been paid: the income of the shares, bond and certificate to be, one year after my death, free of interest, under the care and management of his natural guardian, and the whole to be delivered over to him when of age, or married, and then to be his, his heirs and assigns forever.

“To my grandson Edwin Wagner, I give and bequeath eight thousand dollars, payable free of interest one year after my death.

“To the children of my grandson Charles Wagner, I give and bequeath eight thousand dollars, such part of which sum as may be necessary to be employed in the payment of the loan obtained from the State for rebuilding the burnt houses belonging to his wife, and the surplus to be invested by my executors for the benefit and use of the above children, in such stocks as they may deem most productive, this legacy to be paid, free of interest, one year after my death.

“To the Societe Francaise de Bienfaisance, I give and bequeath two hundred dollars, payable, free of interest, one year after my death, one half to be added to the increase of capital and the other half to the charity fund.

“In order to raise the sum of sixteen thousand two hundred dollars bequeathed to my grandson Edwin Wagner, to the children of Charles Wagner and to the French Society, I appropriate the notes and cash I may have at the time of my death; also the proceeds of my house in College street, which I direct and authorize my executors to sell on such terms and for such price as they may think proper; also the net income of one year of my landed estate, stocks, bonds and Bank and Insurance shares; also twenty-two shares of the Bank of Charleston; the surplus, after paying the foregoing legacies, amounting to sixteen thousand two hundred dollars—if there be any, to be divided amongst my eight grand children, share and share alike.

“To my grandson Godard Bailey, I give and bequeath my Library, Engravings, &c.

“The residue of my estate, which, after paying the foregoing legacies, will consist in my house and lot of land in King street, a bond of Mr. James Fife of ten thousand dollars, three hundred shares in the Union Bank of South Carolina, two hundred shares in the Bank of Charleston, I give and be-

*4

*queath to my grandsons, Godard Bailey, William Henry Bailey, John Edwards Bailey, share and share alike, to be delivered over to them as they successively become of age, or are married, and until then, the income to be used and employed in their education and maintenance, under the superintendence and management of their natural guardian. In case the bond of Mr. J. Fife, or any of the shares herein bequeathed, be paid or sold the amount shall be made good at the following rates, that is, the bond for ten thousand dollars, the shares of the Union Bank at forty-seven dollars per share, and those of the Bank of Charleston, at one hundred dollars per share.

"I name and appoint William Bailey and Henry Bailey, Esqrs., my executors."

That the testator, on the third day of May, in the year 1845, departed this life, leaving the said will in full force, and leaving Effingham Godard Wagner, Charles George Wagner, Maria Louisa Wagner, the wife of Thomas J. Legare, Edwin Adolphus Wagner and Francis Henry Wagner, children of Franciade Maria Godard, a deceased daughter, who was the wife of Effingham Wagner, Esq., and Godard Bailey, William Henry Bailey and John Edwards Bailey, children of Jane Eliza Godard, a deceased daughter, who was the wife of your orator, Henry Bailey, his distributees, and next of kin; of whom Francis Henry Wagner and the children of Mrs. Bailey, are infants under the age of 21 years. That your orators proved the said will and paid all the testator's debts, which were very inconsiderable, and are willing to pay the legacies, but have met with difficulties in doing so, which compel them to resort to this Honorable Court, for the purpose of having the trusts of the will declared and the rights of the legatees ascertained.

That your orators delivered to Thomas J. Legare and Maria Louisa Legare the specific legacies bequeathed to her, without any delay, and received the rents of the house in Meeting street, the house on East Bay and the Insurance office, during one year, and then put the said Maria Louisa in possession as devisee. But the testator in his life time had sold George, one of the slaves bequeathed to the said Maria Louisa Wagner; and hereupon, a question has been made, whether the legatee is not entitled to compensation for this legacy, which your orators are advised that they cannot allow.

That to Effingham Godard Wagner, your orators, one year after the testator's decease, delivered the bond bequeathed to him, the interest to that date having been paid to your orators, and put him in possession of the house in Cumberland street.

That Francis Henry Wagner is a minor, and a question has been raised whether his father, Effingham Wagner, Esq., is entitled to a transfer of the bond and certificate be-

queathed to his son, or whether the income

*5

should be paid into the hands *of the father, or whether so much thereof as may be necessary, should be laid out under his direction in the education of his son, and the surplus invested for the son's benefit; on all which questions your orators pray the direction of this Honorable Court. And your orators further shew to your Honors, that at the date of his will the testator had fifty shares in the Insurance and Trust Company of Charleston, a bond of Victor Durand's for 5,000 dollars, and a certificate for 1,500 dollars in the 5 per cents of the city of Charleston; and that at the time of his death, he was still possessed of the same property: but between the making of his will and his decease, the Charleston Insurance and Trust Company obtained an amendment of their charter, authorizing them to reduce their capital from one million to half a million: And, in pursuance of the power so granted to them, the Directors paid to the several share holders half of the amount of their respective shares: and the testator received on account of his shares, the sum of 2,500 dollars, so that the par value of a share of the said stock, which was 100 dollars when the testator made his will, was only 50 dollars at the time of his decease: And a question has arisen, whether the said Francis Henry Wagner is entitled to the par value of the stock at the date of the testator's will. And on this question your orators pray the aid and direction of this Honorable Court.

That your orators have paid to Edwin Wagner the legacy of 8000 dollars one year after the testator's death.

Your orators further shew to your Honors, that Charles George Wagner, the testator's grandson, called in the will Charles Wagner, in the testator's life time, being then a minor, married with Miss Mary Ann Gourlay, then a minor, who was possessed, among other things, of a certain house in the city of Charleston, at the corner of Anson and Wentworth street, and by articles previous to marriage, bearing date the 20th day of December, 1836—in which the said Charles George Wagner and his father Effingham Wagner, and William E. Bailey, party hereto, and Charles M. Furman, executors of Thomas Rivers, under whose will the said Mary Ann Gourlay was entitled to a considerable fortune, as well as the said Mary Ann Gourlay, joined; it was agreed that when the said Mary Ann should attain her full age, the estate of which she was then seized should be conveyed to the uses of the marriage. That in the great fire of 1838, the house at the corner of Wentworth and Anson street was burnt; and by certain proceedings in this Court in the case Ex parte Charles G. Wagner and wife, on the 31st day of January, 1839, Effingham Wagner, father of the said C. G. Wagner, was, for the uses afore-

said, made trustee, and authorized to borrow money upon the conditions of the Fire Loan to rebuild the said house. That a loan to the amount of 4000 dollars was effected, for

*6

*which the lot aforesaid, before the testator made his will, to wit: on the 16th day of November, 1839, was mortgaged. But afterwards, in the life time of the testator, to wit: on the 16th day of July, 1844, the money due on the mortgage being in arrear, the premises were sold to satisfy the debt. And a question has been raised, whether the 8000 dollars bequeathed to the children of Charles George Wagner, or any part of it, should be bound by the trusts declared of the property, to the relief of which the testator authorized the money to be applied. That in pursuance of the said articles, after the mortgage herein before mentioned, to wit: on the 17th day of November, which was in the year 1841, a settlement in pursuance of said articles was executed, and the property, subject to the trusts declared in said articles, conveyed to Robert H. Quash, junr. and the appointment of the said Robert H. Quash, junr. as trustee, was, by an order of this Honorable Court in the case *Ex parte C. G. Wagner and wife*, on the 5th day of March, 1842, confirmed.

Your orators further show to your Honors, that at the death of the testator, the said Charles G. Wagner had two children, viz: Thomas Rivers Wagner and Jane Johnson Wagner, of whom Jane Johnson Wagner has since died, an infant of tender years, and since the testator's death, another child, viz: Charles Wagner, has been born to the said Charles G. Wagner, by the said Mary Ann his wife: And a question is made whether the aforesaid legacy vested in the said Thomas Rivers Wagner and Jane Johnson Wagner, or whether the child already born, or the children hereafter to be born, will take under the aforesaid bequest; and on this question your orators also pray the aid and direction of this Honorable Court. And the question has also been raised, whether your orators are trustees for the children of the said Charles G. Wagner; or whether they are only executors, and bound to pay over the said legacy to the guardian of the infants: And on this question your orators pray the aid and direction of this Honorable Court: and also in case they are bound as trustees, the direction of this Honorable Court as to maintenance, and the proper sum to be allowed for that purpose.

That your orators have paid the legacy to the *Societe Francaise*. That they have sold the house in College street, but all the purchase money is not yet paid in, nor all the money that was due to the testator on notes collected, nor have they sold the 22 *Charleston Bank* shares: but the fund from these sources and from the income of the real estate, the interest of the bonds and the divi-

dends of the stock for one year, will not only be ample for the legacies of Edwin Wagner, the children of Charles G. Wagner and the *Societe Francaise*, but will leave a considerable surplus: And a question has arisen, whether this surplus be a specific legacy to

*7

the eight grand *children, and on this point your orators pray the direction of this Honorable Court.

Your orators further show to your Honors, that the bond of Mr. James Fife for 10,000 dollars, mentioned in the will, was paid off in testator's life time: and that testator afterwards lent to Mr. Hedley the sum of ten thousand dollars on his bond: and that the testator, besides the property enumerated in his will as residue, was at the time of his death possessed of Mr. Hedley's bond and two bonds of Mr. Nayal for 1000 dollars each.

That the testator's house in King street was his residence, and produced no rent in his lifetime; but has been rented since his death: and a question has been made, whether the devisees Godard Bailey, William Henry Bailey, and John Edwards Bailey, are entitled to all the rents since the death of the testator, or whether, in compliance with that direction, which requires the rents of his landed estate for one year after his death to go to a fund for the payment of certain legacies, and for distribution among his grand children, it was the duty of the executors to let his house for the benefit of the said grand children; and on this question also, your orators pray the aid and direction of this Honorable Court.

Your orators further show to your Honors, that a question has arisen, how far the devise of the house and the gift of the stocks and bond to Godard Bailey, William Henry Bailey, and John Edwards Bailey, are specific; and in what way the amount of Mr. Fife's bond is to be made good to them.

That in case the Insurance stock bequeathed to Francis Henry Wagner, be made good to him at the par value when the will was made, and the surplus of the fund constituted by the rents, dividends, &c., be deemed a specific legacy, there will be a deficiency to pay the 2500 dollars to Francis Henry Wagner, and 10,000 dollars to Godard Bailey, William H. Bailey and John Edwards Bailey, and in the proper marshalling of the assets on this point, your orators pray the aid and direction of this Honorable Court.

And your orators would have offered to account and requested the parties to come to an understanding and account with them in the premises, but those parties or most of them are infants incapable of giving consent. In tender consideration whereof, and for as much as your orators are remediless at law, and can receive relief only in this Honorable Court, where matters of this kind are peculiarly cognizable. To the end, there-

fore, that an account may be taken of the testator's estate, and of your orator's actings and doings in the premises. That the trusts of the said will may be declared, and the rights of the several legatees and devisees and the duties of your orators ascertained, and that your orators may receive such other and further relief as the nature

*8

of the case may require. May *it please your Honors to grant unto your orators a writ of subpœna ad respondendum, to be directed to Effingham Godard Wagner, Charles George Wagner, Robert H. Quash, junr., Thomas J. Legare and Maria Louisa Legare his wife, Edwin Adolphus Wagner, Francis Henry Wagner, Godard Bailey, William Henry Bailey and John Edwards Bailey, commanding them at a certain day and under a certain pain therein to be inserted, personally to be and appear in this Honorable Court, then and there to answer to the premises and to stand to and abide by such order and decree therein as to your Honors may seem agreeable to Equity and good conscience.

And your orators will ever pray and so forth.

Walker & King, Complainants' Solicitors.

The facts, as set forth in the bill, were in no material degree controverted by the answers of the several defendants. The claims urged by them fully appear in their grounds of appeal from the Circuit decree and order.

After hearing the case his Honor pronounced the following decree:

Dunkin, Ch. Although many points are presented for the determination of the Court, they may be governed by the application of a few general principles.

It is said the legacy to Francis Henry Wagner, and the legacy to the children of Charles G. Wagner, should be paid to the guardians of the minors. This depends on the intention of the testator, if it can be ascertained. The testator directs the income of the legacy to Francis Henry Wagner, and the income of the legacies to the young Baileys, to be under the care and management of their natural guardians. The testator understood, evidently, the distinction between a guardian appointed by the Court, and the father, a natural guardian. He has indicated how much of the legacy was to be taken from the care and management of the executors. He could not have doubted that, if any guardians were appointed, the office would be given to the father—and it would be unmeaning to direct the income to be under the management of one who was legally entitled to the custody of the principal.

Francis Henry Wagner is entitled to fifty shares in the trust company, and it is not perceived that he can claim more. The only doubt arises on the subsequent words, "or

the same amount of money, in case they should have been paid." These terms are strictly applicable to the bond of Durand, and may be well applied to the government securities; but not to the shares in the Trust Company. They may be sold but they are not to be paid. The distinction is recognized by the Testator, in the subsequent clause, bequeathing a bond and Bank shares to the Baileys.

*9

*The Court is unable to discover any authority for appropriating any part of the legacy given to Charles G. Wagner's children, to the uses of the marriage settlement, under the circumstances which have occurred. The testator directs "such part of the eight thousand dollars as might be necessary," &c. If seven thousand dollars had been necessary—If only three hundred dollars had been necessary—it would seem that there could have been no room for argument.—Does it make any difference that none was necessary? The children were the special objects of this bounty.

The next question, which it is thought important specially to notice, relates to the surplus, bequeathed to his eight grand children, after paying the legacies of sixteen thousand two hundred dollars.—"It may safely be affirmed," say the Court in *Pell v. Ball*, Speers' Eq. 85, "that, whether a bequest, couched in general terms, is specific, or otherwise, depends on this; if the things falling within the terms, when enumerated, (or, if they had been enumerated by the testator) are, in their nature, specific, then the legacy is specific, otherwise, it is not."—"If the thing be capable of individuality"—"or if it be an assemblage of things," or "something capable of being separated by sensible distinctions, as the property in a particular estate; in all such cases, the descriptions in the will set forth, with distinctness, the subject of bequest, and make it specific,"—all this is applicable to the assemblage of objects appropriated by the testator to raise the sixteen thousand dollars, and create the surplus bequeathed to his grand children. The only doubt suggested was as to the twenty two Bank Shares. But the direction to appropriate is the same as to sell, which implies ownership by the testator. This is confirmed by the residuary clause which includes, specifically, two hundred shares in the Bank of Charleston. Seeing ground in the will then for holding it specific, the Court is permitted to inquire "whether the effects of the testator afforded any foundation for it."¹ It is there ascertained that the testator left two hundred and two shares, and forty half shares, in the Bank of Charleston, which answered the bequest, and removes all question as to his intention.

It remains only to offer some observations

¹ *Innes v. Johnston*, 4 Ves. 574.

on the residuary clause as to the testator's grand-children, the Baileys. The Court is here aided by the remarks of Sir William Grant. "It has been long settled," says he, "that a residuary bequest of personal estate carries not only everything not disposed of, but every thing that, in the event, turns out not to be disposed of;" "a presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee."²—On these principles a lapsed legacy falls into the residuum. If

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the testator *had, at the date of his will, and at his death, Nayal's notes for \$1,000 each, it would be difficult to contend that they did not pass as a portion of the residue of his estate, though not included in the specifications of the clause.—"Such an enumeration, under a *videlicet*, has been held," says Sir Wm. Grant, in the same case, "only a defective enumeration, not a restriction to the specific articles. The residuary legatees are entitled to all the personal estate that turns out not to have been well bequeathed to others. But I think they are entitled to nothing more. "The net income of one year of the testator's landed estate, stocks, bonds and Bank and Insurance shares," had been previously appropriated for a particular purpose. He had no Bank shares but those included in this bequest and the residuary bequest to the Baileys. It is, therefore, plain that the income for one year of all these articles thus included in the residuary bequest, was subject to this condition or modification.

It is true the testator directs that, if the bond of Fife be paid, or the Bank shares sold, the amount shall be made good, the bond for ten thousand dollars, the Union Bank shares at forty seven dollars, and the Charleston Bank at one hundred dollars per share. But it is perfectly clear that the testator neither contemplated any deficiency of assets, nor an intestacy as to any part of his estate.—The Baileys, being his residuary legatees, would have the fund from which the amount of the bond, &c. was to be made up, and the value of the shares was therefore immaterial to them. The testator was a man of figures as well as a man of fortune. He had fixed the legacies of the other grand children, and it may have been satisfactory to him to know what he left to the Baileys, and to show to them also, that in giving them the residue, he did not intend to leave them merely a remnant. It is a consolation to hope that if this construction be erroneous it will be immaterial, as the fund will probably be sufficient to satisfy all the legacies.

It is declared that the sale of the negro George is pro tanto an ademption of the legacy to Maria Louisa Legare; and that so much of the income of the property bequeath-

ed to Francis Henry, as may be necessary, be applied to his maintenance, and to that end, be paid into the hands of his father Effingham Wagner. And that the principal, and so much of the income of that property as may be spared, be retained by the executors, and invested, under the direction of one of the Masters of this Court, for the benefit of said infant; and it is declared that the infant is not entitled, under the bequest of the Insurance Stocks, to any thing more than the stocks as they existed at the time of testator's decease. And it is declared that the sum of 8000 dollars, bequeathed to the children of Charles Wagner, enures to the

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benefit of all the children of the said Charles Wagner, born and to be born, and that the same be invested by the executors, under the direction of one of the Masters of this Court, in trust for the children of Charles Wagner; and that it be referred to the Master to enquire whether the father of the said infants is of sufficient ability to maintain them.

And it is ordered that Mr. Gray, one of the Masters of this Court, do take an account of the estate of the testator which has come to the hands of the executors, and of his debts and legacies; reserving for the consideration of the Court, after the hearing of his report, such directions as may be proper to be given for the settlement of the estate.

James W. Gray, Esq. to whom it was referred to enquire and report on the circumstances of Charles G. Wagner, reported that he had found him in such indigent circumstances as to render him unable to support his infant children, (the legatees,) and recommended that the sum of \$400 per annum, payable semiannually, be allowed him to aid in their maintenance and education. And that \$200 be allowed for his immediate relief.

Upon his report, his Honor the Chancellor made the following order.

Dunkin, Ch. Special report of Mr. Gray, dated 8th July 1847. Ordered, on motion of Mr. Yeadon, Solicitor for and on behalf of the minors, Thomas Rivers Wagner and Charles G. Wagner, Junior, that the report be filed. It is further Ordered, that the executors of R. Godard deceased, pay to Charles G. Wagner, the father of the minors, from the income of the legacy of eight thousand dollars bequeathed to the children of the said Charles G. Wagner, the sum of two hundred dollars for their immediate relief, and that they pay him the sum of two hundred dollars for the support, maintenance and education of Thomas R., and one hundred dollars for the support and maintenance of Charles G. Wagner, Jr. the said payments to be made one half on the 1st January, and one half on the 1st July of each year—the said father to account annually before the Master for the disbursement of the said fund.—Parties to be hereafter at liberty to apply for such further order as circumstances

² Cambridge v. Rous, 8 Ves. 12.

es may render necessary. Costs of this application to be paid by the executors, out of the income.

Grounds of Appeal.

The trustee of Charles G. Wagner and wife appealed, on the grounds—

1. That the trust estate of Charles G. Wagner and wife, having been incumbered with a debt of \$4000, at the date of testator's will, and testator having directed by his will the extinguishment of that incumbrance, out of the legacy of \$8000, bequeathed to the chil-

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dren of said Charles G. Wagner, *this was equivalent to a bequest of \$4000 to the trust estate, and the fact that the incumbrance on the said trust estate was removed by the sale of the incumbered house and lot, previous to testator's death, does not divest the legacy.

2. That it is clear, from the language of the will, that the testator bequeathed \$4000 of the legacy of \$8000 to the said trust estate, and "the surplus" only to his great-grandchildren, the children of the said Charles G. Wagner.

Charles Macbeth, Defendant's Solicitor.

Charles G. Wagner appealed, on the grounds:

1. That, as guardian of his children, by appointment of the Court he is entitled, on giving bond with good and sufficient security, to receive from the executors the corpus of the legacy bequeathed to them, or at least one half thereof, the executors being directed to invest "the surplus" only for the use and benefit of the children.

2. That, as guardian as aforesaid, he is at least entitled to receive from the executors the entire income, past and future, of the legacy bequeathed his children.

3. That, if not so entitled, he is entitled, having shown his pecuniary inability to support and educate his children, to receive the maintenance allowed him by the Court, without accountability for the expenditure of the same; and the allowance should have been to the full extent recommended by the Master.

4. That there is no residuary bequest, properly so called, in the testator's will, and this defendant is therefore entitled to an aliquot share, with the other grand-children of testator, of the undisposed residuum of the estate, if any there shall be after making good the legacy to the testator's grand children, the young Baileys.

Charles Macbeth, Defendant's Solicitor.

The minor, Thomas Rivers Wagner, appealed, on the grounds:

1. That he, being the only child of Charles G. Wagner living at the testator's death, is entitled to the whole legacy of \$8,000, bequeathed by the testator to the children of Charles G. Wagner.

2. That, if not entitled to the whole of the said legacy, he and his brother Charles G.

Wagner, Junr., are entitled to the same, in equal proportions, in exclusion of children hereafter to be born to their father, he and his said brother having been and being the only persons answering the description of "children of testator's grand-son Charles G. Wagner," at the time appointed for the distribution of testator's property, viz: one year after testator's death.

Richard Yeadon, Defendant's Solicitor.

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*The minor, Charles G. Wagner, Junr., appealed, on the ground,

That the children of Charles G. Wagner, hereafter to be born, are excluded from all participation in the legacy of \$8000, bequeathed by testator to the children of his grandson Charles G. Wagner, no children of Charles G. Wagner being entitled to the benefit thereof but such as answered that description at the time appointed by testator for the distribution of his estate, viz: one year after his death.

Richard Yeadon, Defendant's Solicitor.

The defendant, Francis Henry Wagner, appealed, on the grounds,

1. That he is entitled to have his legacy of fifty shares in the Charleston Insurance and Trust Company, made up to their par value at the date of testator's will.

2. That he is entitled to an equal share with the other grand-children of testator, of the undisposed residuum of his estate, if any, after making up the legacy to the young Baileys.

3. That the corpus of the legacy to him should be paid over to his father and natural guardian Mr. Effingham Wagner.

J. S. Rhett, Defendant's Solicitor.

Thomas J. Legare and wife appealed, on the ground,

That she is entitled to an equal share with testator's other grand-children, of the undisposed residuum of his estate, if any, after satisfying the legacy to the young Baileys.

J. S. Rhett, Defendant's Solicitor.

Effingham Godard Wagner and Edwin Adolphus Wagner, severally appealed.

On the ground last above mentioned.

J. S. Rhett, Defendant's Solicitor.

DUNKIN, Ch., delivered the opinion of the Court.

This Court is of opinion, that the decretal order in relation to the children of Charles Wagner must be modified—only such children as were in esse at the death of the testator, and such as were born within one year after his death and were alive at that time, are entitled to take; and a reference is directed to the Master to ascertain and report, as to those who fall within this description.

A majority of the Court is also of opinion that it is the duty of the executors to invest the legacy bequeathed to the children of

Charles Wagner as provided by the will, and when a guardian shall have been appointed, to transfer the capital to such guardian.

In all other respects the decree of the Circuit Court, as also the decretal order of the 9th July, are affirmed, and the appeal dismissed.

JOHNSTON, Ch., CALDWELL, Ch., DARGAN, Ch., concurred.

Decree modified.

2 Strob. Eq. *14

*ELIZA Y. K. TURNBULL v. T. N. GADSDEN.

(Charleston. Jan. and Feb. Term, 1848.)

[*Equity* ⇨ 12.]

If a person make a representation to another going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good if he knew it to be false, or if he did not know whether it was true or false. And it is a principle of universal law, that fraud and damage coupled together, entitle the injured party to relief in any court of justice.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 22; Dec. Dig. ⇨ 12.]

[*Limitation of Actions* ⇨ 100.]

In any cases where fraudulent misrepresentations have induced a contract, a right of action arises immediately to set it aside, and to recover the damage which may have resulted therefrom.

[Ed. Note.—Cited in *Tate's Ex'rs v. Hunter*, 3 Strob. Eq. 148.

For other cases, see *Limitation of Actions*, Cent. Dig. § 487; Dec. Dig. ⇨ 100.]

[*Brokers* ⇨ 34.]

[A broker undertook to invest money upon a safe bond well secured by mortgage, but falsely represented to the lender that the mortgage security was ample, and received a remuneration from the borrower for negotiating the loan. *Held*, that he was bound to make good the loss arising from the insufficiency of the security.]

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 26; Dec. Dig. ⇨ 34.]

Before Caldwell, Ch., at Charleston, February Sittings, 1847.

The bill stated that plaintiff, being desirous, in the early part of 1842, to invest a small sum of money, requested her father to inquire for a good investment; he applied to Thomas N. Gadsden, a broker, if he had a bond to dispose of, and informed him that the plaintiff would be willing to invest \$1000 in a bond, provided it was a good and legal bond, and well secured by mortgage. Defendant answered, that he would endeavor to find such a bond, and that plaintiff's father might rely upon him that he would recommend none to him, unless it was perfectly safe. That defendant, as plaintiff believes, saw Roger Hasset, who was in very great want of money, and whose circumstances were well known to defendant, who undertook, as plaintiff has heard and believes, for

\$55, to procure for the said Roger Hasset \$1000 by the sale of his bond: that he then informed plaintiff's father that he had found an unexceptionable investment for plaintiff's money, and showed him a bond of Roger Hasset, dated 18th May 1842, conditioned for the payment of \$1100 in one year, secured by mortgage, of the same date, of a house in Cumberland-street, and offered to sell it to him at \$1000—plaintiff's father being assured by defendant, in the strongest terms, that the property mortgaged was clear, and of much greater value than the amount called for by the bond, agreed to the terms proposed, and paid to defendant for the bond \$1000, the money of plaintiff. That the property mortgaged to secure the bond was not clear, as defendant asserted, but, as he well knew, was then mortgaged by deed, dated 5th February 1839, to the City Council of Charleston, for the purchase money to the amount of \$3187.50, which was as much as it was worth. That plaintiff knew nothing of the prior mortgage, till after the money was paid and the papers delivered, and that she then, by her father and other friends, endeavored to obtain from defendant a return of her money, which ought to have been returned immediately, seeing that his assurances, that the property was clear, had led

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her to deal with him for the *bond. But instead of returning the money, the defendant asserted that the debt was well secured, and that plaintiff was alarmed without cause; that Hasset was a responsible person, and had other property and was able to pay his debts, and only wanted the money to defray the expenses of a visit to Ireland, which would be a source of gain to him from the profit he would make on the importation of linens, and that the mortgaged property itself was worth \$7000.

That all these assurances of defendant were untrue, and known to himself to be so, except that Hasset did, in fact, own other property, though all he owned was mortgaged for the purchase money; but plaintiff, ignorant of the extent of the deception practised upon her, so far relied on the assurances of the defendant, as to wait for the affairs of Hasset to be extricated, in expectation of her money. That on the 9th of October 1843, the City Council filed their bill to foreclose their mortgage and made plaintiff a party, and in pursuance of a decree of this Court, made in the cause on the 22d of February 1844, the property mortgaged to the city was directed to be sold, for one-fourth cash, and a credit of one, two and three years for the residue; and the plaintiff's debt to be paid out of the residue of the purchase money after discharging the City's debt and costs. That the property mortgaged to the city included another lot besides the lot mortgaged to the plaintiff;

that on 24th June 1844, Mr. Gray, in pursuance of the order of the Court, made the sale above directed, and defendant himself became the purchaser of the lot mortgaged to plaintiff, for \$3,200; and the other lot was purchased at \$800. And the proceeds of both lots, after deducting costs and expenses, barely paid the city debt; and plaintiff's mortgage being exhausted proved of no value; that plaintiff has received neither principal nor interest, except a payment of \$266 made by Mr. Gray on the 6th of April last, to her as a creditor under the decree of 28th of February 1844, of the said Roger Hasset, from the residue of the sale of his remaining property, which payment being less than the amount of the interest then due, leaves the whole of the principal unsatisfied. And that Roger Hasset is insolvent and without property of any kind. Defendant purchased the mortgaged property at a price far below its value, according to his own representations of the value to plaintiff's agent. The bill prays that defendant may account to plaintiff as the seller of the said bond for the failure of consideration, and for the loss sustained by her in consequence of his false representations of the responsibility of Roger Hasset, and the title to the mortgaged property, and make good to plaintiff the representations which he knowingly made without warrant, to induce her to part from her money.

The answer of the defendant Thomas N.

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Gadsden admits, *that on 9th of May 1842, James Turnbull came to defendant, who is an auctioneer and broker, and represented that he was desirous of investing a sum of money, amounting to about \$1000, which belonged to his daughter the plaintiff, in a good bond secured by a mortgage of real estate, and the defendant did undertake, as a broker, to find an investment for him, but denies that he ever told James Turnbull that he might rely upon him the defendant, that the bond he might procure would prove perfectly safe, or in any other manner led him to suppose he the defendant would warrant the said bond, or become responsible for the ultimate payment of the same. That Roger Hasset had previously informed him that he was desirous of procuring a loan of money upon his bond, to be secured by a mortgage of a lot in Cumberland street in the city of Charleston, of which he was the owner in fee, and that defendant did exhibit to James Turnbull, Hasset's bond dated 18th May 1842, conditioned for the payment of \$1100 in a year, and secured by a mortgage of said lot, and offered on his part to sell the same to him for \$1000; that he agreed to the terms and became the purchaser of the bond and mortgage, and paid for the same \$1000, which sum of money was paid over by defendant to Roger Hasset, less the sum of \$45, which Hasset agreed to allow the

defendant for his commissions for the negotiation. Defendant expressly denies that he ever assured James Turnbull, that the property mortgaged was clear of incumbrances, or that he knew or had any reasons whatever to suspect or believe that there was any prior mortgage or lien on the same to the City Council of Charleston, as alleged in the bill, or to any other person or persons whomsoever; he denies that he gave him any assurance as to the value of the premises mortgaged, but left the value, as well as the title to the same, entirely to the judgment of the said James Turnbull. Defendant admits that James Turnbull did afterwards complain to him that he had discovered a prior mortgage on the said premises, to the City Council of Charleston, and endeavored to obtain from him the defendant, a return of the \$1000, but defendant told him in reply, that he was not aware of there being any prior mortgage on the lot, and if there was, he the defendant was not responsible for it; he denies that he asserted to him, or to any other person, that the debt was well secured, or that he or the plaintiff was alarmed without cause, or that Hasset was a responsible person and able to pay his debts out of his other property, or that he gave any assurances whatever concerning the visit of Hasset to Ireland, or the profits he expected from the importation of linens, or that the mortgage property itself was worth \$7000, although defendant believes, and if it be material, is ready to prove, that the property was at the time worth more than the amount due upon the mortgage to the

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plaintiff *and City Council. Defendant avers that he acted only as a broker, and in good faith between the parties, and that he practised no deception on the plaintiff, and made no misrepresentations whereby she has sustained damage. That he believes it is true, that a bill to foreclose their mortgage on the lot of land, was filed by the City Council at the time and in the manner alleged, and that the property was sold by Mr. Gray, as set forth; admits that he became the purchaser of the lot at \$3,200, and that he attended that sale, as he is in the habit of attending other sales of the Master; that he bought the lot openly and fairly, and was at that price the highest bidder for the same; and that he has been informed and believes, that the proceeds of the sale were applied first to the satisfaction of the debt to the City Council, but whether there was any surplus remaining thereafter he does not know and cannot say. He has been informed that a payment has been made to plaintiff by Mr. Gray, on account of the bond and mortgage, but is not informed of the amount. Defendant insists that if the plaintiff ever had any cause of suit against him for the matters charged in the bill, the same did not accrue within four years next before

the plaintiff filed her bill, or commenced her suit, or served this defendant with process to appear and answer thereto; and therefore such demand, action, or suit, if at all it could previously have been, cannot now, within the meaning of the statute for the limitation of actions, be maintained and pursued, and prays that he may be allowed the benefit of this defence, as if the same had been specially pleaded.

Upon the case as made by the bill, answer, &c., his Honor delivered his decree.

Caldwell, Ch. There are two questions involved in this case: 1st. Has the Court of Equity jurisdiction? 2d. Is the plaintiff's claim against the defendant barred by the statute of limitations? The statements and charges of the bill make a case to which a demurrer could not be sustained, and the evidence is such a chain of circumstances, as establishes the truth of every material allegation. One of the largest classes of cases in which Equity grants relief is where there has been misrepresentation. In *Evans v. Brickwell*, 6 Ves. 182, it was said to be a very old head of Equity, that if a representation is made to another person going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good, if he knew it to be false; and in *Bacon v. Brunson*; Chancellor Kent, quoting this case, says, "there is no dispute about this doctrine; it is a principle of universal law; fraud and damage coupled together, entitle the injured party to relief in any Court of Justice."

It is necessary that the misrepresentation should be in a matter of substance important

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to the interests of the plain*tiff, and that the damage should not be indefinite or contingent, but result directly from the misrepresentations; but it is not essential that the defendant should derive a benefit from it. The plaintiff's claim is strengthened by the circumstances of the unlimited trust and confidence which she reposed in his truth and fidelity; he was employed to invest her money in a good bond, secured by a mortgage of real estate, and like any other agent who is retained to perform certain work for hire, he was bound to exercise the skill and diligence proportioned to the employment.¹

When a broker is employed to negotiate bills of exchange, he is bound to acquaint himself with all the proceedings which are necessary by law for the protection of the rights of his principal, and to adopt such proceedings without any unnecessary delay: if employed to procure insurance, he must take care that the underwriters are persons in good credit at the time of the insurance; otherwise, he must bear the loss arising from their insolvency. Had the instructions of the principal been to take a bond with per-

sonal sureties, it would have been a matter of discretion, and there might have been a mere error in judgment; but here, there could be no mistake as to the security required, or the certainty of its being sufficient, if the agent had done his duty; the defendant's course in this negotiation was so plain and palpable, that his neglect becomes so gross, as to amount to fraud, which he has not palliated by showing that he made an inquiry of even one person, whether Hasset was good or not. Even when warned by the apprehensions of plaintiff's agent, he repelled with contempt, the charge of the bond and mortgage being insufficiently secured, and persisted to the last in assuring the plaintiff that her money was secure. Whether the defendant in misrepresenting the fact of Hasset's bond and mortgage being good, knew it to be false, or whether he made the assertion without knowing whether it was true or false, is immaterial; for the rule of law and morals is identical, that the affirmation of a fact which one does not know or believe to be true, is equally unjustifiable as the affirmation of what he knows to be positively false.

There is no rule of law or equity that exonerates a broker from the obligations of due diligence, whether he be considered as the agent of one of the parties or of both. If he be considered as the agent of Hasset, he is supposed to know the encumbrances on the property of his principal, and to speak for him, and ought to be bound by the representations that he made, for it was within his power to withhold the money until Hasset could give him proof of his estate being unincumbered; but the circumstances indicate that the defendant was well acquainted with Hasset's condition, and was not dealing with one to whom he was a stranger.

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It was urged on the part of defendant, that it was not his line of business to make contracts, and it could not be expected that a broker would be competent to investigate titles and take bonds and mortgages. If one undertakes an employment for which he is unfit, and in the execution of the business receives a benefit himself and occasions a loss to his employer, he cannot shelter himself behind his ignorance or incapacity, from the responsibility that he has assumed, and must be held answerable for the consequences, especially where he had acted *mala fide*.

The second question involves two points:—1st. Had the Court of Law concurrent jurisdiction of this case? 2d. When did the right of action arise? There are many cases of misrepresentation, of which the Courts of Law and Equity have concurrent jurisdiction. It has been said, that the great case of *Pasley v. Freeman*, which was tried at law, could have been maintained in Equity, on the ground of fraud and deceit in the defendant and damages to the plaintiff. At

¹ Russel on Factors and Brokers, 35.

common law it is a familiar principle that fraud accompanied with damage is a good cause of action, and the proper remedy is by an action on the case—the plaintiff might therefore have brought her action on the case against the defendant at law—she was not bound to wait until the affairs of Hasset were wound up by his other creditors. This case cannot be put upon the footing of a guaranty, where the remedy against the original obligor is first to be exhausted before suit can be brought against the guarantor—here the misrepresentation deceives the plaintiff, defrauds her of her money and deprives her of the adequate means of recovering it—the injury is therefore complete at once, and needs no future or further contingencies to its consummation.

In *Short v. McCarley*, 3 Barn. & Al. 626, the defendant was employed to make a search at the Bank of England, to ascertain whether certain stock was standing in the name of certain persons; he omitted to search, and although his neglect was not discovered by plaintiff until within six years, the statute of limitations was held a bar.

In *Whitehead v. Howard*, the defendant, in 1808, promised to invest plaintiff's money for him on good security by way of annuity; part of the security proposed by defendant consisted of some copy-hold premises supposed to belong to one Alston; the defendant never inspected the rolls of the manor in which the copy-hold was situate; that though in fact Alston possessed no such copy-hold, the plaintiff's money was paid over to Alston, who granted an annuity for it, which was paid by the hands of the defendant till 1814, when Alston became bankrupt; that at the time of the transaction, the plaintiff's two sons were Clerks in defendant's office, were in some degree consulted by the plaintiff, and might if they had thought fit, have inspected

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the rolls of the manor; that upon *Alston's bankruptcy and the state of the security being discovered, Gibbs, the defendant's managing clerk, promised the plaintiff should be paid, which promise was afterwards recognised and confirmed by the defendant. Defendant pleaded the general issue and statute of limitations; and the Court held that the action could not be sustained, and that the defendant's liability was barred by the statute of limitation. In *Howell v. Young*, 3 V. & B. 372, (which was an action on the case against an attorney for negligence,) the declaration stated that the plaintiff retained the defendant to see if a certain security were good; that he accepted the retainer and neglected his duty, and represented the security to be good; the plaintiff advanced his money and the security was bad—by means of which he lost the interest. It was held that the gist of the action was the neg-

ligence, and the statute of limitations runs from the time of the negligence, and not from the time of the loss of the interest.²

This case cannot be considered as a technical continuing trust, nor as belonging to that class of cases which is exclusively remedial in equity. Her right of action arose from Gadsden's misrepresentations of the security of the bond and mortgage, and she was not bound to wait until she could recover the one or foreclose the other, before she could prosecute her claim against the defendant for the deceit, but like all cases of fraud, a right of action arose immediately, to set aside the contract and to recover from the defendant the money of which she had been defrauded. The moment the misrepresentation was discovered and the insecurity of the plaintiff's bond and mortgage ascertained, the cause of action was complete; and it would have been competent for her, in a suit at law against the defendant, to have proved the extent of her damages at any time, independently of the proceedings of other creditors of Hasset: if any other rule were adopted, every action on the case, for giving false representations of credit, would have to be preceded by a suit against the insolvent who had been recommended and had received the goods, before suit could be sustained against the responsible party who had committed the fraud.

It is ordered and decreed, that the plea of the statute of limitations be sustained and the bill be dismissed.

The complainant appealed, and insisted that the statute of limitations does not bar her remedy against the defendant: but that he is bound to make good his fraudulent representations: and a decree should accordingly be made.

Petigru & Lesesne, Complainant's Solicitors.

CALDWELL, Ch. This Court concurs in the result of the Circuit decree, and the appeal is therefore dismissed and the Circuit decree is affirmed.

The whole Court concurred.

Decree affirmed.

² 2 Car. & Payne, 238.

2 Strob. Eq. *21

*MARY JANE KECKELEY et al. v. JOHN W. MOORE et al.

(Charleston. Jan. and Feb. Term, 1848.)

[Wills ⇐ 744.]

Where the Court orders a sale of the real estate of an intestate to be made for partition, under the Act of 1791, the title of a purchaser at such sale cannot be affected by a prior judgment against one of the distributees, but is

just as complete as if the sale had been made to satisfy a debt of the intestate.

[Ed. Note.—Cited in *Stern v. Epstein*, 14 Rich. Eq. 9; *Riley v. Gaines*, 14 S. C. 457; *Pendergrass v. Pendergrass*, 26 S. C. 29, 32, 1 S. E. 45; *Nance v. Hill*, 26 S. C. 230, 1 S. E. 897; *Holley v. Glover*, 36 S. C. 417, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1571; *Wills*, Dec. Dig. C-744.]

Before Johnston, Ch., at Charleston, June Sittings, 1846.

The bill in this case was filed for the purpose of making partition of the estate of the late James Moore, among his heirs, and on the 25th day of June, 1844, an order was made, requiring Mr. Gray, one of the Masters of the Court, to sell the said real estate, including a house and lot in Meeting-street, opposite the Rail Road Depository, and to make distribution of the proceeds among the children of the said James Moore. At the sale, Edward C. Keckeley, husband of Mary Jane Keckeley, one of the distributees, became the purchaser of the house and lot in Meeting street; and on the 16th day of June, 1846, a rule was served on Edward C. Keckeley, to show cause why he had not complied with the terms of the said sale—to which rule Edward C. Keckeley showed cause as follows:

Edward C. Keckeley, upon whom has been served a rule to show cause why he has not complied with the terms of sale in the above case, for answer thereto respectfully shows, that he did bid at the Master's sale for the said lot of land in Meeting-street, the sum of twenty-nine hundred dollars, and was at that price the highest bidder for the same. But that he has not complied with the terms of sale, because he has been advised that a good and sufficient title to the said lot of land cannot be made by the Master. That the said lot of land was the property of the late James Moore, who died intestate some years since, leaving surviving him his widow Ann Elizabeth Moore, and five children, viz: James C. Moore, John W. Moore, Mary Jane Keckeley, the wife of the respondent, Henry Moore and William Moore. That James C. Moore and John W. Moore are married, and their wives are now living. That Mrs. Ann Elizabeth Moore, the widow of James Moore, is now dead, and that the bill in this case was filed for the purpose of making partition among the heirs of the said James Moore. That before the filing of the bill in this case, to wit: on the 30th day of November, in the year 1840, John W. Moore and James C. Moore, as co-partners, confessed judgment in the sum of five thousand dollars, with interest, to Mrs. Ann Elizabeth Moore, who subsequently assigned said judgment to J. McMillan & Co. and J. Dumovant & Co., for the purpose of securing to them payment of

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the sum of fifteen hundred dollars. That

the execution upon said judgment was lodged in the office of the Sheriff of Charleston district, with orders to levy, on the 16th day of February, 1846, which levy was accordingly made. That the said order and levy in pursuance thereof were subsequent to the decree in this case, but prior to the sale of the premises by the Master in Equity. And that the sale by the Sheriff was stayed by a notice or order from Mr. Gray, the Master of the Court. And this respondent submits that the shares of John W. Moore and James C. Moore, in the said lot of land, are bound by the lien of the said judgment.

And this respondent shows, for further defect in said title, that the wives of John W. Moore and James C. Moore, now living, are entitled to dower out of their shares in the said lot. And this respondent submits, that he is willing to comply with the terms of sale, provided the shares of John W. Moore and James C. Moore in the purchase money be applied, under the order of the Court, to the lien of the aforesaid judgment on the land, and that the dower of the wives of the said John W. Moore and James C. Moore be also satisfied out of the purchase money;—otherwise he prays to be released from the purchase.

Brown & Porter, Solicitors for Edward Keckeley.

The following reply to the cause shown by Edward Keckeley, was made by William Moore, one of the parties in interest.

William Moore, one of the parties in interest to this suit, in reply to the cause shown by Edward C. Keckeley, why he has not complied with the terms of his purchase of the house and lot of land referred to in the pleadings, at the sale of J. W. Gray, Esq., Master in Equity, begs leave to state that the judgment referred to by the said E. C. Keckeley, as confessed by James C. Moore and John W. Moore to Elizabeth A. Moore on 30th November, 1840, was given for cash loaned by Elizabeth A. Moore, administratrix of James Moore, deceased, from the funds of the estate of James Moore, and on the partition of the estate of the said James, one thousand dollars of this judgment was allotted to this party William Moore, one of the distributees of the estate, in order to equalize his share with the other distributees. And upon the settlement of the estate of James Moore, deceased, by the decree of this Honorable Court, on 25th June, 1844, it was ordered and decreed, that out of the sales of the real estate of James Moore, the sum of \$968.68, with interest from 18th November, 1836, be deducted from James C. Moore's one-fifth part of the estate of James Moore, by the Master in Equity, and paid over to William Moore, in order to equalize the shares of the children of James Moore: the fund from the sale of this house and lot of land is now the only remaining fund,

for the satisfaction of the decree in this case.

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*The said William Moore, therefore, submits to this Honorable Court, that the decree of the Court, for the division of the estate of James Moore among the distributees, and the arrangement for the equalization and family division, must take priority of any claim which an individual creditor of James C. Moore could set up against him; the more especially as that creditor was the administratrix of the estate of James Moore and the debt was created by loaning part of the funds of the estate to one of the distributees, and all parties were privy to the family arrangement, that this advance of funds to James C. Moore, was to be adjusted out of his share of the estate upon its final settlement. The assignee of the judgment must take it subject to all the equities between the parties in interest.

H. A. Desaussure, Solicitor for William Moore.

His Honor, Chancellor Johnston, ordered the rule to be made absolute against Edward C. Keckelely, the purchaser, and an appeal was taken, upon the following ground:

Because the judgment confessed by John W. Moore and James C. Moore to Mrs. Ann Elizabeth Moore, and by her assigned to McMillan & Co. and Dunovant & Co., as well as the claims of the wives of the said John W. Moore and James C. Moore, for dower out of the land, are subsisting incumbrances on the said house and lot; and the purchaser ought not, therefore, to be required to comply with the terms of sale, unless provision be made, by order of the Court, for the discharge and satisfaction of the said incumbrances out of the purchase money.

Brown & Porter, Solicitors for E. C. Keckelely.

DUNKIN, Ch., delivered the opinion of the Court.

The Act of 1791 prescribes the mode in which the real, as well as the personal estate, of an intestate, shall be disposed of. Among other things it is declared, that no child shall receive any share of the estate, who has been advanced by a portion or portions, equal to the share of the other children, and if the advancement be not equal, he shall receive only so much as will produce equality. Provision is also made for partition of the estate, and power is vested in the Court to direct a sale of the entire real estate, if it cannot be advantageously divided. The only question is, whether the title of a purchaser at such a sale can be affected by a prior judgment against one of the children. It is quite manifest that, until partition made, it is impossible to determine whether the child will be entitled to any, or to what portion, of the estate. The right,

whatever it be, is the creature of the Act of 1791, and must be held in subordination to the provisions of that law. If a sale for partition be ordered, the title of the purchaser is just as complete as if the land had

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been sold to *satisfy a debt of the intestate. To require the judgment or other lien creditors of all the distributees to be made parties to a suit for the partition of the estate of an intestate, would introduce a novelty in the practice of the Court, and would encumber the proceedings with a delay and expense not calculated to promote the final settlement and adjustment of estates between the parties in interest, which is a leading object of the Act of 1791.

The Court is of opinion, that the cause shown by the purchaser was insufficient, and that the rule was properly made absolute, and the appeal is dismissed.

The whole Court concurred.

Rule made absolute.

2 Strob. Eq. 24

ELIZABETH BALL, per pro. ami, v. E. H. DEAS and Wife et al.

(Charleston. Jan. and Feb. Term, 1848.)

[*Joint Tenancy* ⚡6; *Wills* ⚡547.]

When by the terms of the will, an estate in joint tenancy at common law is created, and one or more of the tenants die in the life time of the testator, the principle of the common law applies, and the survivors take the whole estate.

[Ed. Note.—Cited in *Hatcher v. Robertson*, 4 Strob. Eq. 180; *Telfair v. Howe*, 3 Rich. Eq. 241, 55 Am. Dec. 637.

For other cases, see *Joint Tenancy*, Cent. Dig. § 4; Dec. Dig. ⚡6; *Wills*, Cent. Dig. § 1179; Dec. Dig. ⚡547.]

Before Johnson, C., at Charleston, February Sittings, 1846.

Johnson, Ch. The late John Coming Ball, of St. John's Berkley, by his last will and testament, dated the 11th May, 1839, bequeathed and devised as follows:

"I give and bequeath all my estate, real and personal, to my sister Lydia Jane Waring and her three children, John Ball Waring, Ann Simons Waring, and Francis M. Waring, to their heirs and assigns."

He left some few specific legacies, made no residuary clause to his will, and appointed the defendants, E. H. Deas and Keating S. Ball, and James Simons, Esq., executors; the last named of whom has not qualified.

Mrs. Lydia Jane Waring died in 1840, leaving her last will and testament, bearing date the 11th July of that year, whereby she gave all her real and personal estate to her three children above named. The testator died in May, 1845, leaving surviving him the complainant, Elizabeth Ball, daughter of a deceased brother of the whole blood; Ann Deas, a sister of the whole blood, and the

above named children of Mrs. Waring, who was a sister of the whole blood, and Keating S. Ball, a brother of the half blood. All the parties are before the Court. The question is whether the devise and bequest to Mrs. Waring and her children has lapsed, as far as she is concerned, by her death before the testator.

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"I do not think that this case can be distinguished in principle from *Executors of Herbemont v. Thomas*, Cheves, Eq. Rep. 21. In that case, Mrs. Herbemont directed by her will, that certain property specified should be divided into ten shares, and after disposing of six of these shares, proceeded as follows, "and I devise and bequeath the remaining four-tenths to my four nieces in Georgia, daughters of my brother Sampson Neyle, to wit, Mary Bryan Neyle, Eliza Hesther Neyle, Charlotte Neyle and Emily Neyle." Mary Bryan Neyle married, and died, leaving a husband and children, before the death of testatrix. The surviving sisters claimed the four-tenths as a joint tenancy.

The Court of Appeals held that the words above recited were such as would have created a joint tenancy at common law, one of the acknowledged incidents of which was that upon the death of any of the tenants, either before or after the vesting of the right, the survivors would take the whole. Our statutes have not altered the principle as acknowledged at the common law, where the interest has not vested. And therefore, as Mrs. Waring died before the testator, and consequently before the interest could have vested, the principle of the common law must apply, and the right of survivorship take effect.

There is nothing else in the will of John Coming Ball which can limit or qualify the terms of the devise to Mrs. Waring and her children, nor indeed was it contended at the bar that there was. The bill must therefore be dismissed. And it is so ordered.

The complainant appealed, and submitted that it should have been decreed by the Court, that the testator died intestate as to one-fourth of his estate, on the following grounds.

1. Although it is a settled rule in the English Chancery, when, by the terms of a devise, an estate in joint tenancy is created, and one or more of the devisees die in the life-time of the testator, that the survivors take the whole estate; yet the principle of construction on which the rule depends, would lead to the opposite in this State.

In the construction of wills, the primary object is to ascertain, and give effect to, the intention of the testator; and in the above case, upon the death of one or more of the joint devisees, the estate is disposed of according to its nature; and the surviving devisees take the same interest as they would have taken if all the devisees had outlived

the testator; for the *jus accrescendi* being a well known and distinguishing incident of joint tenancy, the testator may fairly be presumed to intend each of his devisees to have the right of survivorship among themselves, according to the nature of the estate. For the same reason, when this is not an incident of the estate created by the terms of the devise, it cannot be presumed that the testator intended what was contrary to the

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nature of the estate. In England every joint tenant may be said, particularly, to have a right to an equal share of the estate, and also the *jus accrescendi*: In South Carolina he has not the latter, and therefore the principle of construction being the same in both jurisdictions, its application to contrary systems will lead to opposite conclusions.

2. The rule of English Chancery in such cases is opposed to the principle that wills are ambulatory until the death of testator, and in fact partly refers the operation of the devise to the life-time of the deceased devisee.

Joint tenancy has respect to the ownership of estates. The persons who are to take, as objects of a testator's bounty, are more likely to be the objects of his consideration than their relations to the estate devised. It cannot be said that the deceased devisee was ever joint tenant with her co-devisees, for there was no devise until after his death; nor that any mutual right of survivorship, as to the subject of the devise, could exist for the benefit of the living, between the living and the dead. If the legal refinement that each devisee is entitled to the whole, can preserve the estate to those who are living, when the will takes effect, why should not its correlative, that all are entitled to the whole, prevent the vesting of the estate because all are not living to take?

3. In the case of *Herbemont and Thomas*, it seems to be assumed that although the A. A. 1791 abolishes the right of survivorship among joint tenants, where an estate of joint tenancy really exists; yet it is a subsisting incident of joint tenancy, where such an estate is prospective and not actually vested: whereas it is respectfully submitted that in the case of a devise to joint devisees, which has no effect until the death of the testator, the right of survivorship among the living devisees depends only on a rule of construction derived from an imperfect analogy, and from the presumed intention of the testator—and that the A. A. 1791, is contrary to any such construction, since it cannot be supposed that the rule now in question, would ever have been adopted if joint tenancy had always been what it is now and has been since A. A. 1791, in respect to the right of survivorship.

Had Mrs. Waring survived the testator and afterwards died, her share would not

have survived to her co-tenants; (as it would have done in England,) yet by an evasion of the A. A. 1791, and a blind adoption of the English rule, if she never lived to take at all, her share would survive to them.

4. The rule in *Herbemont* and *Thomas*, while following the decisions of England, without reference to the principle of construction on which they depend, and disregarding the effect of the A. A. 1791, by an unnatural and artificial construction of its terms, is opposed to the spirit of the English Chancery, which has always been averse to

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devises and *legacies in joint tenancy, and only construes them such when the terms of the will can bear no other interpretation; and also to the maxim of the civil law, (from which we borrow ours with regard to wills,) that "there is no survivorship among legatees." Joint tenancy among devisees who are not all living, when the devise takes effect, is a solecism not recognized in the ecclesiastical Courts.

Northrop, for the appellant.

JOHNSTON, Ch. The Court is satisfied with the decision in the case referred to by the Chancellor, and this case cannot be distinguished from that.

It is, therefore, ordered that the decree of the Chancellor be affirmed, and the appeal dismissed.

The whole Court concurred.

Decree affirmed.

2 Strob. Eq. 27

E. WEATHERFORD et al. v. A. S. TATE,
Executor of J. Richbourg.

(Charleston. Jan. and Feb. Term, 1848.)

[*Executors and Administrators* ⇨470.]

Where there was no disability on the part of the complainants, the lapse of time is a sufficient bar to an account of the administration of one who, as executor, had filed his return twenty-five years previous, and had been dead more than twenty years.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2014; Dec. Dig. ⇨470.]

[*Payment* ⇨66.]

It is a well settled rule, that a lapse of twenty years balances the account of all antecedent transactions, unless there be some disability of the person entitled to the account, or some act or admission of the party liable to account, showing that it remained unsettled in that time.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 179; Dec. Dig. ⇨66.]

[*Limitation of Actions* ⇨183.]

Lapse of time need not be pleaded formally. If there is enough in the answer to show that it is intended to be relied on, that is sufficient.

[Ed. Note.—Cited in *Myers v. O'Hanlon*, 12 Rich. Eq. 210.

For other cases, see *Limitation of Actions*, Cent. Dig. § 683; Dec. Dig. ⇨183.]

[*Wills* ⇨614.]

Testator made a bequest of slaves to her daughter for life, with limitation over to the lawful heirs of her body—held that the daughter took an absolute estate in the slaves.

[Ed. Note.—Cited in *Foster v. Kerr*, 4 Rich. Eq. 391; *Martin v. Bell*, 9 Rich. Eq. 44, 45, 70 Am. Dec. 200.

For other cases, see *Wills*, Cent. Dig. § 1401; Dec. Dig. ⇨614.]

Before Johnson, Ch., at Charleston, February Sittings, 1846.

The decree of his Honor sufficiently states the facts necessary to the understanding of the points decided.

Johnson, Ch. Ann Moore, who died in 1818, by her last will and testament bequeathed to her daughter, Harriet Tuttle, then the wife of William Tuttle, two slaves, Polidore and Lucy; and to her daughter, the complainant, Charlotte Weatherford, three slaves by name; and in the last clause she says, "all the property which I have given to my two daughters, Charlotte Weatherford and Harriet Tuttle, I give to them during their natural lives, and after their death to go to the lawful heirs of their bodies; no

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sale made by either *of their husbands shall be valid, unless by the consent of both or one of my executors, and thus my executors have power to prevent such property being moved off the State." She appointed James Richbourg, the defendant's testator, and Thomas Lehre, executors,—the former of whom alone qualified; he died in 1826, and by his will appointed the defendant his executor. In 18 , a short time after testatrix's death, William Tuttle removed to the State of Georgia, carrying with him his wife, the complainant, Harriet Tuttle, and the slaves Polidore and Lucy; and the bill charges that this was done with the knowledge of the defendant's testator, who made no efforts to prevent it; and that the said William Tuttle there sold and disposed of the slaves, and that the said William Tuttle has since died,—so that, by the negligence of the complainant's testator, the said slaves are lost to the said Harriet Tuttle; and prays that defendant may account for their value, and the value of their issue and increase, three in number. The bill also prays an account of the personal estate of the testatrix, Ann Moore.

On the question of negligence, one witness, Benjamin Godfrey, testified that he gave notice to Richbourg that Tuttle intended to remove the negroes out of the State, but the circumstances lead me to believe that Tuttle deceived Richbourg, by pretence that he was about to remove to another place within the State, and that as soon as he heard that he was about to leave the State he sent an agent, one James Wilson, in pursuit of him, to endeavor to reclaim the slaves, who pursued him to the Savannah River, and finding

that he had crossed the Georgia line he returned. This question is, however, unimportant. There can be no question that the complainant, Harriet Tuttle, took an absolute estate in the slaves, and that her husband's marital rights attached, investing him with power to dispose of them as he pleased. The bequest is to Harriet Tuttle for life, and the limitation over is to the lawful heirs of her body, and judging apart from the terms of the will, I have no doubt there was, in the mind of the testator, a desire to secure to her daughter a life interest, free from the control of her husband, and that the property on her death should go over to the issue of her body, living at her death; but in *Myers v. Pickett*, 1 Hill Eq. Rep. 37, it was held that a bequest of chattels to one for life, and then to the heirs of her body, vested an absolute estate in the first taker, on the ground that the limitation over was too remote; and that is this case. The provision that the slaves should not be removed out of the State, or sold by the husband, is not a condition, because there is no forfeiture or penalty attached to it, and is utterly inconsistent with the general right of property, and can only operate as a command or order that the property should not be removed or sold, which the party might obey or not at his pleasure.

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*James Richbourg, defendant's testator, proved Ann Moore's will, and qualified as executor, 5th June, 1819. He filed his first and only return in the Ordinary's office, 13th April, 1821, showing a balance of \$126.82 against himself, and died, as before stated, in 1826. On the 25th of October, 1841, the defendant appeared before the Ordinary, under a citation, for his testator's administration of the estate of his testatrix, Ann Moore, and upon his stating the accounts the Ordinary found and decreed against him a balance, which, as corrected by the counsel, amounts to about \$252. There was no appeal from this decree, but by consent of parties this bill was filed, and the case is now here to be tried de novo, and the accounts having been stated before one of the Masters, he has reported a balance of \$51.52 in favor of Richbourg. The last item on the credit side, is under date 21st June, 1821, and the last on the debit side 10th May, 1820.

Both parties have excepted to the report, but on the argument here it is insisted that the lapse of time since this administration was granted, authorizes the presumption that this estate was settled. It is now twenty-seven years since Richbourg qualified as executor, twenty-five years since he filed his return, and twenty years since he died, and the well settled rule is that a lapse of twenty years balances the account of all antecedent transactions, unless there has been some disability of the persons entitled to the

account, or some act or admission of the party liable to account, showing that it remained unsettled in that time. It does not appear that there was any disability on the part of any of the complainants; and Richbourg's filing his account in the Ordinary's office on the 13th April, 1821, is the last act done by him in relation to the estate that is known, and between that time and the filing of this bill, 9th November, 1841, more than twenty years had elapsed; and this case strikes me as one to which the rule is peculiarly applicable. Richbourg died leaving a large estate, and it cannot be believed that these complainants, some of whom are shown to be in necessitous circumstances, would have delayed to assert their claim so long, if there had been any just foundation, and looking through the whole case it strikes me as very probable that the matter of account has been brought in as an adjunct to Harriet Tuttle's claim for the value of the negroes.

I did not understand the counsel for the complainant as controverting the rule, or its application to the case, but to insist that the defendant could not have the benefit of it, as it was not pleaded or relied on in the answer. The defendant might have pleaded that matter formally, which probably would generally be the better course, as it might supersede the necessity for an account; or he may, according to our practice, insist on

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it in his answer; but no form is prescribed in which it shall be stated, and I apprehend that if there is enough in the answer to show that it is intended to be relied on, that is sufficient. The defendant here states, among other things, that from all he could ascertain from the papers relating to the estate of Ann Moore, which he had found amongst the papers of his testator, it appeared that his said testator had "settled during his lifetime." Again, "so far as the defendant has any means of knowing, the said James Richbourg did in his lifetime fully and faithfully execute the will of the said Ann Moore, deceased, and administered all and singular the estate and effects of the said estate to the best and utmost of his ability," &c., and I apprehend that he was at liberty to rely on any fact or circumstance to sustain the answer, and a release itself would not have been more effectual than the lapse of time. It is therefore ordered and decreed that the complainant's bill be dismissed with costs.

From this decree the complainants appealed, on the following grounds, viz.:

1st. Because the evidence showed the greatest negligence on the part of Richbourg, in relation to the negroes carried off by Tuttle.

2d. Because the lapse of time was no bar, inasmuch as the same was not pleaded.

3d. Because lapse of time, at best, furnish-

es only the presumption of payment. But in this case, the presumption cannot avail, because the defendant has come in and accounted, and his indebtedness established on the face of his account.

4th. Because Richbourg was a trustee, and not entitled to the benefit of the plea of the statute of limitations.

A. G. & E. Magrath, for appellants.
Northrop & Memminger, for appellee.

JOHNSTON, Ch. This Court is satisfied with the decree of the Chancellor, and with the view taken by him. It is therefore ordered that his decree be affirmed, and the appeal dismissed.

The whole Court concurred.

Decree affirmed.

2 Strob. Eq. *31

*BOOTH and Wife v. SINEATH and Wife.
(Charleston. Jan. and Feb. Term, 1848.)

[*Guardian and Ward* ⇐30.]

The Court refused to order an allowance to a guardian (who was the step-father.) for the maintenance and education of his ward, where she had lived with him, and it appeared that he had expended nothing on the same—and where he had never made such charge in his returns to the Commissioner.

[Ed. Note.—Cited in *Westmoreland v. West*, 9 Rich. Eq. 419; *Crosby v. Crosby*, 1 S. C. 349.

For other cases, see *Guardian and Ward*, Cent. Dig. § 122; Dec. Dig. ⇐30.]

[*Guardian and Ward* ⇐151.]

Commissions were allowed a guardian on moneys received for his ward, although not regularly accounted for—also on the sum found due by him, and ordered by the Court to be paid over to the ward.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 501; Dec. Dig. ⇐151.]

Trusts ⇐297.]

It is the duty of every trustee submitting his readiness to account, to file with his answer a statement of his account.

[Ed. Note.—Cited in *Baker v. Lafitte*, 4 Rich. Eq. 398.

For other cases, see *Trusts*, Cent. Dig. § 416; Dec. Dig. ⇐297.]

Before Dunkin, Ch., at Walterborough, February Sittings, 1847.

The bill states that the defendant intermarried with Rebecca Broxson, widow of Henry Broxson, and mother of complainant, Henrietta Booth, sometime in 1832 or 1833, and that in February, 1833, he was appointed guardian of the person and property of complainant, then an infant of not more than two or three years.

That the estate of complainant consisted of two-thirds of a valuable tract of land and three hundred and forty dollars, which was received from time to time in various sums, from 1834 to 1836, the greater part of which was received in 1834 and 1835.

That the defendant never filed or passed

any accounts with the Commissioner from the time of his appointment as guardian, until the year 1836, a space of three years.

That no further account was rendered by defendant until 1841, when he rendered an account for the years 1837, 1838, and up to January, 1841, in which no mention is made of the said sum of \$340, or of the interest which had or ought to have accrued thereon. And that defendant stated, under the solemn obligation of an oath, that complainant was entitled to no other property than the aforesaid tract of land.

That in February, 1844, another account was filed, in which the same statement was made, since which, no account has ever been made.

The complainant intermarried on the 8th day of October, 1846.

That whilst complainant was sole, and living with defendant and his wife, she was employed by them as a common servant and drudge, even so far as to be required to feed the horses of defendant, and the little education she received was from the Free School Fund.

That her clothing was derived from the labor of her own hands, in spinning and weaving for the defendant and his family.

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*The bill further refers to a copy of defendant's account, and prays.

That defendant may be held to a strict account for the principal and interest of the aforesaid sum of money, and the rent arising from the land, and that he may be decreed to pay over the same.

The defendant admits that he intermarried with Rebecca Broxson, widow of Henry Broxson, as stated in the bill, and that in February, 1833, he was appointed guardian of Henrietta Broxson, then a minor two or three years old. That her estate at that time consisted of two-thirds of eight hundred acres of land, and a small amount in money due the estate of Henry Broxson, which has been since collected by defendant, and due return thereof made to the Commissioner in Equity for Colleton district, from time to time, as will appear by his returns, on file in that office. That from the time of his intermarriage with complainant's mother, until her intermarriage with Wm. Booth, he supported, clothed and educated his ward in the same manner that persons of her class in the same neighborhood, were supported, clothed and educated.

That he always intended to charge the estate of his ward with such sum as was reasonable for her support and maintenance, but was informed by Malichi Ford, then Commissioner in Equity for the district aforesaid, that it was unnecessary to make such charge until he had a final settlement with his ward, when this Court would allow him such compensation for the maintenance of his ward.

as was reasonable and proper under the circumstances.

The defendant admits the marriage of complainant, and has been ready and willing to settle with them, and pay what sum was found to be due, after deducting a reasonable allowance for the maintenance and education of said Henrietta, from the time he became her guardian until she arrived at sufficient age to labor for her support, and prays that an account of the maintenance and education furnished by him to the complainant Henrietta Booth, from the time of his appointment as guardian of her person and estate, to the time of her marriage, may be taken, and that he may have due allowance therefor.

The answer was sworn to, before A. Campbell, Commissioner, on the 1st of February, 1847.

His Honor delivered the following decree.

Dunkin, Ch. On hearing the bill and answer in this case, and the evidence, by which it appears that Jesse S. Sineath, as guardian of Henrietta Broxson, filed an account with the Commissioner of this Court, on the 22d day of February, Anno Domini 1836, by which he was indebted to his ward in the sum of three hundred and forty dollars 45 cents;

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that *from above date he filed no accounts with the Commissioner, until the year 1840, when the aforesaid sum was neither included nor mentioned—so too, in 1842 and 1844 he again filed and passed other accounts without reference or mention of the said sum of three hundred and forty dollars 45 cents; and as the other accounts are for land rent, for which no account is desired, and the prayer of the bill for partition being abandoned, and all the above facts being fully sustained by ample proof—it is therefore ordered and decreed, that the defendant Jesse S. Sineath, do pay to the complainants the sum of three hundred and forty 45-100 dollars, with interest thereon, from the first day of January 1837, up to the day of final payment thereof, and that complainants have their execution therefor, and that the costs be paid by defendant.

The defendant appealed.

1. Because his Honor refused to order a reference on the accounts of defendant, as guardian of complainant, to ascertain the real balance due by him.

2. Because his Honor refused to order a reference to ascertain what was a reasonable allowance to give defendant for the maintenance and education of his ward, on the ground that he had made no such charge in his accounts with the Commissioner, when the answer gives good and sufficient reasons for not doing so.

3. Because the decree does not allow defendant commissions on the money received for his ward.

4. Because the decree is, in other respects, contrary to Law and Equity.

Carn, for appellant.

Edwards & Williams, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The circumstances detailed in the pleadings and evidence, well warranted the conclusion of the Chancellor, on the subject of the defendant's claim for board and maintenance. Neither in the answer or at the hearing, was any suggestion made in relation to commissions. It is the duty of every trustee submitting his readiness to account, to file with his answer a statement of his account. But no exception was taken to this omission. The second ground of appeal is "because the decree does not allow the defendant commissions on the moneys received for his ward." This Court is of opinion, that the defendant is entitled to the charge of commissions, but it is not necessary to send the case back. Allowing the commissions, the balance due by the defendant on 1 January, 1837, was \$329, instead of \$340.45. This sum, with interest to 1 Jan. 1847, amounted to five hundred and eighty-two dollars, and, deducting commissions on this balance as if paid, according to *Vance v. Gary*, Rice's Eq. 2, the balance then

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due would *be five hundred and sixty-seven dollars fifty cents. It is ordered and decreed, that the defendant pay to the complainant this sum, together with the costs of the proceedings, as provided by the Circuit decree.

The whole Court concurred.

Decree modified.

2 Strob. Eq. 34

THOMAS DAWSON, Executor, v. RICHARD P. DAWSON et al.

(Charleston. Jan. and Feb. Term, 1848.)

[*Wills* ⇐77, 194, 482.]

A will subsequently incorporated into a deed, remains a will, with all the functions of a will in relation to every species of property which, by its terms, it can carry, except that portion of property taken out of its operation by the deed; and as to all the property upon which it can act, it is subject to all the modifications of its provisions made by subsequent codicils.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 197, 489, 1008; Dec. Dig. ⇐77, 194, 482.]

[*Husband and Wife* ⇐11.]

A decree which merely gives construction to a will generally and conditionally, will not survive to the husband of a deceased legatee, so as to entitle him to an account from the executor.

[Ed. Note.—Cited in *Larey v. Beazley*, 9 Rich. Eq. 122.

For other cases, see *Husband and Wife*, Cent. Dig. § 49; Dec. Dig. ⇐11.]

[*Husband and Wife* ⇐8.]

The husband is not entitled to an account for a legacy to his deceased wife, except it be in the character of her administrator.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 26; Dec. Dig. ⇐8.]

Before Dunkin, Ch., at Gillisonville, February Sittings, 1847.

On the 2d of May, 1820, Richard Dawson, by his will of that date, bequeathed his property to his seven children, (then living) giving to each certain designated portions of his estate, with sundry limitations. On the 5th July, and 9th August, 1836, he executed certain codicils, whereby he professed to make several modifications of his will, by revoking the provisions in favor of some of his children and grand-children, specially named therein. On 3rd June, 1821, he executed in the presence of witnesses, a deed, incorporating the will of 1820 into its terms, and making the whole irrevocable, so far as the purposes of the deed went. The executor of the will, Thomas Dawson, was also made trustee of this deed. In January, 1838, the plaintiff filed his bill, setting forth these facts among others, and praying a construction of these instruments, and the direction of the Court as to his duties in the premises. All the parties in interest were parties to the bill, as defendants, some of them (of whom Samuel R. McKensie, the husband of Rebecca, a daughter of the testator, was one,) setting up the deed and will as one instrument; and others (of whom Richard P. Dawson, a grandson of the testator, and son of a son named Richard, was one) setting up the will and codicils. The case was heard before Chancellor Johnston, at Gillisonville, January, 1838, whose decree, setting up the

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deed and *will as one instrument, was affirmed by the Court of Appeals in February, 1839. The effect of this decree was (among other things) to adeem, by bringing under the operation of the deed, a specific legacy of thirty-six negroes to Thomas Dawson. The Commissioner was directed to take an account of the property of the late Richard Dawson, and his report was submitted in January, 1840, by which it appears, among other things, that there were thirty-nine negroes that had been purchased by the testator after the date of the deed, of whom Phoebe and her children, and Sib, had been loaned or hired to Josiah Dawson.

The property covered by the deed, including the thirty-six negroes mentioned above, was, by order of the Court, subsequently sold; and at May sittings in 1841, the Commissioner submitted his report of the sales, and of the distribution of the proceeds between Thomas Dawson, Samuel R. McKensie, and the other parties taking under the deed of 1821; Thomas Dawson receiving with other property, one-sixth of said negroes; Richard P. Dawson had elected to take under the codicil. He also reported on the accounts of the executor down to the year 1840. The crop of that year not having been sold, was not accounted for; nor was any account taken of the profits of the thirty-

nine negroes before mentioned. This report was confirmed.

By a decree of the Court of Appeals in January, 1844, five of the aforesaid negroes were directed to be set apart to Richard P. Dawson, and the Commissioner ordered to take an account of the value of their services from 1st January, 1837, which has been done, and the legacy to Richard P. Dawson, under the codicils of the 9th August, 1836, satisfied. It does not appear, however, that any disposition of the remainder of the thirty-nine negroes has been made, nor has the executor rendered any account of their services, or of the crop of 1840, since the report of 1841.

At the February sittings in 1847, Richard P. Dawson and Samuel R. McKensie submitted to his Honor, Chancellor Dunkin, the following motion:

"On motion of E. & H. Rhett, Solicitors for Richard P. Dawson and Samuel R. McKensie, it is ordered, that the complainant, Thomas Dawson, do account before the Commissioner, for all the property of Richard Dawson, the elder, acquired after the execution of the deed of 1821, and the profits thereof, together with a crop of 1840, which has heretofore not been accounted for. It is further ordered, that the Commissioner do inquire and report, to what extent the legacy to Thomas Dawson, of thirty-seven negroes, has been disappointed by the election of the parties in interest, under the deed of 1821, and how much of the said fund remaining in his hands as executor, ought to be seques-

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tered to his use, in *compensation of said disappointment, after charging him with the amount reported to this Court as received by him under the deed of 1821, as so much cash received in extinguishment of his claim; and what is the balance remaining in his hands subject to distribution among the heirs of Richard Dawson, the elder."

On which his Honor made the following order:

Dunkin, Ch. After hearing Mr. Rhett in support of the within motion, and Mr. Colcock and Mr. DeTreville contra, ordered that the same be dismissed.

The applicants appealed from this order on the following grounds:

1st. Because the order of his Honor denies to the appellants their rights as distributees of Richard Dawson the elder, in the undistributed portion of his estate in the hands of his executor, as set forth in the motion submitted to his Honor.

2d. Because the order of his Honor is, in other respects, contrary to law and equity.

E. & H. Rhett, for the motion.
Colcock & DeTreville, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

This case has been, already, three times

before this Court: and comes up, now, the fourth time, upon points which either have been, or should have been, long ago, adjudicated and settled.¹

The motion brought under consideration by the present appeal, is that Thomas Dawson, the executor of Richard Dawson, the elder, do, at the instance of Richard P. Dawson, a grandson, and Samuel R. McKensie, a son in law of the said Richard, (the wife of McKensie being dead,) account for so much of all the property acquired by the said Richard, after the execution of his deed of 1821, and of the profits thereof, and of the crop of 1840, as has not been heretofore accounted for.

The motion further proposes to refer to the Commissioner certain equities claimed by Thomas Dawson, as legatee of Richard Dawson, the elder; and that if the same be allowed, the Commissioner report the balance remaining in the hands of said Thomas, as executor, for distribution among the legatees and distributees of his testator.

Whether Richard P. Dawson and Samuel R. McKensie are entitled to appeal from the judgment of the Chancellor refusing their motion, depends entirely upon their right to claim the account moved for; and that depends upon their interests in the property and funds proposed to be embraced in the account.

A recurrence to the case, which is stated at large in the original decree of 1835, affirmed on appeal at February term 1839,² will assist us in deciding these questions.

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*The substance of the case, thus stated, is, that Richard Dawson, the elder, executed a will dated the 2d of May, 1820, by the first five clauses of which he devised all the real estate he then possessed, (and he never afterwards acquired any additional real estate,) in certain designated portions to his four sons, Richard, Thomas, Josiah and John, with limitations over to their male issue; except two small tracts, which he devised to all his children, males and females, in common.³

By the 6th clause he "bequeathed unto his four beloved sons, Richard, Thomas, Josiah and John, and to his three beloved daughters, Jane Wells, Providence Taylor, (married women) and Rebecca Ann Dawson, (subsequently married to Samuel R. McKensie,) all his personal property, consisting of negroes, horses, cattle, sheep, hogs, &c. share and share alike," &c.

The will contains certain limitations over, &c. Then on the 3d June, 1821, he conveyed, by deed, the whole of his estate, real and personal, to the children named in the aforesaid will, to be enjoyed by them according

to the tenor of said will; and appointed his son, Thomas, trustee under said deed.⁴

On the 5th of July, 1836, he executed a codicil to his will, the provisions of which it is not necessary to notice.

By a codicil dated the 9th of August, 1836, referring to the will of May, 1820, he "revokes and makes void the devises and bequests in said will contained," to his sons, John and Richard, and their children.⁵

From the children of Richard, thus excluded, he, however, excepts his (Richard's) son Richard P. Dawson, to whom he devises and bequeaths two tracts of land, described in the codicil, and "six negroes, to be designated by his executor, of a fair average value with his other negroes," &c. "to him and his heirs, forever."

Then he proceeds to dispose of what he had by the will given to John and Richard; and after devising to Thomas, Woodbine Cot, and sundry other tracts of land, and 37 negroes by name; and to Septimus, (a son of Thomas,) a parcel of land called Oak forest, he concludes in the following words: "The residue of the property, real and personal, devised and bequeathed by my will aforesaid, to my sons John and Richard, and their children, not disposed of by this codicil, I give, devise and bequeath as follows: to my sons Thomas and Josiah, I give, devise and bequeath the whole of the real estate, share and share alike, to them and their heirs, forever; to my said sons, Thomas and Josiah, and my daughter Rebecca A. McKensie, (formerly Dawson,) I give and bequeath the personal property, share and share alike, to them and their heirs, forever."⁶

In the original decree, it was held that

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the deed of 1821, *was a valid disposition in present, of all the property, real and personal, possessed by Richard Dawson, at its date, to take effect in enjoyment by his children, at his death, according to the provisions of his will of May, 1820. That the trusts in favor of the children were vested at the date of the deed, but were to be enjoyed at his death, and that the intermediate interests resulted to the grantor himself, and entitled him to all the profits which accrued during his life.⁷

This decree certainly disposed of all the real estate of the grantor and testator; and it also disposed of all the personalty of which he was possessed at the date of the deed. All these were regulated by the will of 1820, which was held to have been incorporated into the deed of 1821, exactly as if its terms had been transferred to, and inscribed in, that instrument. And about this body of property there is now no contest.

But after the execution of the deed, Rich-

¹ Rice's Eq. 243. Cheves' Eq. 148. Speers' Eq. 475.

² Rice's Eq. 243.

³ Rice's Eq. 245, 246.

⁴ Ib. 250.

⁵ Ib. 248.

⁶ Ib. 249.

⁷ Rice Eq. 261. Cheves' Eq. 156, 157.

ard Dawson, senr., acquired some thirty-nine negroes, referred to in the motion before us; and Richard P. Dawson and Samuel R. McKensie claim an account of them and their profits. What are their rights in relation to them?

In the original decree it was intimated, and it was subsequently decided, that whether these negroes belonged to Richard Dawson, senr., depended upon the question whether he purchased them with the profits of the trust estate accruing after the execution of the deed, or by the employment of the corpus of that estate. In the former case they belonged to him; in the latter, to the grantees under his deed.⁸

If they belonged to the life tenant, they were subject to the dispositions of his will and codicils; and if these contained provisions sufficient to carry them, they must, necessarily, be disposed of accordingly.

It was explained, in language not easily misunderstood, that although the will of 1820, was incorporated with the deed of 1821, it was no further incorporated than as it related to property existing at the execution of the deed. So far it was necessary it should be incorporated in order that the deed should perform the appropriate function of a deed, by transferring and vesting an interest in present in the property to which it related. But the will was neither revoked nor paralyzed. It remained a will, with all the functions of a will, in relation to every species of property, which, by its terms, it could carry, except that body of property taken out of its operation by the deed. As to all other property, it remained as active and operative, as if no deed had ever been executed. And as to all property upon which it could act, it was subject to all the modifications of its provisions made by the codicils.

Upon the supposition then, that these after-acquired negroes were purchased with the

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profits of the life estate, and belong^d to the life tenant, they must be disposed of by the will and codicils, if these will embrace them. If not, they are distributable as intestate property.

The 6th clause of the will already recited, certainly embraces them, by which all the negroes of the testator are, in general terms, given to the four sons, Richard, Thomas, Josiah and John, and to the three daughters, Mrs. Wells, Mrs. Taylor, and Rebecca, afterwards Mrs. McKensie, share and share alike.

The codicil of August, 1836, leaving to Thomas and Josiah their respective shares, (being one-seventh each,) gives the shares of John and Richard, to Thomas, Josiah and Rebecca, share and share alike.

Thus we have gone over the whole ground.

⁸ Rice's Eq. 262. Cheves' Eq. 156.

The result is, that Richard P. Dawson has no interest in these slaves. The only property given him by will or codicil, are the six slaves, mentioned in the codicil of August, 1836, already noticed; and as to these he has already been satisfied.⁹

The motion implies that Mrs. McKensie's share has not been received. But she is dead, and the question is whether her husband is entitled to the account claimed, or whether that account is not to be rendered to her administrator. Mr. McKensie has not taken out letters of administration on her estate, or, if he has, his motion is not made in his character of administrator.

It is said that he was a joint party with her to this suit, and that a decree has been obtained which survives to him, and entitles him to the account. But I think otherwise. The judgment of the Court was general, (i. e. relating to, and declaring, the right generally and even conditionally) and not specific and positive, so as to be enforceable for a specific amount or upon any particular chattel. The judgment was not complete. Where is the trace of a decree, that the executor account to McKensie and wife for this property? I think it would be difficult to say that such an adjudication as was made survives to the husband. If he wishes to proceed, he must administer, and file his supplemental bill to complete the proceedings.

I have said nothing of the crop of 1840; purposely confining myself to the slaves; as to which the rights of these parties are more plain and obvious.

My opinion is that the motion was properly refused, and that the appeal should be dismissed; and this being, also, the opinion of the Court, it is so ordered.

The whole Court concurred.

Motion refused.

⁹ Speer's Eq. 475.

2 Strob. Eq. *40

*B. VILLARD and Wife v. ROBERT and CHOVIN.

(Charleston. Jan. and Feb. Term, 1848.)

[Reported and annotated in 49 Am. Dec. 654.]

[*Executors and Administrators* 109; *Guardian and Ward* 30.]

A guardian will not be permitted to expend upon the maintenance and education of his ward, more than the income of the estate, without the sanction of the Court.

[Ed. Note.—Cited in *Holmes v. Logan*, 3 Strob. Eq. 33; *Ashley v. Holman*, 44 S. C. 166, 21 S. E. 624; *Anderson v. Silcox*, 82 S. C. 115, 63 S. E. 128.

For other cases, see *Executors and Administrators*, Cent. Dig. § 435; Dec. Dig. 109; *Guardian and Ward*, Cent. Dig. § 130; Dec. Dig. 30.]

Before Dunkin, Ch., at Gillisonville, February Sittings, 1847.

In this case Chovin, as administrator with the will annexed of M'Kenzie, (Mrs. Villard's father) received about \$2500. This fund belonged, under M'Kenzie's will, to Mrs. Villard and Mrs. M'Kenzie—the latter of whom Chovin married, and thus became entitled to half the fund.

Chovin expended the whole fund (except about \$200) on Mrs. Villard—as well his part as hers. Among other items in the expenditures for Mrs. Villard, there were a Piano, a Harp and a Wardrobe, amounting to about \$250 or \$300.

When the case came up for a hearing on the commissioner's report, the complainants, Villard and Wife, made the objection that Chovin had no right to expend Mrs. Villard's share of the fund on her, but ought to have limited his expenditures to the interest of the fund. They also excepted as to the hire of Nancy and her family. Nancy had been bequeathed, by the testator M'Kenzie, to his widow and daughter, to be fully and peaceably enjoyed by them, during the minority of his daughter, or until she married.—Since the death of the testator, Nancy had borne seventeen children, of whom six were alive.

Upon the exceptions, &c. his Honor pronounced the following decree.

Dunkin, Ch. In the case of Villard v. Robert's exix. and others, [1 Strob. Eq. 393] the first question arises under the exception that the account, amounting to \$2847, "is an expenditure of the capital of the fund."

No charge whatever, is made against the complainant by Chovin, until 1836, when he received funds from the representatives of her father's estate. About \$1500 of the account is for expenditures scarcely falling within the terms "support and maintenance," but for higher branches of education and elegant accomplishments. But a trustee should never permit such disbursements to encroach on the capital of the minor's estate, without the previous sanction of the Court, which is only granted in cases of urgent necessity. But as the principal expenses were in the years '36, '39, '40, '41 and '42, it is deemed not inconsistent with the requisitions of this exception on the part of the complainant, that these charges in the account may be deducted from the income received during a series of years, provided the capital remain unimpaired.

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*Then as to the hire of Nancy. In 1826, at the death of McKenzie, Nancy had no issue. It was stated, at the hearing, that between that time and 1845 she had borne seventeen children, of whom six were alive at the date of the commissioner's report. By the will of McKenzie his property (including Nancy) was bequeathed to his "widow and daughter, to be fully and peaceably enjoyed by them, during the minority of his daughter, or until she married."

If there were any profits arising to the de-

fendant from the possession of Nancy and her increase during this period, he must account for them. But, as was ruled by Chancellor Johnston, at Walterboro' in the case of Pye and Wife v. D. Carr, [2 Strob. Eq. 105,] I think he is entitled to an account of the expense and trouble of raising young negroes, and that the profits or hire to be charged should be estimated in reference to this consideration.

It is ordered and decreed that the commissioner stated the accounts on the principles herein declared.

The defendant, A. E. Chovin, appealed from the foregoing decree, on the following grounds:

1st. Because it is respectfully submitted that the defendant Chovin ought to be allowed the charges in his account for the education and other necessary expenses of Mrs. Villard; for although it be true, as a general rule, that a trustee ought not to exceed the capital, without leave, yet if the expenditures be such as the Court would have allowed if leave had been asked they ought to be allowed in an account which is otherwise fair, just and liberal, as this is, for the executor (Chovin) expended not only Mrs. Villard's share of the estate on her but his own also.

2d. Because his Honor has not decreed that the complainants should surrender to the executor Chovin, the piano, wardrobe and harp, as it was contended at the hearing they should do, if they repudiated his account, and held him to a strict settlement, for they ought not, in equity, and good conscience to keep these articles and make Chovin pay for them.

Colcock, Solicitor for defendants.

Martin, for complainants.

Colcock, Solicitor for Chovin. In the case of Lee v. Brown, 4 Vesey, Jr. 369, the Master of the Rolls says: "If this had been such a case that the Court would have authorized the act that was done, I desire to be understood that it would be considered as properly done; for the principle has been established since Andrews v. Partington, 3 Bro. C. C. 60—401, that, if an executor does without application what the Court would have approved he shall not be called to an account, and forced to undo that merely because it was done without application."

In the case of Howe v. Earl of Dart-

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mouth, 7 Vesey, 150, the Lord *Chancellor said "Lord Kenyon, who was a repository of valuable knowledge, produced a dictum of Lord Northington, that the Court would protect an executor in doing what it would order him to do. The Court in this case would order him to do that," &c.¹

"Money laid out on a child's education has been allowed out of the principal of a

¹ Morton et ux. v. Smith Ex'r, 1 Desaussure 123.

legacy, and was considered most advantageous and beneficial to the infant."²

"Executors cannot justify paying a legacy payable at 21 to the infant or for his use, except for express necessities."³ Converse must be true—

"If an infant borrows money to pay for necessities, he is liable."⁴

Cited McPherson on Infants, sec. XI, page 253, for cases where the Court will break into principal for maintenance and education.

DARGAN, Ch., delivered the opinion of the Court.

The defendant, Chovin, was not the guardian of the complainant's wife, but the administrator de bonis non with the will annexed of her father's estate. By virtue of his administration he became possessed of the estate of the complainant's wife, who was an infant, and who resided with him, he having married her mother the widow of the testator, Daniel W. McKenzie. In settling with the complainant's wife for the share to which she was entitled under her father's will, the defendant, Chovin, set up charges against her for disbursements made in the way of maintenance and education, which, if they do not swallow up, encroach largely on, the capital of her estate.

The Chancellor's decree disallowing those charges that encroached upon the corpus of the infant's estate, was in accordance with the plainest principles which govern the decisions of this Court in cases like the present. Placing the defendant in the most favorable point of view, and regarding him in the character of a guardian, such must be the result.—A guardian will not be permitted to expend upon the maintenance and education of his ward, more than the income of the estate, without the sanction of the Court. The Court itself, on an application, proper as to time, would proceed with the utmost degree of caution, and would withhold its sanction, except in a case of strong necessity or advantage to the ward, very clearly made out. In a case where the ward had considerable expectancies, or his estate had not yet been reduced to possession, or he was likely to suffer for the common necessities of life, or exhibiting fine talents, it was desirable to expend his small estate in his education, with a view to his future advancement in life; in these and similar instances of necessity or advantage to the ward, the Court would authorize the ex-

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penditure of the capital of his estate. *The Master of the Rolls in *Walker v. Wetherell*, 6 Vesey R. 473, says "my impression is, that the rule has been never to per-

mit trustees, of their own authority, to break in upon the capital. I am not aware that the Court has ever sanctioned that conduct in a trustee. It very rarely has occurred, that the Court itself has broken in upon the capital for the mere purpose of maintenance; though frequently for the purpose of putting the child out in life; but as to mere maintenance, I doubt it, even upon a petition presented. It is a great misfortune if the capital is so small as not to leave a comfortable maintenance and education; but what can the Court do?

"But whatever might be done upon particular circumstances, it is impossible to sanction a trustee in breaking in upon the capital. There are no particular circumstances in this instance upon the one side or the other. It is not shown that there were expectancies of fortune, which made it necessary to provide a suitable education. The capital might be exhausted in a few years. On the other hand, no particular extravagance upon the part of the executor appears. On the contrary, applications were made to him by some of the executors, stating that the children could not live upon the interest. This claim is therefore ungracious. But it is better that an individual should suffer a hardship, than that a general rule of the Court should be broken through, in a point that would endanger the interests of all children."

When we turn to the facts of the case under consideration, we find that the expenditures were in the highest degree improper, and such as would not have been sanctioned if an application had been previously made to the Court. They were for an expensive education, a piano, harp, wardrobe, &c., that were unsuited to the condition and estate of the infant.

It was said in the argument, that Mrs. Villard had other estate or expectancies; but to what amount was not stated. Such a fact, if it existed, does not appear in the brief, nor in the Master's report, as it should, and was not submitted to the Chancellor. But if it had, I am not prepared to say, that it would have varied the decree. The objectionable expenditures run through a course of years, during which it was easy to have made application for the sanction of the Court. An expenditure made upon an emergency, suddenly arising and acted on by the guardian, might afterwards be sanctioned by the Court, where it proved to have been for the benefit of the ward. But these unauthorized encroachments upon the capital, by the guardian or trustee, are not to be encouraged, and it must be a strong case that would be exempt from the operation of the general rule.⁵

As to the second ground of appeal, that the Chancellor did not decree a restoration

² 1 Vern. 255.

³ 3 Bro. C. C. 179.

⁴ Marlow v. Pitfield, 1 P. Williams, 558. Law Library Vol. 41.

⁵ Prince & wife v. Logan, Speer Eq. R. 29.

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to the defendant of the piano, harp, &c., it is sufficient to say these questions were not made in the pleadings. If Mr. Chovin has a right to these articles, he must assert it in the proper way.

The decree of the Circuit Court is affirmed, and the appeal dismissed.

The whole Court concurred.

Decree affirmed.

2 Strob. Eq. 44

Ex parte T. O. LOWNDES & E. R. LOWNDES, in re EXECUTORS of J. LOWNDES v. H. L. PINCKNEY et al.

(Charleston. Jan. and Feb. Term, 1848.)

[Execution \hookrightarrow 78.]

The writ in the nature of a fieri facias, which, under the Act of 1785, 7 Stat. 111, may be sued forth for the collection of money, decreed by this Court to be paid, must adopt the substance, and follow the form of a fieri facias at law, according to the capacity of the party defendant, whether as executors, devisee, &c.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 174; Dec. Dig. \hookrightarrow 78.]

[Judgment \hookrightarrow 768.]

The Act of 1840, 11 Stat. 116, provides that "no order or decree for the payment of money shall, as to third persons, without express notice, have any effect as a lien, on the estate, real or personal, of any person or estate intended to be bound thereby, but from the day when the brief or abstract shall have been delivered to or lodged with the Register or Commissioner," &c.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1325, 1326; Dec. Dig. \hookrightarrow 768.]

[Execution \hookrightarrow 9.]

It is the duty of the Register or Commissioner, to sign no execution on a money decree, until the party applying for it complies with the provisions of the Act of 1840.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 21; Dec. Dig. \hookrightarrow 9.]

[Execution \hookrightarrow 454.]

Where it may be presumed, from their course in the suit, that executors have a sufficiency of assets to satisfy the demand against their testator, and they have alleged nothing to the contrary; after confirmation of the Master's report, fixing the amount of their liability, they will be considered as having waived the objection, and execution ought to issue against them, as executors, in the usual form where judgment passes by default.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1382-1386; Dec. Dig. \hookrightarrow 454.]

[Executors and Administrators \hookrightarrow 454.]

Where there is a deficiency of assets, neither executor nor devisee can be held liable, if they make the proper defence.

[Ed. Note.—Cited in Trimmier v. Thomson, 19 S. C. 253; Hardin v. Melton, 28 S. C. 46, 4 S. E. 805, 9 S. E. 423.

For other cases, see Executors and Administrators, Cent. Dig. § 1917; Dec. Dig. \hookrightarrow 454.]

[Principal and Surety \hookrightarrow 152.]

Where the creditor has no security but the joint and several bond of the sureties with their principal, for his debt, he has a right to call upon any one of the sureties to pay it; and the Court will not delay enforcing his claims, until

the several remedies against the other sureties may be exhausted.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 418; Dec. Dig. \hookrightarrow 152.]

[Principal and Surety \hookrightarrow 197.]

[A confirmation of a master's report, fixing the amount due to creditors on an official bond, which has been reformed, according to the principles by which the court of errors directs the debts to be ascertained for which the sureties are liable, is a sufficient decree against the sureties for the amount due the creditors on which a fi. fa. may issue, although the proceedings originated in a bill by one surety against his co-sureties for contribution, upon which an order was passed directing creditors to prove their claims before the master.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 632½; Dec. Dig. \hookrightarrow 197.]

Before Johnston, Ch., at Charleston, June Sittings, 1846.

Johnston, Ch. This was a petition filed by the petitioners, to have an execution recalled that had been issued against them out of this Court, in behalf of the creditors, on the official bond of the late Benjamin Elliott. The petition sets forth, that James Lowndes, one of the sureties on the said bond, had filed his bill in this Court, calling, among other things, his co-sureties to come in and contribute towards the payment of the debts due on that bond. That an order was made, requiring the creditors on the said bond to

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come in and *prove their demands before the Master. That the said James Lowndes died, and the petitioners, Thomas O. Lowndes and Edward R. Lowndes, as his executors, revived the proceedings. The several defendants filed their answers. The Master proceeded to the execution of the order of reference, and made his report. That a decree was made on that report, and an appeal carried to the Court of Errors on that decree, and in January Term, 1845, that Court pronounced its decree, modifying the circuit decree, and ordering the case back to the Circuit Court, that the Master might reform his report, according to the principles declared by the decree of the Court of Errors. On the 10th March, 1846, the Master reported that the debts due to the creditors on the official bond of Mr. Elliott, amounted to seven thousand and seven hundred and fifty two dollars, thirty cents, and on the same day this order was entered on it: "This case came up on the Master's report, on the reference before him under the appeal decree, and the report being read, and after hearing Messrs. Petigru and Memminger, for the securities of Elliott, and M. King, for the creditors, Ordered, that the said report be and is hereby confirmed, on the motion of M. King." James Jervey, one of the sureties, a defendant in the Circuit Court, died between the decree of the Circuit Court and that of the Court of Errors. The proceedings are not revived against his estate. On the

5th of May. the creditors sued out and lodged with the Sheriff, an execution of fieri facias on the said confirmed report of the Master, against the petitioners in their individual capacity, and against the surviving defendants, either being surety or representing a surety of the said official bond. The petitioners have paid to the creditors \$3,035.35, of the debt and costs decreed to be due to them; and the executor of James Jervey, though not a party to the execution, has paid \$2,000 towards the extinguishment of the debt. The creditors have directed the Sheriff to make the balance from the petitioners, and they have filed this petition, to have this execution superseded or recalled, on the ground, as set forth in the petition, that no decree has been made in this Court upon which the parties are authorised to sue out a writ of fi. fa. against the petitioners; and on the grounds, as alleged in argument, that the execution was issued against them in their own right, and not as executors—that under the law of 1840,¹ no execution fi. fa. can issue on a money decree, until an abstract is made of the proceedings, and the decree is enrolled, which has not been done in this case; and that the proceedings ought to have been revived against the estate of the deceased surety, James Jervey.

Some days ago, a motion was made in this case to suspend the execution against the petitioners, on the ground then taken, that the creditors had not the right to levy

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the whole amount due *to them, but only the equitable proportion of the debt, until they, the creditors, had endeavored and failed to collect the equitable proportions of the debt from the co-sureties, or their representatives; and after hearing counsel for and against this motion, it was refused by the Court, for the reasons then stated, it being then admitted that the creditors, after exhausting their remedy against the other co-sureties, might levy the whole balance under their execution against these defendants; but as both the motion and judgment of the Court were viva voce, no notice of them appears in the minutes of the Court. By the petition, and in the arguments on it, new points are made for the judgment of the Court. It is stated in the petition, and urged in the argument, that there is no decree for the payment of this debt. The statements in the petition, and the whole proceedings in the case, lead the Court to a different conclusion. An inquiry into the official debts is ordered by this Court—creditors appear and prove their claims—the Master reports in their favor—the Chancellor on Circuit modifies the Master's report, and on appeal from his decree, the Court of Errors establish the principles by which these official debts, for which the sureties are liable, are to be as-

certainied; and on a return of the report to the Master, under the appeal decree, he reforms his report in conformity with these principles, and reports the amount due to these creditors—the petitioners, at every stage of this case, litigating the claims of the creditors—and that report is confirmed, fixing the amount due to them. In the judgment of the Court, that is a decree against the sureties for the amount due to the creditors, on which an execution fi. fa. may rightfully issue. The sureties themselves, it seems clear, put that construction on it, for they have, it is admitted, paid a considerable part of the debt.

But it is said that this execution must be recalled, because it is issued against the petitioners in their personal and not in their representative capacity. Now, in the whole course of these proceedings, they have never given the slightest intimation, nor is it now suggested in this petition, that they had not, or even might not have, assets sufficient to pay the debt. Had they thought of or intended to rely on such a defence, it certainly ought to have been made by the pleadings, or at least to have been offered to be proved before the Master. They have litigated the claims at every stage of the investigation into them, and the decree has been made for their payment—would it be competent now to the petitioners, after six years of litigation, to turn round and set up a deficiency of assets? A decree in Chancery, from the first moment it is believed that there was such a decree, has operated on the direct parties to the suit. The Court considers the petitioners as personally liable for this debt.

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*The provision of the Act of 1840, (sec. 23, p. 116) respecting the enrolment of decrees, is manifestly intended for the protection of third parties—persons not parties to nor with notice of the decree. As between the parties to a decree, it leaves the practice—the law of the Court on the point now made, as it was ascertained and decided to be in the case of *Blake v. Heyward*, 1 Bail. Eq. 208, 218.

It was not necessary for the creditors to endeavor to revive the proceedings against the executor of Mr. Jervey. Every surety to the official bond is liable to them for their whole debt. They clearly have the right to go against the survivors in the suit, who are responsible to them. Even by the strict rules of the common law, the death pendente lite of one of the joint and several obligors to a bond sued against the co-securities, does not abate the suit against the survivors. It is competent to the petitioners at their pleasure to revive their suit against Mr. Jervey's estate; and if there has been any laches in bringing in the executor of Mr. Jervey, that is imputable to the petitioners. On the whole, the Court overrules the motion to recall or supersede the execution, and the petition is dismissed.

¹ A. A. 1840, 116.

The petitioners appealed from the decree of the Chancellor, and moved the Court of Appeals to reverse the same, and to grant the prayer of the petition, on the following grounds:

1. Because the original bill was filed to ascertain the debts for which the co-sureties were liable, and to decree contribution among them; that the order entered in the cause directed an inquiry into the amount of debts due on the official bond of Benjamin Elliott, and into the amounts paid thereon by the sureties, "In order to an equal contribution towards the satisfaction of the official bond of the said Benjamin Elliott;" that under this order a report was made and confirmed, ascertaining the aggregate amount due on the bond, but before any proceedings had to apportion the same, or to ascertain what payments were made by either surety, and before any decree ordering payments, an execution was issued, directing the whole amount to be levied from the proper goods and lands of the petitioners.

2. Because the petitioners filed their bill as executors, and were before the Court entirely in a representative capacity, and no proceeding has been had by which they had admitted assets, or had in any way rendered themselves personally liable to answer the demand upon which execution has been issued.

3. Because it is the course of Chancery, in rendering a decree, to adjust the rights of all parties, and that the object of the present bill was expressly to procure such redress; whereas, the issuing of execution, as practised in this case, defeats every purpose of equitable intervention.

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*4. Because the proceedings were not in a state to authorize the issue of an execution having abated as to some of the parties, and there having been no abstract filed as required by law.

5. Because the execution was improvidently issued, and ought to be recalled.

Memminger & Jervey, pro pet.

CALDWELL, Ch., delivered the opinion of the Court.

The creditors of Benjamin Elliott, who had given his bond, with Henry L. Pinckney, James Jervey, James Lowndes, and Judge Waties, as sureties, to the State, for the performance of the duties of his office as Commissioner in Equity of Charleston District, brought suits for debts due on his official bond; the executors of James Lowndes filed a bill for the purpose of compelling the co-sureties, Henry L. Pinckney and James Jervey, and the executors and devisees of Judge Waties, to contribute to the payment of these debts. The plaintiffs obtained an order at June Term, 1839, directing Mr. Gray, one of the Masters of the Court, to take an account of the debts and assets of Benjamin Elliott,

and to give notice to his creditors to prove their demands; and as they were made parties to the proceedings from that time, their suits at law were not further prosecuted; for as it was apprehended there would be a deficiency of assets, it became the common object and interest of the parties, to prevent a multiplicity of suits. Orlando S. Rees, the surviving executor of Judge Waties, relied upon the following circumstances as a bar to his liability; that his testator died in 1828, and his executors had fully administered his estate; that both his real and personal estate, in 1833, had been distributed agreeably to his will, and that they had had no notice of their testator's liability, or of this demand, until 1837: the devisees of Judge Waties, who were subsequently made parties, relied upon the statute of limitations as a bar to their liability, as they had been in possession of their legacies more than four years before they were made parties to the bill.²

The Master reported the amount of the claims upon the official bond of Benjamin Elliott, to be \$7,752.30,³ which was confirmed, and a fi. fa. was issued on the 5th of May, 1846, for that sum and costs, against the goods and chattels, rights and credits, lands, tenements and hereditaments of Thomas Osborn Lowndes, Edward Rutledge Lowndes, Henry L. Pinckney, Orlando S. Rees, Thomas Waties the elder, Thomas Waties the younger, Mary Waties, Mary B. Waties, — Rees, the wife of Orlando S. Rees, W. W. Anderson, and — Anderson his wife, Anna Waties, and Thomas Bracey.

Agreeably to the Act of 1785,⁴ when the payment of money is decreed by this Court,

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the party to whom such payment is *to be made, "may sue forth, at his option, either the usual process for compelling the performance of the decree, or a writ in the nature of a fieri facias, to make the estate, real and personal, of the party by whom such money is to be paid liable to satisfaction thereof, in the same manner as it is on such a writ from the Court of Common Pleas."

From a comparison of the execution issued, with a fieri facias at law, it is manifest that it neither adopts the substance or follows the form in suits against executors or devisees. There is no distinction between the liability of the property of the testator, executor or devisee; nor any apportioning of the amounts, for which either of the sureties, or the legal representatives, or devisees of the deceased sureties are respectively liable, but the process is against the several parties indiscriminately. Where there is a deficiency of assets, neither executor nor devisee can be held liable, if they make the proper defence; and in this case, it is apparent that there has been no decree against either the surviving

² 1st Rich. Eq. Rep. 155.

³ March 10th, 1846.

⁴ 7 Stat. of S. C. 211.

executor, or the devisees of Judge Waties, and that the other parties have not prosecuted the enquiries as to their liability, and until these questions are decided, no final process can issue against them.

The case, as to the executors of James Lowndes, stands upon a different footing; they have not alleged a full administration of the estate of their testator, or a deficiency or distribution of assets, but from the course which they have pursued, and the statements of their bill, it may be presumed that they have a sufficiency of his assets, in their hands, to satisfy this demand, and if the fact were otherwise, they ought, before the confirmation of the report, to have brought forward their objection; as they have not done so they may be considered as having waived it, and execution ought to issue against them as executors in the usual form where judgment passes by default. If the execution had been issued against them only, its defects, perhaps, on a proper application to the Court, might have been amended.

The Court of law, which is much more restricted by technical rules, established forms, and inflexible precedents, often amends its judgments and executions according to the right of the case, even after a sale of property under them, nor will the collection of the amount called for in a *feri facias*, or the marking of it satisfied, by the Sheriff, deprive the plaintiff of the right to correct the mistake in the assessment of the sums due, or to have the judgment and execution amended; such amendments have frequently been permitted during the trial of actions of trespass to try titles, when either party claims under a Sheriff's deed conveying the land in dispute, which had been sold under a judgment and execution that were defective, either in form or from clerical errors.⁵

The official creditors of Benjamin Elliott

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have a right to call upon any one of his sureties to pay the debt, and this Court will not delay enforcing their claims, until the several remedies against the other sureties may have been exhausted; it was the business of the plaintiffs, and not of the creditors, to prosecute the enquiry as to what assets have come into the hands of the executors and devisees of Judge Waties, and no execution can issue against them for any amount until their respective defences are overruled, and a decree made against them. This case is clearly distinguishable from the cases where the creditor has taken securities from his debtor, for the payment of the debt; there the sureties are entitled to the benefit of all the securities, and the creditor must exhaust them before he can call on the sureties for

payment; but this doctrine has never been extended to co-sureties, where the creditor has no security but their joint and several bond with their principal for his debt. This Court cannot restrain the creditors in the enforcement of their legal rights, as there is no fund liable to the payment of their debts under its control, and their claims are not secured by a lien upon property, but exist merely against the sureties and their legal representatives.

The Act of 1840⁶ is not imperative in its terms as to the enrolment of money decrees; it provides that "any party, in whose favor an order or decree for the payment of money may be made, may cause such order or decree to be enrolled at any time within a year and a day after making the same;" it then prescribes how the brief or abstract shall be prepared, certified and deposited, and enacts that "no order or decree, for the payment of money, shall, as to third persons, without express notice, have any effect as a lien on the estate, real or personal, of any person or estate intended to be bound thereby, but from the day when the said brief or abstract shall have been delivered to or lodged with the said Register or Commissioner as aforesaid," &c.

In a succeeding clause an index of money decrees is required to be kept, "in which any enrolled order or decree for the payment of money shall be entered."

To protect the rights of parties, to prevent litigation, to follow the analogy of enrolling judgments in the Court of law, and to preserve the symmetry of the records of this Court, it is expedient and proper to adopt such a rule, in the practice, as will carry out the Act of 1840, and to require the Register or Commissioner to sign no execution on a money decree, without the party applying for it complies with the provisions of the Act.

It is therefore ordered and decreed that the Circuit decree be reformed in these respects, and that the execution in this case be set aside.

DUNKIN, Ch., and DARGAN, Ch., concurred.

Decree modified.

⁶ 11 Stat. of S. C. 116.

2 Strob. Eq. *51

*JAMES MCGREGOR v. HENRY V. TOOMER, Administrator of R. W. VANDERHORST, et al.

(Charleston. Jan. and Feb. Term, 1848.)

[Wills ⇄ 634.]

Testator, in case he should have no other children, devised and bequeathed all his estate, both real and personal, to his daughter, during her life, and at her death to be equally divided among her children, share and share alike; *held*,

⁵ Hubbell v. Fogartie and wife, 1 Hill's L. R. 167 [26 Am. Dec. 163]. Giles et al. v. Pratt, 1 Hill, 239 [26 Am. Dec. 170]. Patton v. Massey, 2 Hill, 475.

that upon the death of testator without leaving other children, the children of his daughter took a vested interest in the property.

[Ed. Note.—Cited in *Tindal v. Neal*, 59 S. C. 15, 36 S. E. 1004.]

For other cases, see *Wills*, Cent. Dig. § 1495; Dec. Dig. ¶634.]

Before Caldwell, Ch., at Charleston, ———
Sittings, 1847.

Caldwell, Ch. The bill states that on the first day of June, 1829, plaintiff obtained and entered up judgment in the Court of Common Pleas, in Charleston district, against Richard W. Vanderhorst, for the sum of \$14,571.42, on bond which had been given to plaintiff some years before, for the purchase money of certain negroes, sold by him to the said Richard W. Vanderhorst; that afterwards, on or about the day of 183 , the said judgment being unsatisfied, and no payment having been made thereon, the said Richard W. Vanderhorst died, leaving a considerable estate, but with debts to a much larger amount, and a will appointing his widow, Mary Vanderhorst, executrix, and John Axson, Josiah Taylor, and Joshua W. Toomer, executors; that Josiah Taylor and Joshua W. Toomer renounced the executorship, and Mary Vanderhorst alone proved the will, qualified and acted as executrix; that she possessed herself of all the estate of which the testator died possessed, and sold the same, and applied the money, in due course of administration, to the payment of his debts; but the whole of the assets which came to her hands were applied to and absorbed by judgments and mortgages of the testator, of prior date to plaintiff's judgment, and which were, therefore, entitled to priority of payment, and nothing was paid on account of his said judgment. Plaintiff further shows, that the said Richard W. Vanderhorst, at the time of his death, besides the property in his possession, and which was administered by his executrix, was entitled to a vested interest in remainder, in one-third part of a large estate, which by the will of his grandfather, Richard Withers, had been devised to Mrs. Sarah C. Vanderhorst for her life, and at her death to her children; that the said Sarah C. Vanderhorst, who, after the death of the said Richard Withers, her father, being a widow, intermarried with William Cartwright Shackelford, had three children, namely, the said Richard W. Vanderhorst, William C. Shackelford, and Mary L. Shackelford, who intermarried with Thomas Butler; and that the said William C. Shackelford and Mary L. Butler, as well as the said Richard W. Vanderhorst, died in the life time of the said

their mother was tenant for life, under the will of her father Richard Withers; that this estate consists for the most part of about 120 negroes, and some other personal chattels; that soon after the death of the said William C. Shackelford, his widow Mary Shackelford, took out letters of administration of his estate in Georgetown district, he having died intestate in that district, leaving his widow and three children, namely, Richard W. Shackelford, R. F. W. Shackelford, and Susan, the wife of Benjamin W. Rumney, and the said Mary Shackelford has since intermarried with William Lester; and since the death of the said Sarah C. Shackelford, the said Mary Vanderhorst and John Axson, the executrix and executor of the said Richard W. Vanderhorst, being both dead, Dr. Henry V. Toomer has lately taken out letters of administration de bonis non, with the will annexed, of the said Richard W. Vanderhorst, and H. Pinckney Walker has taken out letters of administration of the estate of the said Mary L. Butler.

The bill further sets forth that the said Dr. Henry V. Toomer has also taken letters of administration de bonis non, with the will annexed, of the said Richard Withers, and denies and pretends that the negroes and other property of which the said Sarah C. Shackelford was possessed for life, under her father's will, are, since her death, unadministered estate of the said Richard, and that he as administrator of that estate, is entitled to take possession of and administer the same. The said Sarah C. Shackelford left a last will and testament, whereof she appointed her grandson Richard W. Shackelford executor, and that the said Richard W. Shackelford now has custody and possession of the negroes and other property of which the said Sarah C. Shackelford was tenant for life, as aforesaid.

The bill charges the said Henry V. Toomer, Richard W. Shackelford and one Rumney, who has intermarried with a daughter of the said William C. Shackelford, and claims, in right of his wife, to be entitled to a share of the said estate, intend to sell the negroes, or remove them beyond the jurisdiction of this Court, and prays that defendants Henry V. Toomer, William Lester, and Mary his wife, H. Pinckney Walker, and Richard W. Shackelford, executor of Sarah W. Shackelford deceased, may answer the charges of the bill, and for an account of the estate of which Sarah C. Shackelford was tenant for life, under the will of her father, with remainder to her children, and for partition thereof, and that the share to which the estate of the said Richard W.

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*Sarah C. Shackelford; that the said Sarah C. Shackelford has lately died, whereby the estates of the said Richard W. Vanderhorst, William C. Shackelford, and Mary L. Butler have become respectively entitled, each to one-third part of the said estate, of which

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Vanderhorst is entitled may be ascertained and allotted, and the same applied to the payment of his debts, in due course of administration, and that plaintiff's judgment may be paid, and that Henry V. Toomer, Richard W. Shackelford and Rumney, may

be restrained from selling or otherwise disposing of the negroes, or of any part of the said estate, and for a writ of injunction, &c.

The joint and several answer of Benj. W. Rumney and Susan his wife, neither admits nor denies the allegations in plaintiff's bill, touching the judgment against Richard W. Vanderhorst: the condition of his estate at the time of his death, and the administration of the same. These defendants have no knowledge thereof. They admit that Richard Withers, father of the late Mrs. Sarah Shackelford, did leave a large number of negroes to his said daughter during her life, and at her death to her children; but Mrs. Sarah Shackelford had, besides the children mentioned in the bill, two other children, James and Hugh, by her second husband Wm. C. Shackelford, both of whom died in her life time, while still of tender years, unmarried and intestate, and who, according to plaintiff's construction of the will of Richard Withers, took an interest in the will of the said testator, to a portion of which these defendants would be entitled, in right of this defendant Susan, as one of the descendants of Wm. C. Shackelford and Sarah his wife. These defendants admit the death of Mrs. Sarah Shackelford, and that she left a will appointing her grandson, R. Withers Shackelford her executor, and they have heard that Dr. H. V. Toomer has administered on the estate of R. W. Vanderhorst, deceased, with the will annexed; they also admit that William C. Shackelford, father of this defendant Susan, and son of Mrs. Sarah Shackelford, did, sometime since, die, and that his widow administered on his estate, and afterwards intermarried with Wm. C. Lester; and that Mary Lupton, daughter of Mrs. Sarah Shackelford, who intermarried with Thomas Butler, is also dead, and that H. Pinckney Walker has administered on her estate; and this defendant Benj. W., denies that he has ever attempted or intended to eloin or dispose of any of the said negroes, bequeathed under the will of Richard Withers, and in possession of Mrs. Shackelford at the time of her death, or to remove the same beyond the jurisdiction of this Court. These defendants are not in any wise concerned or interested in the estate of Richard W. Vanderhorst, or the administration of the same, but only desire that the portion and interest to which they are entitled out of that property, bequeathed by Richard Withers, deceased, may be allotted and set apart to them in severalty, &c.

The answer of Henry V. Toomer, as administrator, and in his own right, denies all

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knowledge of plaintiff's judgment *against R. W. Vanderhorst; admits that Mary Vanderhorst did qualify as executrix of the will of R. W. Vanderhorst, but being wholly unacquainted with business, she intrusted the

management of the estate to her solicitors, and therefore no books, papers, or documents of any kind, that would show the amount of debts that were paid or left unpaid, came into the possession of this defendant, after the death of the said executrix of R. W. Vanderhorst, when he qualified as her executor. But this defendant is informed and believes, that the said estate was known to be partially insolvent in the lifetime of the said executrix. Defendant is informed and believes, that R. W. Vanderhorst, in his lifetime, had a contingent interest only in one undivided third part (if not in the whole) of the estate of his grandfather Richard Withers, to which he would have been entitled if he had survived his mother, Mrs. Mary C. Shackelford, but the said Mary C. Shackelford survived her said son many years, as she did her other children; by reason of which this defendant is advised and believes, the said estate of which she died possessed, on her death vested in her grand children, as there were no children alive in whom it could vest. This defendant, therefore, took out letters of administration with the will annexed, for the purpose of making partition of the said estate, under the direction of this honorable Court, among her surviving descendants, "share and share alike," according to the intention of the will of the said Richard Withers, to which this defendant craves reference, and more particularly to the following part thereof; "and if I should have no child by my loving wife Frances Withers, I do then give and bequeath the use of all my estate, both real and personal, to my daughter Sarah Vanderhorst, during her life, and at her decease to be equally divided among her children, share and share alike." This defendant further answering says, that R. W. Vanderhorst was the only child of the said Sarah, then born, inasmuch as she had no other child by her first husband Elias Vanderhorst, who survived her said father some years; and she afterwards intermarried with her second husband Shackelford, by whom she had two children; that Frances Withers, the wife of testator, died without leaving any child or children, and possession was given by the executors to his daughter Sarah, according to the provisions of the above clause of the will; that the said Sarah Shackelford died on the day of November last, leaving a will, of which R. W. Shackelford, her grandson, is now qualified executor, and by which she disposed of certain moveables of her own acquisition, which defendant believes she had a right to do; but her executor, at the time of her death, took possession of the personal property left to her for life by the will of her father, which consisted of one hundred and nine negro slaves,

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and not one hundred and twenty, as *in the bill set forth: And this defendant further

answering shows, that by the said will of Richard Withers, other contingent interests were created in favor of John Withers, Ann Calvert, Rebecca Calvert, Wm. Shackelford, and Richard Shackelford, which defendant is advised and believes could not be determined, until after the death of the said Sarah Shackelford, as will more fully appear by reference to the will, (Exhibit A.) Admits that he took out letters of administration on the estate of R. W. Vanderhorst, not because he believes the said estate entitled to any portion of the estate of Richard Withers, left by the death of the tenant for life, but partly to prevent strangers from administering thereon, and partly to enable him to ascertain the true condition of the said estate, or whether there be any estate, besides a small tract of land in Christ Church Parish, which this defendant is informed and believes belongs to the said estate, and has not been disposed of; denies all manner of combination with any persons whatsoever, to remove the above negroes beyond the jurisdiction of this Court; on the contrary, this defendant gave large and sufficient security to the Court of Ordinary for Charleston, as administrator of Richard Withers, and has also at great expense returned an inventory of said slaves to said Court, and petitioned said Court for leave to sell the same for a division, which petition was refused, at the instance of plaintiff and others; and James W. Gray, Esq., one of the Masters of this Court, is now acting on the said account or inventory, (the matter having been referred to him) so made at the expense of this defendant; and he therefore prays that the amount so expended be refunded to this defendant, out of the first monies that shall come into the hands of the Master on account of the said estate or estates. And this defendant denies all, &c.

The separate answer of Henry Pinckney Walker neither admits or denies that plaintiff was a creditor of, or had a judgment against R. W. Vanderhorst in his lifetime; defendant has heard and believes, that R. W. Vanderhorst died about the time stated, and left a testament; has no knowledge of the administration of his estate, and neither admits or denies the same. Admits that R. W. Vanderhorst was, as one of the children of Sarah C. Vanderhorst, entitled to a share of a large estate, devised to the said Sarah C. Vanderhorst, by Richard Withers, her father, and that she had three children, Richard W. Vanderhorst, William C. Shackelford, Mary Lupton Shackelford, this defendant's intestate, who afterwards married Thomas Butler, and that all these children died in the lifetime of Mrs. Shackelford; admits that Mrs. Shackelford died at or about Nov. 1845, and the estates of the said children have become entitled to a third part of the estate of which Mrs. Shackelford was tenant

for life; believes *that after the death of Wm. C. Shackelford, his widow administered on his estate, and that she has since intermarried with his co-defendant William Lester; that H. V. Toomer, his co-defendant, has also taken out letters of administration *de bonis non et cum testamento annexo*, upon the estate of R. W. Vanderhorst; and that this defendant has taken out letters of administration of the estate of Mary Lupton Butler; that the said Henry V. Toomer has also taken out letters of administration *de bonis non et cum testamento annexo*, of the said Richard Withers; that the said Sarah C. Shackelford did leave her last will and testament, whereof she appointed Richard W. Shackelford executor and that the said R. W. Shackelford now has the custody and possession of the negroes and other property of which Mrs. Shackelford was tenant for life. This defendant claims one third of all and singular the negroes and other estate of which Mrs. Shackelford was tenant for life, and is ready and willing to assent to any just and fair partition and division whereby the rights and interests of his intestate shall be respected and maintained, and therefore prays to be hence dismissed with his reasonable costs and charges.

The separate answer of R. Withers Shackelford neither admits or denies the allegations in the bill touching the judgment of plaintiff, and the debt claimed to be due from the late R. W. Vanderhorst, and the judgment obtained thereon in his lifetime nor as to the condition of indebtedness of said R. W. Vanderhorst at the time of his death; nor as to any last will and testament left by him, or the administration of his estate, of all which things this defendant is entirely ignorant. This defendant admits that Richard W. Vanderhorst was one of the children of Mrs. Sarah W. Shackelford, deceased; and that by a clause in the will of Richard Withers, certain property, real and personal, was devised and bequeathed to Mrs. Shackelford during her life and at her death to her children, but says that there are other claims in the said will also, relating to the said legacy and devise and the nature of the interest devised to the said R. W. Vanderhorst, according to a proper construction of the whole said will, this defendant cannot determine. Admits further, that a considerable estate, consisting of a large number of negroes went into the possession of his testatrix Sarah Shackelford, as tenant for life, under the will of her father Richard Withers; and after the death of Vanderhorst, the said Sarah married William Cartwright Shackelford, grand-father of this defendant, and that she had born to her, R. W. Vanderhorst, by her first husband, and by her second husband, Wm. C. Shackelford, father of this defendant, and Mary Lupton Shackelford who aft-

erwards intermarried with Thomas Butler, but that she had also by the said W. C.

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Shackelford two other children, both of whom died unmarried, without issue and intestate. Further admits that the said Sarah Shackelford lately died, leaving this defendant her executor and that she was at the time of her death in the possession of a large number of negroes, to wit, bequeathed to her during her life under the will of Richard Withers; that Shackelford after the death of her husband Wm. C. Shackelford, did take out letters of administration on his estate, and that she afterwards married William Lester, and has heard and believes that Dr. Henry V. Toomer has lately taken out letters of administration de bonis non on the estates respectively of Richard Withers and Richard W. Vanderhorst, and the said Henry V. Toomer now pretends that he is entitled to the negroes of which Sarah Shackelford was possessed as tenant for life, under the will of Richard Withers, as his unadministered estate. This defendant denies that he has ever attempted or intended to sell the said negroes or remove them beyond the jurisdiction of this Court, but on the contrary is ready to act in the premises as this Court shall direct; and submits his rights under the will of Richard Withers to the adjudication and determination of this Court. Denies all, &c. and prays to be hence dismissed with his costs and charges, &c.

The answer of Elizabeth F. W. Shackelford, a minor, by Thomas J. Gantt, her guardian ad litem, neither admits nor denies the allegations of the bill touching the condition of the estate of Richard W. Vanderhorst, or the rights of complainant as a judgment creditor of the said R. W. Vanderhorst, as none of these things are within her knowledge. This defendant has heard and believes, that besides the children of her grandmother, the late Sarah C. Shackelford deceased, mentioned in complainant's bill, there were two other children, James and Hugh, born to her by her second husband Wm. C. Shackelford, both of whom died under the age of twenty-one, intestate and unmarried. And this defendant further says, she is an infant, and submits her rights and interest under the will of her great grand-father, Richard Withers, and in the property bequeathed by him, to the protection of this Court.

The question in this case is, did Richard W. Vanderhorst take a vested interest under the will of Richard Withers? The clauses out of which the question arises are as follows, "and if I do not have a son, I do then give and bequeath the half of my lot of land in Charleston to my grand-son Richard W. Vanderhorst, that is thirty feet in front, fronting Union street, and Queen street, and one hundred feet in depth, at the decease of

my daughter Sarah Vanderhorst, or at the age of twenty-one years, which shall first happen, to him, his heirs and assigns forever. And if I should have no child by my loving wife Frances Withers, I do then give

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the use of all my personal estate not mentioned, unto my daughter Sarah Vanderhorst during her natural life, and at her decease to be equally divided, share and share alike, amongst all her children, to them and their heirs and assigns forever; and if I should have no child by my loving wife, I do then give and bequeath the use of all my estate, both real and personal, to my daughter Sarah Vanderhorst during her life, and at the decease of my daughter Sarah Vanderhorst, to be equally divided amongst her children, share and share alike, to them and their heirs and assigns forever, &c. and if it should so happen that I should leave no children, and my daughter Sarah Vanderhorst should die and leave no children, then and in such case, at the decease of loving wife Frances Withers, I do give the whole of my estate, both real and personal, to be equally divided, share and share alike, amongst John Withers, Ann Calvert, Rebecca Calvert, William Shackelford and Richard Shackelford, to them and their heirs forever."

The consideration of the whole will, where there is an apparent inconsistency in the parts, generally enables us to perceive the intention of the testator, and to give such a construction as will reconcile the conflicting clauses. The relative position of the clauses is of no importance, unless there is an irreconcilable inconsistency between them—then the last clause must prevail. The testator appears to have selected four objects of his bounty, his wife, daughter, grand children, and the ultimate remaindermen.

He contemplated three events as important contingencies, 1st. His having no child by his wife, Frances Withers, which occurred. And 2. Having no children at his death. And 3d. His daughter's dying having no children, which were necessary to co-operate before the death of his wife, Frances Withers, or the remaindermen could take no estate; these events did not occur, and therefore that part of the will is as inoperative as if it had not been inserted, and has no weight in the construction of the other clauses, only so far as it may illustrate his general intention. When there is a clear vested interest, not divested, the express contingency on which it was to be divested not having happened, the construction of the clause giving the vested interest is not to be affected by any thing connected with the contingency that would otherwise have divested the estate. In *Harrison v. Foreman*, 5 Ves. 208, it was held "that when there are clear words of gift, giving a vested interest to parties,

the Court will never permit that absolute gift to be defeated, unless it is perfectly clear, that the very case has happened in which it is declared that interest shall not arise." If the previous clauses give a vested interest to Richard W. Vanderhorst, and the contingency on which it was to be divested never happened, the vested interest remains as if that contingency had not been annexed

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*to it. The first inquiry is what estate did Richard W. Vanderhorst take under the following words of the will, "and if I should have no child by my loving wife, Frances Withers, I do then give the use of all my personal estate not mentioned, unto my daughter, Sarah Vanderhorst, during her natural life, and at her decease to be equally divided, share and share alike, amongst all her children, to them and their heirs and assigns forever;" this is a residuary clause of the personal property of the testator, and brings the claim of the personal representative of Richard W. Vanderhorst within the rule, that when there is a residuary bequest, the intention of the testator must be very clearly indicated in order to postpone the vesting of the legacy. One of the objects of the rule, is to prevent an intestacy, which is always incompatible with the intention of one who makes a will. This is analogous to giving a legacy out of a particular fund, which becomes, at the death of the testator, separated from his estate and appropriated to a specific purpose, first for the use of Sarah Vanderhorst for her life; and second, at her death, it is distributable between her children; and there being no survivorship provided for by the will, it would seem that the interest was vested. It is very clear, if instead of the present legacy, real estate had been given after the death of the tenant for life to her children as tenants in common, but if either of them died before her death, then to the survivor, there can be no doubt it would have been a vested estate, to be divested on a contingency of survivorship; and there is no reason why personal property does not pursue the same course. When a gift is made to B. with a charge to C. it is a distribution of the fund between the person to take in the present, and him who is to take in the future, and the gift to the latter vests in him at the same moment it does in the former. The general rule which has been drawn from the host of cases of this kind, with which the books abound, is that if futurity be annexed to the substance of the gift, the vesting is suspended, but if it appears to relate to the time of payment only, the legacy vests instantly. Words directing distribution between two or more objects at a future time, fall within the same category as a direction to pay, and therefore when they are engrafted on the

gift, which would without these superadded expressions confer an immediate interest, they do not postpone the vesting.¹

An important distinction is to be observed between a case where payment or distribution is deferred, not merely until the lapse of a definite interval of time, which will certainly arrive, but until an event which may or may not happen; the effect it would seem is to render the legacy contingent, unless perhaps in the case of a residuary bequest.² If it appears that the distribution or

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payment, either on account of some *interest being given to the person on whose death the gift is to take effect in possession, or of some difficulty attending the collecting of the testator's assets, the legacy will be considered independent of the time specified, and will vest at the death of the testator. When the testator has any ulterior object in deferring the vesting of the legacy to the time appointed for the legatee to take possession, then there would be some ground to consider it contingent; but when the enjoyment of it by the first taker is the only obstacle that postpones the possession, it is no reason why it does not vest at the same instant as the interest of the tenant for life.

There was no other contingency annexed to the legacy's vesting in Richard W. Vanderhorst, than in his mother: it was only necessary that the legacy should not lapse in the lifetime of the testator; but if the daughter had died in her father's lifetime, it is very clear the grandson would have taken the legacy; her death would not have defeated his rights—the particular estate, or rather interest to which she was entitled during her life, and the remainder to him vested at the same time; and there is no event designated in the will that has occurred that can divest this legacy. A contingent interest may be transmissible to the personal representative of the legatee, according to the nature of the contingency on which it is dependent. If the gift be to children who shall live to attain a certain age, survive a prescribed period, or a specified event, the death of any child before the contingency, has the effect of precluding such deceased child out of the class of presumptive objects; but when the contingency on which the vesting depends, is a collateral event irrespective of attainment to a given age, and surviving a given period, the death of any child pending the contingency, works no such exclusion, but simply substitutes and

¹ Booth v. Booth, 4 Ves. 399. Monkhouse v. Holme, 1 Brown C. C. 298. Jones v. Mackelwane, 1 Rus. E. R. 220. Dawson v. Kellet, 1 Bro. C. R. 123. Jar. on Wills, 760 & 761. Atkins v. Hillecock, 1 Alk. 500.

² Booth v. Booth, Jones v. Mackelwane, ante. Jar. on Wills, 764.

lets in the legatee's representative for himself.³

When the parties to take are ascertained, though their interest may be contingent, if they die before the contingency happens they take an interest that is transmissible to their representatives: it would have been a different contingency if the limitation had been to the children of Sarah Vanderhorst that might survive her.⁴

The expression in the clause, "if I should have no child by my loving wife, Francis Withers, I do then give," clearly indicates the time when the use vests in Sarah Vanderhorst, and remainder in Richard W. Vanderhorst—the property was transmissible to them eo instanti (after the death of the testator) that event occurred; and it would be inconsistent with the established rules of construction to hold that the remainder was suspended to the death of Sarah Vanderhorst, as the will provides for no other event to happen prior to the possession of the remainder man, but the contingency of her

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*having other children, on whose birth an interest vests in them, but their births do not divest the estate in remainder that had already vested in R. W. Vanderhorst, except pro tanto to let the younger children into a share.⁵ This was certainly the intention of the testator: he had at the making of his will and his death, but one daughter and one grandson, and his object was to make a suitable provision for his grand children, if he left no other child, and to put all his grand children upon an equality, as they must be the children of the same mother: this view is strengthened by the fact that the testator had made provision for his grandson Richard W. Vanderhorst by a previous clause: it cannot be implied from any part of the will that the testator intended that the issue of any of his grand children that might die in their mother's lifetime should not take the shares bequeathed to such deceased children; much less could it be inferred that he intended in case his grand children died in the lifetime of their mother, that at her death the estate should go over to the ultimate remaindermen in preference to her grand children.⁶

A limitation over disposing of the property to another, in case of the prior devisee dying under certain circumstances, always affords a strong argument in favor of the prior devisee taking a vested interest: and the weight of the argument, especially as to the

intention of the testator, is proportionally increased by the proximity of relationship, when the class of intermediate remaindermen are lineal descendants of the testator and the ultimate remaindermen are collateral and remote relations.⁷

The same arguments may be applied to the succeeding clause of the will, by which the testator, if he should have no child by his wife, gives the use of all his real and personal estate to his daughter, Sarah Vanderhorst, during her life, and at her decease to be equally divided amongst her children, share and share alike, to them and their heirs and assigns forever. This differs from the preceding clause in two points, first, its subjects are real and personal property; second, it cannot be technically called a residuary clause; but these circumstances are immaterial, and do not diminish the force of the argument, or change the conclusion.

It is therefore ordered and decreed, that the legal representative of Richard W. Vanderhorst, deceased, is entitled to the one-third of the real and personal estate of which his mother, Sarah C. Shackelford, had the use for her life, under the will of her father, Richard Withers, (with remainder to her children) and that the same be applied in due course of administration to the payment of the plaintiff's debt: It is also ordered and decreed, that it be referred to the Master to report upon the accounts: the parties to be at liberty to apply for any further order that

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it may be necessary and proper to *obtain: the costs to be paid out of the estate of Richard W. Vanderhorst, deceased.

Defendant, H. V. Toomer, adm'r. Richard W. Vanderhorst, appealed from the decree of the Chancellor, on the following grounds:

1st. Because his Honor erred in deciding that the interest of Richard W. Vanderhorst, was a vested interest at the death of Richard Withers, the testator.

2d. Because his Honor erred in applying the rule for the opening of a vested remainder, to let in after-born children, to this case. The said rule being only applicable to marriage settlements, where children are never supposed to be in esse at the time of the execution of such deeds—or to wills in the nature of marriage settlements.

3d. Because the only rule truly applicable to the interpretation of the will of Richard Withers, is the intention of the testator, which in no form can be made to agree with the decree of the Chancellor, but by striking out a part.

4th. Because the intention of the testator cannot be arrived at, but by supposing a contingent remainder vesting in the children of Sarah Vanderhorst at the time of her death, and not before. The condition being

³ Winsbur v. Gordon, 7 Met. Rep. 363. Burns v. Allen, 1 Bro. C. C. 181.

⁴ Ward on Legacies, 174. Jarman on Wills, 777.

⁵ Edwards v. Symons, 6 Taunt. 213.

⁶ Powell on Devisees, 303, 304. Right v. Creber, 12 Com. L. R. 392. 2 Jar. 75, 497, 74. Ayton v. Ayton, 1 Cor. 327. [Myers v. Myers] 2 M. C. Eq. R. 256.

⁷ Smether v. Wilcock, 9 Ves. 293. Peyton v. Barry, 2 P. W. 626. 3 M. & K. 257.

that they should survive both Frances Withers and herself the estate being by the terms of the will otherwise limited over to third persons—grand children in such cases being by common interpretation of law included in the word "children."

5th. Because if the estate vested at all at the time of testator's death in R. W. Vanderhorst, the whole of it vested, and the rule for letting in after-born children, applicable to real estate at times is not applicable to the present bequest.

6th. Because his Honor erred in directing the debt of complainant to be paid out of these assets, other and prior judgments to a much larger amount than the whole of the probable sum thereof, being of record and remaining unsatisfied against the said R. W. Vanderhorst, in the Court of Common Pleas of Charleston District, besides additional claims not yet ascertained by the administrator.

7th. Because the decree of the Chancellor is in other respects contrary to Law and Equity.

Jas. Smith Rhett, defendant's Solicitor.

CALDWELL, Ch., delivered the opinion of the Court.

This Court concurs in the construction of the will of Richard Withers, given by the Circuit decree, that the children of Sarah Shackelford take a vested interest in the property devised and bequeathed to her during her life, and after her decease to be equally divided amongst her children, share and share alike; and that the share of her son, Richard W. Vanderhorst, is liable to

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the payment of his debts. It is referred to the Master to ascertain and report who were the children of Sarah Shackelford, and who are their heirs and next of kin, and entitled to the distribution of their shares.

The sixth ground of appeal appears to have been taken from a misapprehension of the decree. The assets of Richard W. Vanderhorst are directed to be applied, in the due course of administration, to the payment of the plaintiff's debt; this was not designed to disturb the order in which the Act prescribes the debts of the deceased are to be paid by executors or administrators; if, however, creditors who might be entitled to a preference, neglect to prefer their claims, it is no reason why other creditors, who establish their demands, should not be paid. It is ordered and decreed that the appeal be dismissed and the decree affirmed.

DUNKIN, Ch., DARGAN, Ch., concurred.

JOUNSTON, Ch., absent from indisposition.

Decree affirmed.

2 Strob. Eq. 63

JOSEPH DOUGHERTY v. EXECUTORS of JOHN DOUGHERTY et al.

(Charleston. Jan. and Feb. Term, 1848.)

[Wills \hookrightarrow 587.]

The words of a will, "should my niece outlive my son, then all my property both real and personal to be given to her and her children, if she leaves any at her death," held to constitute a residuary disposition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1279; Dec. Dig. \hookrightarrow 587.]

[Wills \hookrightarrow 610.]

Where there is a bequest of personalty to "A. and her children," the general rule is that A. takes the absolute estate; but where the provisions of the will show an intention of giving, in remainder, to the children living at her death, this will restrict the mother to a life-estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1380; Dec. Dig. \hookrightarrow 610.]

[Wills \hookrightarrow 728.]

A residuary bequest of real and personal estate, in the same clause, to take effect upon the happening of a future contingency, will carry with it the intermediate rents and profits, unless they have been otherwise appropriated by the testator.

[Ed. Note.—Cited in *Drayton v. Rose*, 7 Rich. Eq. 339, 64 Am. Dec. 731.

For other cases, see Wills, Cent. Dig. §§ 1760, 1766; Dec. Dig. \hookrightarrow 728.]

[Wills \hookrightarrow 858.]

A bequest of freedom to slaves, is void by the provisions of the Act of 1841. But such slaves will not pass under the residuary clause of the will: according to the same Act, the trustee, or person holding them under such bequest, is accountable for them or their value, to the distributees, or next of kin of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2173; Dec. Dig. \hookrightarrow 858.]

[Slaves \hookrightarrow 22.]

A bequest of freedom to slaves, after the termination of a life-estate in them, does not impair the life-estate; but subjects the slaves to the provisions of the Act of 1841, after its termination.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 92-111; Dec. Dig. \hookrightarrow 22.]

[Wills \hookrightarrow 855.]

A gift over, which is void, cannot defeat a vested interest, previously given.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2171; Dec. Dig. \hookrightarrow 855.]

Before Dunkin, Ch., at Charleston, Sittings, 1847.

Dunkin, Ch. John Dougherty died in November, 1844. His will, written by himself, and executed shortly after his death, provides, among other things, as follows, to wit:

"I give to my son Joseph Dougherty, 700

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dollars per year, payable quarterly, during his natural life, but he is never to have anything to do with my estate, neither his heirs or assigns, in Law or Equity." After some pecuniary legacies, the will proceeds: "I leave old Tenah, her daughter Charissa, and her children Anna, Sarah, Thomas, Louisa and John, to be left free under the guardianship of my executors, and

as they wont be able to support themselves. to have a reasonable support from the estate. I give to my niece, Miss Mary Dougherty, the following negroes, young Tenah, and her son Ben, Flora and her sister Peggy, during her own natural life, and at her death they are to be left free, under the guardianship of my executors; and should my niece, Miss Mary Dougherty, outlive my son Joseph, then all my property, both real and personal, to be given to her and her children, if she leaves any at her death, and if she does get married, her husband is not to have anything to do with any of the property she may get from my estate." James Adger, William H. Houston and John Dougherty, Jr., the testator's nephew, were appointed executors, the two latter of whom qualified on the will.

It is proposed, first, to consider the interest of Mary Dougherty, under the provisions of this will. And here it may not be superfluous to premise, that it is the duty of the Court to give effect to the intention of the testator, where it can be satisfactorily ascertained, provided such intention would not violate the law of the land. Where the language of the testator is so obscure or ambiguous, that no safe construction can be given, or where his manifest purpose would be obnoxious to the policy of the law, or where he has made only a partial disposition of his estate, in all these cases, the testamentary power not having been effectually exercised, the law interposes and determines the succession, and it the province of the Court merely to declare the law.

To a certain extent, the intention of the testator seems to the Court sufficiently explicit. His scheme, so far as he attempted to express it, or to carry it out, is stated with ordinary clearness, although it is not couched in technical language. To his son he gives an annuity, (equal to the interest of ten thousand dollars,) payable quarterly, during his life, and he declares, "but he is never to have anything to do with my estate, neither his heirs or assigns, in Law or Equity,"—just as he afterwards declares that if his niece Mary Dougherty should get married "her husband is not to have anything to do with any of the property she may get from my estate." In both cases, the Court must presume that the testator knew what the law was, and expressed himself in reference to it. His son was his heir, and would be entitled to his whole estate, unless effectually excluded, and so the husband of Mary Dougherty might become entitled to the property be-

assertion of any right conflicting with the other dispositions which he made of his estate. Whether the testator has accomplished his purpose, is another and a different inquiry. However fixed his intention may have been, if the testator has not made a valid disposition of his estate, the right of the heir is unimpaired.

The next prominent object of the testator's affection and bounty, was his niece, Mary Dougherty.—"Should my niece, Miss Mary Dougherty, outlive my son Joseph, then all my property, both real and personal, to be given to her and her children, if she leaves any at her death." This is the language of a man who supposed that he had provided for the appropriation of the income of his estate during his son's lifetime. But it was stated although no proof was offered on the subject, that the income was more than sufficient to pay all that was charged upon it by the testator's will. It was insisted, on the part of the complainant, that the surplus income, which had accrued, or which should accrue during the lifetime of the son, was not disposed of by the testator, and therefore belonged to the heir at law or distributee. In 1 Jarman on Wills 495, it is said, "Where a specific devise is to take effect in future, so that at the death of the testator, there is no person actually entitled to the immediate income, the rents and profits will, until the devise vests in possession, pass under the residuary clause, if any, and should the will contain no such clause, will descend to the testator's heir at law; and it is immaterial whether the future devise in question be vested or contingent. If the residuary devise itself be contingent or future, i. e., deferred in point of enjoyment, it becomes a question of much nicety, whether the income, accruing in the interval from the residuary real estate, passes by such devise." After commenting on the authorities, the author adopts the conclusion, that where "the testator mixes up real and personal estate in one clause, as where there is a gift of all the residue of his real and personal estate to the oldest of three persons who should attain twenty-one years of age, charged with a sum of money to the others if they should attain that age, this comprises the rents accruing between the testator's decease, and the attainment by the devisee of the prescribed age."¹

Among the authorities cited by Mr. Jarman, in reference to his principal proposition, is Brailsford v. Heyward, 2 Des. R. 32. That was a devise of real and personal estate to trustees, to hold to the use of the wife dur-

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queathed *to her. The intention of the testator is therefore declared to exclude the son from the inheritance, and to preclude the marital rights of the husband. It may be too much to say, that the testator has exhibited a manifest intention to disinherit the son; and the more just construction probably is that he intended to preclude him from the

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ing life, and at her death, to the *youngest child of the testator, who should attain 21 years of age. The wife died, and also the two youngest children under 21. It was held that the next child, who had attained

¹ See 4 Cond. E. C. R. 218. Jacobs 468.

21. was entitled to the intermediate rents and profits which had accrued since the death of the widow, against the claims of the heir at law, as well as of the residuary devisees and legatees. That cause was argued by very eminent counsel, and was affirmed after a rehearing. The decision was made to depend very much on the particular provisions of the will, as indicating the intention of the testator. But on perusing the arguments of the counsel, it is difficult to resist the conclusion that, on principle, the only question was, or would have been between the complainants and the residuary devisees and legatees. If the complainant was not entitled, the intermediate rents and profits passed under the residuary clause; and moreover, that the heir at law would be held by this Court to be a trustee for carrying into effect the purposes of the will, if such declaration were necessary. The language of this will is—"Should my niece outlive my son, then all my property, both real and personal, to be given," &c. It is no violence to declare, that this is substantially a residuary disposition. As is said by Lord Hardwicke in 3 Atk. 400, "there are no particular words required to pass the estate, but any words that show the intention of the testator are sufficient." I think the intention manifest enough to dispose of all the residue of the testator's estate at that time. But the result would be the same by adopting the construction of the Court in *Brailsford v. Heyward*, 2 Des. p. 33. "The whole property, lands, negroes &c. being blended and united together, and given to the respective devisees under certain limitations, the profits as naturally follow and belong to such devisees, as the shadow follows the substance."

The estate is "given to her and her children, if she leaves any at her death." Where there is a bequest of personalty to "A and her children," the general rule is that A. has the absolute estate. *Shearman v. Angel*, Bail. Eq. 351, [23 Am. Dec. 166]. But the rule is different, as is said by the Court in *Johnson v. Johnson*, McM. Eq. 347, where the provisions of the will "show an intention of giving, in remainder, to the children living at her death," and in such case, would restrict the mother to a life estate. Such seems to the Court the intention exhibited in this will, and it can hardly be regarded as an argument against this construction, that in the event of Mary Dougherty's death without children, the remainder would be undisposed of. It is quite clear, as has been intimated, that the testator's scheme is rather limited. He did not affect to exercise his power over his estate beyond a certain period, and in reference to certain objects. If his niece had died the day after the testator, the son's interest would have been absolute in the whole estate, and the provision for his annuity would have been simply superfluous.

*The bequest of freedom to old Tenah, Clarissa and her children is void, by the provisions of the Act of 1841. Ordinarily, the effect of this would be, that Tenah and Clarissa and her children would fall into the residuum, and pass to Mary Dougherty, by the clause which the Court has construed to be residuary. The rule is stated by Sir William Grant, in *Leake v. Robinson*, 2 Merivale, 392. But the terms of the Act of 1841 are too positive to admit of this construction, and the policy of the law cannot be mistaken. "Every donee or trustee, holding under such bequest, gift or conveyance," (declares the Act) "shall be liable to deliver up such slave or slaves, or held to account for their value, for the benefit of the distributees, or next of kin, of the person making such bequest, gift or conveyance." The negroes included in this clause, must be delivered up to the complainant.

The four slaves bequeathed to Mary Dougherty for life, and at her death to be left free, &c., are affected by the same principle, so far as the bequest violates the law of 1841. But the life estate of Mary Dougherty is not thereby impaired.—A gift over, which is void, cannot defeat a vested interest previously given.²

It is ordered and decreed that the slaves, old Tenah, and Clarissa and her children, Anna, Sarah, Thomas, Louisa, and John, be delivered up to the complainant—that the rents and profits of the real estate of the testator be paid to the executors, to be by them held and applied to the fulfillment of the purposes of the will, as herein declared and established; and that the parties have leave to apply, from time to time, at the foot of this decree, for such further order as may be deemed necessary—costs to be paid out of the assets of the testator's estate.

The complainants appealed, on the following grounds:

1. That the testator made no disposition of the bulk of his real and personal estate, except in the event of his niece (Ann Dougherty) outliving complainant, and, in that event, and that event only, bequeathed and devised the same to her, and therefore the fee or estate therein devolved in the meantime, and until the happening of the contingency, on the complainant, as testator's only child, heir at law and distributee.

2. That even admitting that the testator did not die intestate, as to any portion of his estate, the law will imply an estate in the heir at law, in preference to a stranger or even a niece, and the Chancellor, it is respectfully submitted, should have decreed accordingly.

3. That it is manifest from the language of testator's will, that of an illiterate man, inops consilii, that he intended only a con-

² *Bease v. Burgh*, 2 Beavan 221, Lord Langdale, *M. R. Ring v. Hardwicke*, do. 352.

tingent estate to his niece, leaving the inter-

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mediate es*ate or income, to devolve or enure to the benefit of his only son and child, and heir at law.

4. That even admitting that the testator intended to exclude and has excluded his son from the intermediate income, and the same is to accumulate until the contingency contemplated by the will shall be determined, yet the executors have no right to intermeddle with or receive the rents and profits of the real estate, and the real estate, and the right to receive its rents and profits, will at least devolve immediately on the complainant, as testator's heir at law, in trust for the party beneficially entitled.

5. That his Honor should have ordered the executors to account generally, especially for the rents of real estate, and wages of negroes.

6. That the decree was, in other respects, contrary to Law and Equity.

Yeadon & M'Beth, for the complainants.

Petigru & Lesesne, for the defendants.

JOHNSTON, Ch., delivered the opinion of the Court.

We concur that this case is decided by the cases of *Gibson v. Montfort*, 1 Ves. Sr. 485, *Genery v. Fitzgerald*, Jac. 468, and *Ackus v. Phipps*, 9 Blig. New Parl. Rep. 430.

In *Genery v. Fitzgerald*, Lord Eldon says, "the general principles are these: when personal estate is given to A. at 21, that will carry the intermediate interest. If the testator gives his estate, black acre, at a future period, that will not carry the intermediate rents and profits. But where he mixes up real and personal estate in the same clause, the question must be whether he does not show an intention that the same rule shall operate on both." "Here," proceeds his lordship, "the property was partly real, partly personal, and partly of such a description that the testator does not seem to have known whether it was real or personal. He does not by his will create any trust, but makes a legal devise and bequest of the whole together. Then is not the weight of authority in favor of the proposition—that when real and personal estate are given in this way, the intermediate profits of both must go together."

The inference arising from the combination of realty and personalty, in the same testamentary disposition, is that the testator, in this case, intended his niece to have the intermediate rents of the realty, in exclusion of his son; and this evidence of intention is strengthened by the expression of another intention, exactly harmonizing with it, to wit: that the son should have no more out of his estate, than an annuity of \$700. This, although insufficient to exclude the son without giving the property over to another,

certainly helps to a more enlarged construction of the clause, in favor of the niece; and enables us to determine, with more con-

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fidence, that that clause extends to the intermediate profits, and gives them away from the son.

It is ordered that the decree be affirmed, and the appeal dismissed.

The whole Court concurred.

Decree affirmed.

2 Strob. Eq. 69

W. J. McFEELY and Wife v. JAMES GADSDEN, Executor, et al.

(Charleston. Jan. and Feb. Term, 1848.)

[Wills \hookrightarrow 733.]

Where testator left property to his three children, a daughter and two sons, "to be kept together, undivided, under the sole supervision of his executors," for the purpose of educating them, until they should "either marry, or attain the age of twenty-one years;" upon a bill being filed by the daughter (who had married,) and her husband, the Court held that the whole fund was chargeable with the education of each child, but that complainants were entitled to their proportion of the surplus, to be annually accounted for to them.

[Ed. Note.—Cited in *Beard v. Jones*, 45 S. C. 107, 22 S. E. 748.

For other cases, see Wills, Cent. Dig. § 1825; Dec. Dig. \hookrightarrow 733.]

Before Dunkin, Ch., at Charleston, ———
Sittings, 1847.

His Honor states the case as made by bill and answer in the following decree:

Dunkin, Ch. Thomas Wilkes Seabrook, the testator, died in Florida, leaving in force his will, dated 29th April, 1835. At the time of the execution of his will, and at his death, his estate consisted of a tract of land in Florida, containing some 210 acres, and forty-four negroes. He left a widow, (who subsequently removed to South Carolina, and married the defendant, James L. Rose,) and three children, to wit: a daughter and two sons.

His will directs that, after payment of his debts, his "real as well as personal estate should be equally divided between his beloved wife, Mary Martha Seabrook, his daughter Honoria Wilkes Seabrook, and his two sons, Allston and Whitmarsh Henry Seabrook, and the gift of the same I do hereby confirm to them. But I desire and hereby wish it to be distinctly understood by my executors hereinafter named, that should my daughter Honoria Wilkes Seabrook, marry and die without issue, that her proportion of my real estate shall revert back to my two sons, Allston and Whitmarsh Henry Seabrook, and be equally divided between them." After appointing the defendant, James Gadsden, and the late John A. Cuthbert, his executors, the testator proceeds:—"And I do hereby enjoin it, most earnestly, upon the said executors, to give my three children a

first rate education; and for the purpose of effecting the purpose aforesaid, I desire that my executors shall be the guardians of my

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three children, *and their proportion of my real and personal property shall be kept together and undivided, under the sole and entire supervision and direction of my executors, until they shall either marry or attain the age of twenty-one years.

The proportion of the widow has been some time since delivered to her. The daughter Honoria Wilkes, recently intermarried with the complainant W. J. McFeely, and the prayer of the bill is, that her share of her father's estate may be delivered to them, in severalty. The defendant submits whether, under the last clause of the testator's will, the share or proportion of the children must not be kept together until they are educated.

There can be no doubt that both the widow and children took vested interests under the first disposing clause of this will. This directs that, after the payment of his debts, the testator's estate should be equally divided between them, "and the gift of the same he thereby confirms to them." Contemplating that some division would be made before his children were educated, the testator then expresses his deep solicitude on that subject, enjoins on his executors to give them "a first rate education," and endeavors to secure to them the means of accomplishing his purpose. If he had supposed that the income of each child's share would be sufficient, it was only necessary to appoint his friends testamentary guardians of his children. The direction to keep their proportion together was simply superfluous and nugatory; but the children were of different ages. The expense of education for each would be different at different periods, the eldest making large requisitions on the fund—the youngest nothing perhaps. The expense of the eldest, for some years, exceeding far the interest of any one share, while at the same time, the expense of the younger children would fall below it. To adopt the language of Chancellor Harper, in *Ellerbe v. Ellerbe*, Speers' Eq. R. 341, [40 Am. Dec. 623,] "the allowance for education must depend on circumstances and exigencies. If, as in the case of *Whilden v. Whilden*, [Riley, Eq. 205,] a testator leaves a fund for the support of a large family, of whom one is an infant, one a boy at school, one at college, you would not give an equal allowance for the support of each of these. The inquiry would be, what is reasonable and competent in the situation of each."

But as this is a common fund, great inequality would exist if the elder, after drawing three-fourths of the income for some years, should then, at majority or marriage, withdraw one-third of the capital, and leave a diminished income to meet the increasing

expenses of education of those who followed. To prevent this—to secure to each child a first rate education, by charging an ample fund with the expense of it, seems to the Court the natural and obvious purpose of the testator in the direction which he gives,

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"to keep their proportion together, undivided, under the sole supervision of his executors."

It does not follow that the complainant is entitled to no share of the income in the meantime. On the contrary, the fund belongs to the children, charged with the expenses of education. What is required for that purpose, must be annually appropriated by the executor and he must account to the complainant for his proportion of the surplus.

No objection is interposed by the executor to rendering an account of his transactions. He seeks the inquiry.

It is ordered and decreed that it be referred to one of the Masters to take an account of the defendant's management as executor of Thomas W. Seabrook deceased and that he report thereon. It is further ordered, that the Master have leave to report any special matter, and that parties be at liberty to apply at the foot of this decree, for such further order as may, from time to time, become necessary. Costs to be paid out of the assets of the estate.

The complainants appealed from the decree of the Chancellor, and respectfully submitted that the same was erroneous, and ought to be modified.

1. Because the true construction of the testator's will is, that the complainants are entitled to possession of the legacy given to his daughter Honoria, on her marriage.

2. Because, under the construction adopted by the Chancellor, the adult or married children might be deprived of all benefit from the estate, until all the younger children attain twenty-one, or marry.

3. Because the shares of the minor children are ample for their education; and there is no necessity for interfering with the rule of law, which construes the periods for division to be the time at which the first of the class attain the age fixed for distribution.

4. Because the decree is, in other respects, erroneous.

Memminger, for the complainants.

Hayne, contra.

DARGAN, Ch. In this case the Court concurs with the views of the Chancellor who presided at the trial of the case, for the reasons expressed in his decree.

The decree is therefore affirmed, and the appeal is dismissed.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

Decree affirmed.

2 Strob. Eq. *72

*SAMUEL GASQUE v. WILLIAM F. SMALL.

(Charleston. Jan. and Feb. Term, 1848.)

[*Specific Performance* ⇨53.]

The Court refused to decree the specific performance of an agreement for the purchase of land, where the value was grossly inadequate to the price, although fraud could not be inferred.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 167; Dec. Dig. ⇨53.]

[*Specific Performance* ⇨49.]

The inadequacy of price which will prevent the Court from enforcing specific performance, ought to be palpably disproportioned to the real and market value of the property, so as to constitute a hard, unreasonable and unconscionable contract.

[Ed. Note.—Cited in *Holley v. Anness*, 41 S. C. 355, 19 S. E. 646; *Coley v. Coley*, 94 S. C. 387, 77 S. E. 49.

For other cases, see *Specific Performance*, Cent. Dig. § 151; Dec. Dig. ⇨49.]

[*Specific Performance* ⇨49.]

The Court is not bound to decree a specific performance in every case where it will not set aside the contract, nor to set aside every contract that it will not specifically perform.

[Ed. Note.—Cited in *Davis v. McDuffie*, 18 S. C. 501.

For other cases, see *Specific Performance*, Cent. Dig. § 151; Dec. Dig. ⇨49.]

Before Johnston, Ch., at Georgetown, 1847.

Johnston, Ch. This is a bill for the specific execution of a contract for the sale of a tract of land.

The plaintiff, Gasque, being indebted by two judgments, the first of which was for about \$——, and owned by Thomas N. Gadsden; and the second and junior for about \$——, owned by the Bank of Georgetown; and being, in fact, utterly insolvent, some time in the summer of 1846 advertised for sale his plantation of about 1400 acres of land, lying on great Pee Dee, with the ferry thereto belonging, called Godfrey's Ferry. By the advertisement, persons disposed to purchase were invited to confer with Gasque, the proprietor, who lived on the premises, or with his agent, Samuel Kirton, who resided in Georgetown. It appears that Kirton was responsible, as indorser of Gasque, on the note upon which the judgment of the Bank of Georgetown had been obtained. Sometime in September, 1846, the defendant Small, then recently of age, and who lived in or near Georgetown, and at a distance from the premises to be sold, called on Kirton for information as to the qualities and value of the land. Kirton made very encouraging representations of both; and gave it as his opinion that the body of land was very valuable, that the ferry was worth \$500 per annum, and that the place would afford a good stand for a store; but as he was not informed of the price set by Gasque on the premises, he advised Small to go up with him in order to confer with Gasque, and to inspect the prem-

ises. Kirton owned a line of stages running from Georgetown to Godfrey's Ferry; and shortly afterwards, by Kirton's invitation, Small went up with him by this conveyance to Gasque's. After a very cursory examination of a part of the premises, near the dwelling house, Small professed himself satisfied with the property, and with the price, which was \$5,000. He said he did not wish to examine the premises further, having had a

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description from one *Harral, who formerly resided there. But he wished to consult his friends before closing the bargain, particularly his former guardian, Mr. Atkinson, who it appears still had his property in his hands, and transacted business for him. On their way home, they accidentally met Mr. Atkinson, near Georgetown, who being consulted, said he was very little acquainted with the country about Godfrey's; and Small then stated that he would come to a conclusion in a day or two. By the terms proposed, \$1,000 were to be paid by the purchaser to Gasque, and \$4000 to the Bank, upon titles being made. And as to the titles, Kirton, who was examined, says that he told Small that Gasque's title was good; but to put the matter on the surest footing, it was agreed that titles should be made by the Sheriff.

In the interval taken by Small for reflection, Kirton, by his request, consulted the officers of the Bank, and obtained their promise to indulge Small for so much of the purchase money as was to be paid to the Bank; but the promise was indefinite, or if any time was limited, the witness forgot it. Small having made up his mind, informed Kirton of that fact; upon which Kirton proposed that they should make a memorandum, in writing, of the contract, to be forwarded to Gasque, his principal; and accordingly, the following was executed on the 28th of September, 1846:

"A memorandum of agreement, between Samuel Gasque, of one part, and W. F. Small, of the other part:

"Said Samuel Gasque agrees to sell to W. F. Small the plantation and ferry known as Godfrey's Ferry, on Pee Dee, Marion District, with adjoining lands on both sides of the river, and to give him a Sheriff's title; on the following condition: that W. F. Small, when the title is executed, is to pay said Gasque one thousand dollars in cash; to pay to the Bank of Georgetown, S. C., four thousand dollars; which is to be in full for said purchase."

(Signed)

Sam'l. Gasque,
per Sam'l. Kirton.

28th September, 1846." W. F. Small."

About three weeks afterwards, Small addressed the following note to Kirton, declining the purchase:

"Dear Sir,—I have been advised best to let Godfrey's ferry alone; thanking you for

the trouble that you were about to undergo on my account: you can get another purchaser.

Yours, with respect,

(Signed) W. F. Small."

21st. Oct. 1846."

Measures were immediately taken to put matters in that condition that he could be compelled to complete the purchase. A levy was made (of the Bank's execution, I suppose,) on the land, by the Sheriff of Marion, and it was exposed to sale. There was considerable competition among the bidders, but

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*Kirton, acting as the agent of the Bank, bid it off at \$1500: and by their pleadings, a tender is made on behalf of the plaintiff and the Bank, to give the defendant a good and unincumbered title, either by directing the Sheriff to convey immediately to him, or by taking the Sheriff's title to the Bank, and superadding the Bank's conveyance. I understand the tender to be, that the title shall be good and sufficient, and clear of all incumbrances.

The question is, whether Small shall be compelled to take such a title, and complete the purchase.

He objects: that a hard and unconscionable bargain has been imposed on him; that advantage has been taken of his youth and inexperience by crafty men, who induced him to purchase by highly colored representations, amounting to misrepresentations and fraud; that the land is for the most part of little value, and sickly; and that a small portion of it is productive; that the ferry brings not more than one-third of the income represented; and that as for a store, the neighborhood, on both sides of the river, is too poor to afford customers; and that on one side access is debarred by Lynch's creek, which running within four miles of the place, cuts off all beyond.

The evidence is, that the land is not estimated to be worth what he promised to give for it, though it abounds in rich beds of marl, which, if properly applied, must make it very valuable. Portions of the arable land have produced excellent crops, though these portions are quite limited. There is great diversity of opinion among the witnesses as to the real value of the place. There has never been a store on the premises, though Gasque was, at the time of the contract, erecting one; and whether one would do a profitable business or not is conjectural; no clear evidence was exhibited as to the value of the ferry. But what must govern me in this case, is, that Small, although very young and inexperienced, is proved to have ordinary capacity, and to have acted for himself. He opened the treaty, and having full opportunity for examination and deliberation, decided upon his own judgment. Kirton says, that what has been attributed to him as representation, was given by way of opin-

ion, and was so understood; and he still retains the opinions expressed. He states that he requested Small to protract his examination, and to judge for himself; but that he replied he had seen enough, with what Haral had told him, (upon whom he depended) to satisfy him of the value of the property.

It appears to me that these circumstances are decisive. If any other person of unquestionable capacity and judgment had made this contract, I suppose his obligation to fulfil it would not be disputed. But Small had legal capacity, and that is always coupled

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with legal obligation. It is true, there *was* no comparison, according to the testimony, between his capacity and that of those with whom he contracted. Mr. Coachman says he was no match for them, and I think there is no doubt of it. But equality of intellect is not necessary to the validity of bargains; if it were, very few indeed could stand. But all the witnesses attributed to Small a legal capacity to contract; and having that, his contracts must be binding.

It is said, however, that this is a hard bargain, and should not be enforced. I do not think it reflects much credit on Kirton and Gasque; and if I had the official right, I am not wanting in inclination to refuse its enforcement; but I can lay hold of no principle or authority upon which to found such a decision. It is admitted, that there is a clear distinction between enforcing and rescinding a contract. A Court of Equity may, in many cases, refuse to enforce a bargain, while at the same time it may not be authorized to rescind. When the circumstances are not sufficiently strong to justify an active interposition to set aside the contract, they may yet be of such force as to induce the Court to refrain from enforcing it; in which case it will leave the parties where it found them, without interposing for either. The Court is said to have a discretion in such cases. But the discretion is not the discretion of the Judge, but belongs to the former; it is not a personal, but an official discretion; as is said in *White v. Damon*, 7 Ves. 33, "giving a specific performance is matter of discretion, but that is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it judicial."

There was no fiduciary relation between the parties—no relation of confidence—there is not proof amounting to undue influence. The parties acted at arms length each for himself, and upon his own judgment. The inadequacy of value in the property, as compared with the price, is not clearly made out; and if inadequacy were established, is not so gross as to infer fraud. I must, therefore, reluctantly leave this young man to the bargain he has made. I cannot shield him from it without establishing a precedent, tending to shake the sanctity and validity of contracts in general, than which there is

not an evil more pernicious to society or more to be shunned by judicial tribunals.

I shall refer it to the Commissioner to inquire and report whether, by either of the methods proposed in the pleadings, a good and sufficient title clear of incumbrances can be made to the defendant Small. If it becomes necessary, the Commissioner is authorized to have a survey made, and if there be any portion of the land encumbered by an outstanding title, let it be designated in the plat, and in the Commissioner's report; and let the Commissioner report upon evidence, whether the part thus encumbered

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formed an essential consideration in the purchase, so as to enable the Court to decide whether the contract may or may not be enforced by allowing compensation. And it is so ordered.

If either party should object to the Commissioner's acting, on the ground of his official connexion with the Bank, upon giving notice to the other party, application may be made to either of the Chancellors, at Chambers, to substitute a special referee in his place. And it is so ordered.

Final decree reserved till the coming in of the report.

The defendant, Small, appealed from the decision of his Honor the Chancellor, and moved to reverse it, on the following grounds, viz:

1st. Because the real value of the land in question, was so greatly disproportioned to the price contracted to be paid for it, coupled with the gross misrepresentations of the complainant's agent, Kirton, in relation to its value, as to amount to conclusive evidence that fraud and undue influence had been practised on this defendant, in procuring his signature to the agreement; therefore complainant is not entitled to the aid of this Court in enforcing its specific execution, but should be remitted to his remedy at law.

2d. That the agreement was void for want of mutuality, inasmuch as there never was a period from its execution to the present time, when it was in complainant's power to procure even a Sheriff's title to the land, and the only way in which he proposes to procure one now, is through the agency of another, who is not a party to the agreement.

3d. Because the Bank of Georgetown has no interest whatever in the matter in controversy; on the contrary, its position in the present suit does not arise out of any interest which it has in the agreement in question, or otherwise, but is merely that of a volunteer, and upon whom no decree, which this Court can make in the matter, will be binding.

4. Because this defendant submits, that he ought not to be compelled to accept a title from the Bank of Georgetown, who is not only a stranger to the agreement in question, but whose rights, if it have any in the mat-

ter, accrued long subsequently to its execution, and against whom this defendant never had a remedy for its violation, either at Law or in Equity.

Munro, for appellant.

CALDWELL, Ch., delivered the opinion of the Court.

The question in this case, is whether, under the circumstances, the disproportion between the real value of the land, (which the plaintiff, by his agent, agreed to sell to the defendant,) to the price to be paid for it, is a sufficient ground to refuse the specific performance of the contract. There is a material difference between a party who seeks to

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rescind and *one who seeks to enforce an agreement, as it requires much stronger evidence to effect the former, than will be sufficient to enable the defendant to resist the latter; and in applying either of the remedies, an important distinction must be observed between executory and executed contracts. It seems, from what is said by all elementary writers on this subject, that the specific performance of agreements is not an absolute right in the party, but a question of sound discretion in the Court; not that the exercise of this discretion is either arbitrary or capricious, but is, like all other judicial powers, dependent upon principle and precedent.

Where there is a plain and adequate remedy at law on a contract, the Court of Equity will not enforce a specific execution of it. And there are certain qualities that every contract must possess before it can come within the class of cases entitled to this extraordinary remedy: "generally it may be stated," says Justice Story, "that a Court of Equity will decree specific performance when the contract is in writing, is certain and fair in all its parts, and is for an adequate consideration, and is capable of being performed, and not otherwise;" and therefore if any of these essential ingredients be wanting, relief would not be granted: and he strengthens and illustrates the proposition by saying, "the Court will not decree specific performance in cases of fraud, or of hard and unconscionable bargains, or where the decree would produce injustice, or compel the party to an illegal act, or where the performance has become impossible, and generally not in cases where it would be inequitable under all the circumstances."¹ There is no difficulty in cases where one is induced to give an unreasonable price for an estate, by the fraud or gross misrepresentation of the vendor, or by an industrious concealment of a defect in the property, as equity will not only not compel the purchaser to perform the contract, but will at his instance rescind it; and Mr. Sugden adds, "when these circumstances

¹ 2 Story E. J. S. 769.

do not appear, but the estate is a grossly inadequate consideration for the purchase money, equity will not relieve either party."²

"More inadequacy of price," says Mr. Maddock, "unless it amounts to what is termed gross inadequacy, is not a ground for annulling an agreement, although executory, if the same appears to have been fairly entered into, and understood by the parties, and capable of being specifically performed; still less does such inadequacy form a ground for rescinding an agreement executed; but under such circumstances the Court will not decree a specific performance of an executory agreement."³

But this principle does not depend for its support solely upon elementary authors, as it has been repeatedly recognized and sanctioned by the highest judicial authority. It is a

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*very ancient doctrine of this Court, that a contract which carries an equity to have it decreed in specie, ought to be without all objection. And we find several cases, as early as the time of Lord Harcourt, decided agreeably to the maxim, that equity will not carry hard or unreasonable agreements into execution: and a short time before that, in the case of the Marquis of Normandy and Lord Berkley, Lord Sommershed held that the Court would not carry agreements into execution unless the contract was reasonable and fair in every particular, because they cannot mitigate damages upon the circumstances of the case as a jury may do, but must decree the whole contract to be performed.

In *Young v. Clark*, Lord Macclesfield dismissed the bill brought for a specific performance of articles, as they appeared to him to be unreasonable and shameful, although there was no direct fraud proved. In *Thompson v. Hurcourt* the bill for the specific performance of a contract for stock, was dismissed, and the decree afterwards was affirmed in Parliament, on the ground of the great inequality of the agreement, to pay £9200 for that which was not worth more than £1000 at the time of performance: this was considered a hard case, though fairly made without fraud, surprise or ignorance. In 1726 the same doctrine was held in *Squire v. Baker*, when the Court refused to carry into execution an unreasonable agreement, but decreed that it be delivered to the party for whose benefit it was designed, that he might have an opportunity to make the most of it at law. Lord Talbot reasserted the distinction between rescinding the contract, and refusing the specific performance of it, in *Savage v. Taylor*, and left the plaintiff to pursue his remedy at law.⁴

Lord Hardwicke repeatedly recognized and

applied this principle in several cases during his long administration of Chancery; he held that in a case of a hard bargain that was executory only, the constant rule of the Court was not to carry it into execution; in another case he says, "nothing is more established in this Court than that any agreement of this kind ought to be certain, fair, and just in all its parts; if any of these ingredients are wanting in the case, this Court will not decree a specific performance; for it is in the discretion of the Court, whether they will decree a specific performance, because otherwise a decree might be made which would tend to the ruin of one party."⁵ He reiterated these principles in *Joyne v. Statham*, the *City of London v. Nash*, and of *Underwood v. Hitchcox*, and expressly ruled, in *Faine v. Brown*, that without the other circumstances, "the hardship alone of losing half of the purchase money," if the contract were carried into execution, was sufficient to determine the discretion of the Court not to interfere, but to leave them to law. These two last cases were decided sole-

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ly upon *the ground that inadequacy of price is sufficient to prevent the specific performance of an agreement to sell land.

In *Heathcote & others v. Paignon*, 2 Bro. C. C. 167, the Master of the Rolls extended the doctrine of inadequacy so far as to set aside a contract solely on that ground, and his decision, on an appeal to the Chancellor, Lord Thurlow, was affirmed: although this decision may now be questioned, yet it indicates the great weight that inadequacy of price had in such cases, which certainly would have been much greater in resisting an application for the specific performance of such an agreement, than in rescinding it. A written agreement, in *Day v. Newman*, 2 Cox's Cases in Chan. 77, was the subject of a bill for specific performance, and a cross bill for the rescission of the contract. Lord Alvanly dismissed both bills. The agreement was entered into for the purchase of an estate, at a price represented on the one hand, of the value of 9 or £10,000, and on the other, of only £5000. The amount agreed upon was for £6000, and £14,000 at the death of a person 65 years old, making it a case of a contract for the purchase of an estate for £20,000 that was not worth more than £10,000; and although there was no circumstance of fraud or surprise, the Master of the Rolls thought that he ought not to decree a specific performance; yet as no advantage was taken, of necessity he was not warranted to decree the vendor to deliver up the contract: this case was therefore made to turn upon the question of the inadequacy of price alone, independent of any other fact.⁶

⁵ 2 Ves. 304, 1750.

⁶ Vide *Underhill v. Horwood*, 10 Ves. 209. *Gilson v. Jayes*, 6 Ves. 274. *Lukey v. O'Donnell*, 2 Sch. & Lef. 471 and 488.

² Sugden on Vendors, 189.

³ 1 Mad. Ch. 267.

⁴ 1736.

The case of *White v. Damon*, cited in the Circuit decree, is one of a peculiar class, a purchase made at auction, which cannot be put on the same grounds as private agreements, and Lord Rosslyn dismissed the bill for specific performance, merely on account of the inadequate price given for the estate, viz: £1120, and it was worth £2000; and on a rehearing before Lord Eldon, although the decree was affirmed upon a different ground, yet he said that he was inclined to say that a sale by auction, where there is no fraud, surprise, &c. cannot be set aside for a mere inadequacy of value.

In the case of *Mortlock v. Buller*, 10 Ves. 29, the question of inadequacy was again discussed, but Lord Eldon distinctly reserved his opinion upon that point, although he had held that the rule was perfectly settled and not to be questioned, that the Court is not bound to decree a specific performance in every case where it will not set aside the contract, nor to set aside every contract that it will not specifically perform. In addition to these cases, it was held in *Osgood v. Franklin*, 2 John. C. R. 23, by Chancellor Kent, that there is a very important distinction, which runs through all the cases, between ordering a contract to be rescinded and decreeing a specific performance.—Though inadequacy of price is not a ground for decreeing an agreement to be delivered

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up or a rule rescinded (unless its grossness amount to fraud) yet it may be sufficient for the Court to refuse to enforce performance.

And in the subsequent case of *Seymour v. Delaney*, 6 John. C. R. 222, and others, the same learned Chancellor, after an elaborate examination of the English cases, came to the conclusion that inadequacy of price may, of itself, and without fraud or other ingredient, be sufficient to stay the application of the power of this Court, to enforce a specific performance of a private contract to sell land, although it may be true, as the Lord Chief Baron said in *Griffith v. Spratley*, 1 Bro. C. C. 179, that mere inadequacy of price, independent of other circumstances, is not sufficient to set aside the transaction. A similar view had been expressed by the Court of Equity, in this State, as early as 1792, in the case of *Clitherall v. Ogilvie*, 1 Des. E. R. 250, where they refused to decree the specific performance of a contract for the sale of land, on the ground of the inadequacy of price, although there was no direct fraud or imposition in the purchaser, but the vendor was a very young man who had just arrived of age, was ignorant of the real value of his land, and had acted precipitately in concluding the contract, on being urged by the purchaser. Doubts have been occasionally cast upon this doctrine, and a few decisions may be found that apparently conflict with it, but the principle appears to have

been established by a strong current of well considered cases, and the circumstances of the case under consideration, instead of constituting it an exception, would seem to strengthen the defendant's claim to its application.⁷

In addition to the difficulty of applying mere abstract propositions to the practical purposes of life and the administration of justice, it has not been very distinctly defined what degree of inadequacy must exist, to authorize the Court to refuse the specific performance of an agreement.

The inadequacy must not be measured by grains, but it ought to be palpably disproportioned to the real and market value of the property, so as to constitute a hard, unreasonable, and unconscionable contract; but it is not necessary that it should be so gross as to excite an exclamation or to indicate imposition, oppression or fraud, for this would be sufficient ground not only for refusing a specific performance but for rescinding the contract.

Whatever wisdom there was in the civil law, prescribing a definite amount as the standard of a valid contract, that the price must exceed half the value of the property purchased, it may be doubted whether the application of such a rule, to set aside agreements, would not be inexpedient and impracticable in any, but especially in a commercial community; it has never been adopted either in England or in this country, but it may well be considered as a fair standard of inadequacy. Although in *Muskeen v. Cole*, cited in 2 Mad. Chan. 267, 1733, where the sale was

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for one-half of the worth of the estate, the Court relieved against the contract, and in another very early case the Chancellor expressed a wish that the rule of the civil law should be adopted, I can find no other case in which it has been applied in rescinding agreements; but from the established principles of equity, and from the case quoted, there is no doubt that such inadequacy is sufficient to resist the specific performance of an executory contract. In this case the defendant was a young man who had arrived at the age of twenty-one years a few weeks before the agreement, and who, from the want of sagacity, advice, and experience, was unable to cope with the other party in the contract: it is manifest that his examination of the land was utterly insufficient to enable him to ascertain its value, which from the glowing description of the advantages that he might derive from the purchase, was no doubt greatly exaggerated in his imagination, and although the case does not come within the class of contracts with young heirs who are entitled to expectations, yet it approximates the principle in practice. The

⁷ *White v. Damon*, 7 Ves. 36. *Burrows v. Lock*, 10 Ves. 470. *Newland on Con.* Chap. 4th Cox Repts.

weight of evidence establishes such inadequacy of value, that the most liberal calculation cannot resist the conclusion that Kirton (who, although apparently only the agent of Gasque, is the real party in interest,) bargained the land to the defendant for double its value, and probably for three or four times as much as it would bring if sold at auction. Under all the circumstances this Court will not enforce the specific performance of the contract, but will leave the plaintiff to pursue his remedy at law, where he may recover damages more adequate to

the injury he has sustained, than the price he seeks to receive here is proportioned to the value of the property.^s

It is therefore ordered and decreed that the circuit decree be reversed, and the plaintiff's bill be dismissed.

DUNKIN, Ch., and DARGAN, Ch., concurred.

JOHNSTON, Ch., absent at the hearing.

Decree reversed.

^s 2 Chan. Cas. 127.

CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA,
APRIL (EXTRA) TERM, 1848.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN.
" J. J. CALDWELL,
" G. W. DARGAN.

2 Strob. Eq. *83

*JANE E. O'DANIEL v. THOMAS LEHRE,
Late Ordinary, et al.

(Charleston. April Term, 1848.)

[*Executors and Administrators* ⚡443.]

Where an executor is sued before the time allowed for ascertaining the debts of the estate, and objects to the prematurity of the suit, his defence is in the nature of a dilatory plea; and the long established practice in this Court, is not to dismiss the bill, but to order the plaintiff to pay the costs, and that the bill stand over. At the expiration of the time allowed to the defendant, the Court proceeds to the hearing.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1826; Dec. Dig. ⚡443.]

Before Dunkin, Ch., at Charleston, June Sittings, 1847.

His Honor's decree states all that is necessary to the understanding of the preliminary point, which was alone decided in this case.

Dunkin, Ch. Mrs. Susan S. Wilson, the testatrix, died in December, 1846. This bill was filed on the 15th May, 1847, about five months after the decease of the testatrix. Mr. Lehre, the former Ordinary, had taken possession of the estate under the provisions of the Act of 1839, and was about to administer the same under the authority of the Act of December, 1846. His term of office expired, and Dr. Mendenhall succeeded to his rights and duties, among which was the administration of Mrs. Wilson's estate.

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*The cause was heard on the bill and answers. On the part of the complainant it was insisted that under a proper construction of the Act of 1846, the duty of the Ordinary

had ceased; that the Court ought to direct him to transfer the assets and funds to one of the Masters, by whom the same should be administered according to the provisions of the will, and under the direction of the Court.

I think that under the Act of December, 1846, the rights and duties of an executor are cast upon the Ordinary. It is not certain that he would be exempt from suit for nine months; but this seems to me a necessary protection. Twelve months are allowed to creditors to present their demands; and no legal representative ought to consent, much less be compelled by the Court, to distribute an estate among legatees, until time has been allowed for those who have higher claims, to interpose their objections.

According to the answer of Dr. Mendenhall, which stands for proof, he has done all that could be required of him, and the complainant has no ground on which to ask for the aid or interference of this Court. The time may come when she will be entitled to implead the defendant on the matters set forth in the bill.

This is the first occasion on which it has become necessary to give construction to the Act of 1846. There were circumstances, too, arising out of the change in the incumbents of the Ordinary's Office, which may have induced the complainant to suppose that the precautionary authority of this Court could be properly invoked.

It is ordered and decreed, That the bill be dismissed, but without costs and without prejudice.

The plaintiff appealed, on the following grounds:

1. Because, at the time of filing the bill,

the estate in which complainant had an interest as legatee was in jeopardy, and it was essential to the final enjoyment of her interest under the will of her testatrix that this Court should interfere to preserve the property, inasmuch as it was then and now uncertain whether the securities of either, and if of either, which of the two Ordinaries were responsible for the management of the estate of the testatrix Susan S. Wilson.

2. Because any legatee or party interested in an estate, is justified to implead minors whose rights are in jeopardy, so as to commit their interest to the supervision of this Court.

3. Because the amount of the estate in this case so greatly exceeded the security given by either of the Ordinaries, that any party interested in the preservation of the estate was authorized to seek the aid of this Court in securing the fund, which were neither in the hands of the executor having the confidence of the testatrix, nor an administrator having given adequate securities.

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*4. Because, by the report of the Master, the debt of the estate did not exceed a thousand dollars, and as all the parties interested in the estate, except the creditors, were before the Court, and their interests could be effectually protected by this Court before distribution, there was no further use for either of the Ordinaries, and the estate ought to have been brought into Court.

5. Because the Act of 1846 and that of 1839 being made in *pari materia*, should be construed together, and from the scope and character of their provisions, the action of the Ordinary was founded on the necessity of protecting a derelict estate, and as soon as all the parties in interest were before the Court, no necessity for further action by the Ordinary existed, and he should have been decreed to deliver up the estate.

6. Because if the Ordinary was in fact an executor named by the testatrix, there was a perfect right in complainant to file her bill to secure the support provided for her, and to bring the infants into Court for protection and support, and the fact that a support was provided for them is proof of the necessity of the bill. Creditors cannot sue until after nine months for debt, but legatees can at any time seek the protection of the Court.

7. Because all the facts and circumstances of the case entitled the complainant to have her bill entertained, and her right under the will of Mrs. Wilson sustained.

Benj. F. Hunt, for the complainant.

Potign & Lesesne, for defendant Lehre.

Bailey & Brewster, for defendant Mendenhall.

JOHNSTON, Ch., delivered the opinion of the Court.

Where an executor is sued before the time allowed for ascertaining the debts of the es-

tate, and objects to the prematurity of the suit, his defence is in the nature of a dilatory plea; and the long established practice in this Court is, not to dismiss the bill, but to order the plaintiff to pay the costs, and that the bill stand over. At the expiration of the time allowed to the defendant, the Court proceeds to the hearing.

There may be cases, but this is not one of them, when the bill may be entertained, even before the time usually limited; as when it is filed to preserve the estate from imminent danger of loss.

We are of opinion that the decree in this case should have been that the plaintiff pay the costs of the bill; and that the cause stand over: and it is so ordered.

The cause is also remanded to the Circuit Court. The year allowed to executors having now expired, the Court, when the cause comes again before it, may proceed to order the vesting of a sum sufficient to secure the plaintiff's annuity, or whatever may appear proper under the pleadings. It may

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*be proper, too, if desired, to direct an enquiry whether the plaintiff's specific legacies have been delivered to her. But we will not anticipate what decree may be required in the case.

It is ordered, that the Circuit decree be reformed agreeably to this opinion.

CALDWELL, Ch., and DARGAN, Ch., concurred.

Decree reformed.

2 Strob. Eq. 86

Ex parte A. M. ROBERT, N. CRUGER, E. A. CRUGER, and EDWARD RILEY.

(Charleston. April Term, 1848.)

[Trusts \hookrightarrow 161.]

The Court will not substitute a trustee resident in a foreign jurisdiction, without security for the faithful discharge of his duties: and the sureties must be persons amenable to the jurisdiction of the Court.

[Ed. Note.—Cited in *Cochran v. Fillans*, 20 S. C. 245; *Carr v. Bredenberg*, 50 S. C. 486, 27 S. E. 925.

For other cases, see Trusts, Cent. Dig. § 210; Dec. Dig. \hookrightarrow 161.]

Before Dargan, Ch., at Charleston, 1847.

Petition states that John Robert, by his will, bearing date 21st December, 1833, among other things devised as follows: "All the rest and residue of my estate, not otherwise disposed of by this instrument, it is my will and desire shall be equally divided between my two sons Lucius C. Robert and John H. Robert, and my three daughters, Cornelia E. Riley, Sarah Isabella A. Robert and Elizabeth A. Robert, under such limitation as will be hereafter limited and declared. The property, both real and personal, to which my

daughters Cornelia E. Riley, Sarah Isabella A. Robert, and Elizabeth A. Robert, may be severally entitled under this instrument, I give to my executor and executrix hereinafter named, in trust for the sole and separate use of my said daughters severally, during life, and at the death of either of them, then the portion of such child to descend to such child or children as she may leave alive at the time of her death, under such limitations as will be hereafter expressed as above mentioned. But if either of them should die without leaving child or children, at the time of her death, then her proportion shall revert to my estate, and be equally divided among my children, under such limitations as will be hereafter expressed and declared as above mentioned."

That testator, not long after the date of his said will, departed this life, and Mrs. Robert, party to this petition, with William H. Robert, proved the will and paid all the debts. That Sarah Isabella Ann Robert died unmarried, intestate, and without issue, and her proportion was divided as directed by the

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*will. That all the testator's other children attained the age of twenty-one years, and received their several specific and residuary legacies. That Elizabeth Anne, party to this petition, was married with Nicholas Cruger, (party,) and the said Anne M. Robert has in possession 54 negroes, which have been assigned to Elizabeth Anne as her share of the residuary legacy of her father, and of the portion of Sarah Isabella, also money arising from the income of the property, and a plantation purchased in her name. And that all the estate of Elizabeth Anne, before her marriage with Nicholas Cruger, was conveyed in trust for the uses of the said marriage; but the said settlement is without a trustee, inasmuch as none has accepted the said trust.

Petitioners, Cruger and wife, are desirous of having her fortune removed to Georgia, and the purchase money of her land, and the money in the hands of the executrix, laid out in the purchase of a plantation in Georgia, called Greenwood, in Baker county, to be conveyed in trust for the uses of the marriage settlement. Pray that Mrs. Robert may be removed and Edward Riley appointed in her place, trustee under the will, and also trustee under the marriage settlement.

The report of James W. Gray, one of the Masters of the Court of Chancery for Charleston District.

By an order of this Honorable Court, it was referred to me to ascertain whether Dr. Edward Riley is a proper person to be appointed a trustee under the will of John H. Robert, and under the marriage settlement of Mr. and Mrs. Cruger, in place of Mrs. Ann Maner Robert, the surviving executrix of the said will, and of Reverend Peyton L. Wade, who has not accepted the trust of the marriage settlement, and whether it is ex-

pedient to permit the fortune of Mrs. Cruger to be transferred to the State of Georgia, and her money invested in the purchase of Greenwood plantation.

I have examined witnesses to the point, and find that Dr. Riley is a substantial planter residing in Glynn county, and a person very fit to be entrusted with the care of Mrs. Cruger's fortune. That Mr. Cruger is a resident of Apalachicola, and that his marriage was with the consent of the family, and that the removal of Mrs. Cruger and her fortune was necessarily connected in the minds of the parties with the marriage, as an incident to the proposed union. That the purchase of Greenwood plantation, in Baker county, in the State of Georgia, is beneficial to the trust estate, if it can be accomplished; and that the proposed trustee is the proper person to ascertain and be answerable for the title, and that the trusts of the will and the settlement be protected by the laws of Georgia; and that the prayer of the petitioner ought to be granted.

James W. Gray,
13th December, 1847. Master in Equity.

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*His Honor Chancellor Dargan refused to substitute Dr. Riley as trustee, and the petitioners appealed, and renewed their application in the Court of Appeals.

Petigru and Lesesne, Solicitors.

DUNKIN, Ch., delivered the opinion of the Court.

The petition sets forth, among other things, that the petitioner, Ann Maner Robert, the executrix of John H. Robert, deceased, has in possession about fifty-four negroes which have been heretofore assigned to her co-petitioner, Elizabeth Ann, as her share of the residuary legacy of the testator, and of the portion of her deceased sister, Sarah Isabella, and that she has also money arising from the income of her property, and a plantation purchased for her, and in her name, out of the said income.

The order proposed, and which the Chancellor declined to grant, was that Dr. Edward Riley, a citizen of Glynn County, in the State of Georgia, should be admitted a trustee under the will of John H. Robert, for the petitioner, Elizabeth Ann, and that Mrs. Ann Maner Robert transfer the property in her hands, as trustee under the will, to the said Edward Riley, and be discharged.

The decretal order does not state the grounds on which the Chancellor declined to execute the authority vested in the Court, by the Act of 1795, but they may be well understood from the written argument, submitted by the Solicitors, on behalf of the petitioners.

The only inquiry for this Court, is whether, under the circumstances of the case, the discretion of the Chancellor was properly exercised in refusing the motion.

The argument affirms that Dr. Riley being

a gentleman of high respectability, it was the duty of the Court to have made the substitution, although he was resident in a foreign jurisdiction, and without requiring security for the faithful discharge of his duties.

The case of *Meinertzhagen v. Davis*, recently decided by Mr. Vice Chancellor Knight Bruce, (a report of which was furnished by the Counsel,) shows very clearly the general understanding and practice, in Westminster Hall, on this subject. It is not too much to say that the general correctness of Mr. Lee's position was not questioned, to wit: that "nothing could be more contrary to the principles of the Court of Chancery, in England, than the appointment of Americans, or any other foreigners, to execute and be responsible for the execution of the trusts of an English settlement." In that case the settlement was executed in England, but the trustees, by the terms of the deed, had authority to substitute other trustees in their place, and they had also authority to invest the lands in American securities. The hus-

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band was a citizen of *Virginia, temporarily a resident in London. He, with his family, afterwards returned to Virginia, and the original trustees, under the power vested in them by the deed, substituted three Virginia gentlemen in their place, transferred the funds to one of them then in London, and the funds were afterwards invested in securities, in America, in the name of the three substituted trustees. So stringent is the English rule on the subject, that eminent counsel advised that the original trustees were responsible, because they had substituted foreigners in their place, and Mr. Knight Bruce remarks, "it is impossible to say that doubts and difficulties on the subject, might not reasonably have suggested themselves to any counsel, or to any adviser." The original trustees, in England, had been advised to demand an indemnity from the husband. "This difficulty was suggested," says the Vice Chancellor—"the question whether the power of appointing new trustees had been properly exercised—a difficulty, at which, I repeat, I do not at all wonder, presenting itself to the minds of the advisers of the trustees, and that circumstance produced this paper" of indemnity. After commenting on the special clauses of the settlement, and particularly the authority to invest in American securities, and the condition of the parties, the Vice Chancellor adopted the conclusion that "whatever might be the general rule, the course pursued was, under the circumstances, proper and justifiable."

It is difficult to say that the motion to reverse the order of the Circuit Court derives support from this opinion of Vice Chancellor Knight Bruce. But it is valuable as presenting a more full and satisfactory discussion

of the subject, in Westminster Hall, than is found in other decided cases. But a single expression of Lord Thurlow, in the Attorney General v. The City of London, 1 Ves. Jr. 243, indicates the great objection to the appointment of a foreign trustee. It is said he was moved by the consideration that, if the Court were to look to the execution of the trust, it ought to have persons bound to discharge those trusts liable to its jurisdiction. In that case it was proposed to appoint, or rather to continue, a foreign corporation as trustees.

It was successfully objected that William and Mary College, in Virginia, which had hitherto disbursed the trust funds, was, by the establishment of American Independence, emancipated from the control of the Court of Chancery in England. Although Mr. Mansfield and Mr. Mitford represented that the "application of the money could be managed as well now as before, by accounts properly transmitted to the officer of the Court." But, said the Lord Chancellor, "where is the scire facias in case of misbehaviour?"

Ex parte Mayrant, MS. 1831, Columbia, [Rich. Eq. Cas. 1,] is an authority of the

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Appeal Court for *saying that a trustee, appointed or substituted by the Court under the Act of 1795, and receiving funds, is bound to account to this Court.

It is true that the condition of our country has rendered it both expedient and necessary to introduce some modification in the administrative practice of the Court, while the proximity of so many independent States, the facility of intercourse, as well as the migratory disposition of their inhabitants, demand some relaxation of the rules; it is rendered less objectionable in consequence of the identity of language, and homogeneous character of the laws and institutions of the several States. An administrator is sometimes appointed, who is resident in North Carolina or Georgia, although the domicile of the intestate and all the assets may be within the jurisdiction of the Courts of South Carolina—so, I suppose, under special circumstances, a guardian may be appointed who is a non-resident; but in all such cases, the Court of Ordinary, or the Court of Equity, as the case may be, requires security to be given that the foreign administrator, or guardian, will discharge his duty faithfully, and the sureties must be persons amenable to the jurisdiction of the Court.

The refusal of the Chancellor to substitute a trustee resident in Georgia, without security, presents no ground for the revision of his judgment; should it be deemed desirable to have an order for the appointment of the trustee, on giving security for the faithful discharge of his duties, parties may take a reference to one of the Masters, for the purpose of ascertaining the value of the

property, and the amount of the bond to be taken by the Master.

The whole Court concurred.
Appeal dismissed.

2 Strob. Eq. 90

BANK OF THE STATE OF SO. CA. v. JAMES ROSE et al.

(Charleston. April Term, 1848.)

[*Equity* ⚡404.]

Where the defendant refused to attend a reference, at which, by the exhibition of his accounts, and the production of his evidence, he might have made a better case for himself, he cannot afterwards object to the irregularity of the mode in which the Master obtained his testimony, or that the evidence on which he made up his accounts, was inferior to that which he himself had withheld.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 891; Dec. Dig. ⚡404.]

[*Appeal and Error* ⚡715.]

Facts which appellant should have made to appear before the Master on the reference, are not admissible on a hearing of exceptions to the Master's report on the Circuit—much less are they admissible on an appeal from the Circuit decree on the exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2964; Dec. Dig. ⚡715.]

[*Equity* ⚡399.]

A commission may issue at any time after the filing of the bill, to examine witnesses upon matters of litigation that are anticipated in the progress of the trial.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 865; Dec. Dig. ⚡399.]

[*Equity* ⚡410.]

It is too late after the Master's report has been confirmed, to object that it was made up on evidence taken under a commission directed to, and executed by, only one Commissioner.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 914; Dec. Dig. ⚡410.]

[*Account* ⚡1.]

[One who has been subjected by a decree to a contingent and probable liability may be compelled to account with a view to that liability when the state of things shall happen upon which it may depend.]

[Ed. Note.—For other cases, see *Account*, Cent. Dig. § 1; Dec. Dig. ⚡1.]

[*Equity* ⚡355.]

[Where a commission to examine witnesses is directed to and executed by one commissioner, and is objected to on that ground, the objection will prevail.]

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 739; Dec. Dig. ⚡355.]

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*Before Dunkin, Ch., at Charleston, July Sittings, 1847.

The premises in question (the new Theatre,) had been ordered by the Court to be sold in satisfaction of a debt to secure the payment of which they had been mortgaged to the Bank of the State of South Carolina. J. B. Campbell one of the defendants, had previously become the purchaser of the said premises at Sheriff's sale, under an execution

junior to the mortgage. He was held liable for the rents and profits which had accrued since the demand of possession, should the sale not satisfy the debt, and J. W. Gray, Esqr. one of the Masters, was ordered to take an account of the same.

The following is an extract of that part of the Master's report to which Mr. Campbell excepted.

"I further report that I have taken the account of the rents of the Theatre received by James B. Campbell, Esq. from the filing of the bill, 18th November, 1843, to the sale, 25th March, 1847, and the particulars for the first three seasons, are derived from the testimony of W. C. Forbes, a witness examined under commission. In stating the particulars of the last season, for the want of any direct testimony, I have adopted the amount charged the previous year, and I find that there is now due, from the said James B. Campbell, the sum of \$3,335.31, as per Schedule B annexed. And in stating the account, I have charged interest on the yearly payments to Mr. Campbell.

"I further report, that Mr. Campbell objected to the references on the account as premature, and declined attending the references, and that the same ought not to be taken until now when the deficiency is, for the first time, ascertained, but I overruled the objection."

Schedule B.

1844. March. Rent received by James B. Campbell from filing of Bill		\$751.66
Interest to March, 1847, three years	\$157.83	
1845. March. Rent received to date..		766.08
Interest to March, 1847, two years	107.24	
1846. March. Rent received to date..		750.00
Interest to March, 1847, one year	52.50	
1847. March 25. Rents received to date		750.00
Principal	\$3,017.74	
Interest	317.57	
Total		\$3,335.31

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*The defendant, James B. Campbell, excepted to so much of the report of the Master in this case, as refers to and states an account of the rents and profits of the Theatre received by this defendant.

1. Because the defendant was only liable to account for rents and profits, in case the mortgage debts should not be satisfied by the sale of the Theatre, and until such sale, and a report of the same, no account accrued, and until then, the Master had no more right or authority to take an account, than to inquire and take an account of this defendant's personal and private affairs, income and expenditure.

2. Because all the evidence upon which the account is reported, was taken by the Master ex-parte, without the authority of any

order of reference, and before the complainants had any right to such an order: and the report was made up and filed irregularly, and this defendant was never notified to attend the references before the Master, except one previous to the sale, which was before a final decree of foreclosure, and therefore "premature" and unauthorized, and the Master ought to have sustained the defendant's objection taken at the reference.

3. Because the account reported is incorrect in its statements of rents received and expenditures paid out for repairs, &c. For instance: the account charges the defendant with the sum of \$751.66 received for rents from Mr. Forbes, from the filing of the bill, to March, 1844, which is erroneous, and includes money paid by Mr. Forbes to defendant for a private debt, for money advanced and professional services, &c. due to defendant, to the amount of \$664.14, which should be deducted from the first named sum,—and in the two following seasons, (charged in the account at \$766.08 and at \$750.) there are also errors, made by charging defendant with cash received, which in fact, was paid in part, by sundry items of repairs, taxes, &c., and ought to be reduced so much as said items amount to, and the correct way of stating the account is avoided, and the error made, by first charging the defendant with the amount of cash actually received, and adding to it the amount of taxes and repairs, which in fact is equivalent to giving him no credit for the taxes and repairs.

4. Because, as to the last season, [1846 and '47.] the Master has charged an arbitrary sum, without pretending to have any evidence before him for the same, and in fact, if he had examined Mr. Forbes to this point, whose testimony he has reported as to part of the account, he would have shown that Mr. Forbes does not pretend to charge defendant with more than the sum of \$275, paid to him that season.

5. Because interest is improperly charged, and if charged at all, it should commence the 18th November, and not from March, and the account correctly stated will show that the

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*defendant has received and is properly chargeable from November 18th, 1843, to the sale in 1847, on account of rents, the sum of \$1878.68, or thereabouts, which he is entitled to reduce by the amounts paid by him for taxes, repairs, &c., and the balance he is liable for in cash, and ready to pay.

James B. Campbell, Defendant.

Dunkin, Ch. This cause was heard on exceptions to the Master's report, filed 25th June, 1847.

The first exception was that chiefly insisted on by the defendant. After an examination of the several decrees, the Court cannot perceive that the Master has erred in his judgment.

It is ordered and decreed that the several

exceptions be overruled, and that the report be confirmed.

Grounds of Appeal.

The defendant appealed from the decree of Chancellor Dunkin confirming the Master's report as to rents and profits.

1. Because the Chancellor, for the reasons therein stated, should have sustained the exceptions, and because the report is founded on evidence taken irregularly and upon no evidence at all, and so it appears upon the face of the report.

2. Because the report was made up and filed irregularly and without the notices or references required by the rules of Court.

James B. Campbell, Defendant.

DARGAN, Ch., delivered the opinion of the Court.

I cannot divest myself of an impression, that the defendant, James B. Campbell, has not had a full measure of justice in the account stated by the Commissioner against him; this impression is founded, however, upon his own *ex parte* representations, which have not been submitted in the proper manner to a judicial examination. From these (if they could be received) it would seem that he has been charged with more rents and profits, for the Theatre, than he has actually received, and has not been allowed disbursements for repairs, &c. It is to be regretted if the result of the case should be injustice to Mr. Campbell; but if parties in Court will peril their rights, by a course of procedure which should prove not to be in accordance with the rules of practice and pleadings, it cannot be a matter of just complaint, and the responsibility must rest upon themselves. It appears that the defendant, though advertised of the reference, did not exhibit his accounts and his evidence to the Master, but objected to his authority to hold a reference, and chose to rest his case on the validity of that objection. This constitutes the gravamen of his first and second exceptions to the Master's report, and are also grounds of appeal from the decree of the Chancellor confirming that report.

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*In the first decree, in 1844, which has been pronounced in this cause, the appellant was held liable for the rents and profits of the Theatre, from the date of his purchase, in March 1842, and it was referred to the Master to take an account of the same. The Court of Appeals, at Jan'y. Term, 1846, modified this decree, but in a manner not affecting the merits of this question—"all the Court are of the opinion," (says Chancellor Dunkin in delivering the judgment of the Court of Appeals,) "that the accounts for rents and profits cannot be carried beyond the period when the demand was made, to wit: the 31st October, 1843. In this respect the decree is modified. In all other matters

the decree of the Circuit Court is affirmed, and the appeal dismissed." This decree, clearly, does not recall the order of reference, and neither does the subsequent circuit decree of Chancellor Johnston, have that effect. This last mentioned decree, after ordering the property mortgaged (to wit: the Theatre,) to be sold, by Mr. Gray, for cash, &c. and the proceeds applied to the debt secured by the mortgage proceeds to provide, "if there be any surplus, after paying the said demands, that the same be paid over to the said Campbell as the owner of the equity of redemption. But in case the purchase money do not suffice to pay off the said demands, then the rents and profits received by the said Campbell, since the demand of possession made on him, be applied to that purpose, and that Mr. Gray do take an account of the rents and profits for the benefit of the parties entitled to have the same so applied," &c.

This Court is of opinion that the decree is not inconsistent with, and does not modify, or mean to modify, the previous order of reference, which had in fact the sanction of the Court of Appeals, and that the order of reference was unrevoked and in full effect at the time that Mr. Gray summoned the defendant before him to account. It is true that Mr. Campbell could not have been called on to pay the amount found due by him, before a sale of the mortgaged property, but the decree had subjected him to a contingent and probable liability. The examination of his accounts, with a view to that liability, when the state of things should happen, on which it was to depend, is an entirely different matter.—There was a decree to that effect, and there was no inconsistency or irregularity in it. The commissioner then had authority to hold his reference. And as to the objection, that the appellant was never notified to attend but one reference, it appears that only one was ever held. The decree of the Chancellor was correct in overruling the first and second exceptions to the Master's report.

As to the facts stated and assumed in the third exception to the Master's report, they were not properly before the Chancellor, neither are they properly before this Court.—

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*They are facts that the defendant ought to have made to appear before the Master on the reference. But there he withheld all evidence and showing; assuming the position that there was no authority for the taking of the account.—On the matter of account, ordered to be referred, new facts or evidence, not before the Master, are not admissible on a hearing of exceptions to his report by the Chancellor. And much less are they admissible in this Court on an appeal from the decree of the Circuit Court upon the exceptions. It is objected to the account taken by the Master, because it was support-

ed only by the evidence of W. C. Forbes, a witness examined by commission, and the evidence is objected to, on two grounds. First, that the commission was issued before the decretal order of reference, and at a time when the Master was not authorized to hold a reference. But the rule of practice is, that a commission to examine witnesses may issue at any time after the filing of the bill, upon matters of litigation, that are anticipated in the progress of the trial.—And this is in substance the 19th Rule of Court. Any other rule than this, surely, would operate mischievously upon the rights of parties before the Court, particularly when witnesses are aged and infirm or transient. The second objection to this evidence is, that it was directed to and executed by one commissioner only. This would have been a fatal objection if taken at the proper time. If the defendant, who was duly notified, had attended the reference, and then made this objection, it would have prevailed. And if overruled it would on appeal have been corrected. The evidence, though irregular as to the form of the procedure by which it was taken, is yet that of a competent witness, and being admitted by the default of the defendant, it could not constitute a valid ground of exception to the Master's report.

It might as well be contended that a defendant with an order pro confesso against him, should, after final decree, question that decree, on the ground that there was irregularity in the manner of taking the evidence.

In regard to the 4th ground of exception, it may be remarked that the Master, as to the receipts of the last season, while the defendant had possession of the Theatre, acted on the presumption that the last had been as profitable as the preceding season. This was in the absence of better and positive testimony; this kind of testimony was resorted to, in consequence of the refusal of the defendant to account or make any exhibition. He had it in his power to explain, but did not explain, but utterly refusing to do so, said to the opposite party in effect, "go on and prove your case." And I do not think that after they have proved it by presumptive testimony, and the case has been tried and found against him, that it lies with him to

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say, you might have proved it *by better testimony, which it was in his power to produce.

This Court is of the opinion, that the defendant ought to have been charged with interest only from the 18th of November, instead of March, on the annual receipts of the rents and profits: but will not send the case back to the Master for the correction of an error in the calculation, which can so easily be corrected here. The difference in the interest account, will be eighty-one dollars; this is to be deducted from the amount reported to be due by the defendant, James B. Campbell, reducing his indebtedness to the

sum of three thousand two hundred and fifty-four dollars: the principal seems to bear interest from the first of March, 1847.

To this extent the decree is modified, in all other respects it is affirmed.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

Decree modified.

2 Strob. Eq. 96

THOMAS B. CHAPLIN v. EXECUTORS OF JENKINS et al.

(Charleston, April Term, 1848.)

[*Executors and Administrators* Ⓒ453, 511.]

Where the litigation was for the adjustment of the claims of different legatees, and there was no default on the part of the executors, the decree adjusting these claims, but making no order in relation to costs, is not final in fixing the executors with the costs; they may be afterwards adjusted under an order of the Court on a rule taken for that purpose.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1897, 2266; Dec. Dig. Ⓒ453, 511.]

[*Costs* Ⓒ60.]

Where various claims are made, some of which are allowed and some rejected, the rule that costs shall follow the event of the suit is inapplicable. In such case neither party is entitled to costs as of course, nor under the provisions of the Act. They can only be obtained by either party from the other under a special order of the Court.

[Ed. Note.—Cited in *Higginbottom v. Peyton*, 4 Rich. Eq. 316; *Cooke v. Poole*, 26 S. C. 325, 326, 2 S. E. 609.

For other cases, see *Costs*, Cent. Dig. § 271; Dec. Dig. Ⓒ60.]

Before Caldwell, Ch., at Charleston, February Sittings, 1847.

This case came up before Chancellor Johnston at Charleston, June, 1846, on the report of the Master, to whom the matters of account of the executors of the late Mrs. E. M. A. Jenkins had been referred at the previous term; and upon the coming in of this report, the Solicitor for the said Chas. Myers and Wm. Perry, executors, put in the following exceptions:

"1st. Because the Master charges the said executors with interest on the sums reported to be due as wages of the negroes of T. B. Chaplin, and the share of the crops of the Hickory Hill plantation previous to his marriage.

"2d. Because T. B. Chaplin is not entitled to receive the amount found to be due to Thomas B. Chaplin, until he shall have rendered his account with Saxby Chaplin as one

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of the *distributees of their sister, M. L. Chaplin, of whom he is administrator, but is only entitled to have a credit to the amount which may be now found due to him in the accounts hereafter to be made between him and his brother, Saxby Chaplin.

"3d. Because T. B. Chaplin having received all of the estate of his father, and having settled with the administrator of his said father for the rents and profits of his estate, should account to his brother for the share of the said Saxby in the income of his father's estate, as the same shall appear by the account of the same Benjamin Chaplin, administrator, from the death of his said father, until the election of the Hickory Hill plantation, made by the said Saxby; so that the true balance, as between the brothers, shall be ascertained, before the said T. B. Chaplin shall receive from the executors of Jenkins, funds which they would otherwise hold for the credit of the said Saxby."

After argument heard, his Honor Chancellor Johnston overruled the above exceptions, and made the following decree.

Johnston, Ch. "On hearing the Master's report in this case, and on motion of E. DeTreville, complainant's Solicitor, it is ordered that the said report be confirmed. It is further ordered and decreed, that the said Charles Myers and William Perry, executors of Mrs. E. M. A. Jenkins deceased, do pay over to the complainant, Thomas B. Chaplin, the sum of \$528.31, with interest on the sum of \$445.48, from the 16th. Feb. 1846, (which sum is reported to be due to the said Thomas B. Chaplin by the said executors) until the same is paid."

No appeal was taken from this decree; and the complainant's Solicitor, two months after the rising of the Court, and after the principal and interest of the indebtedness reported by the Master, and so decreed against the said executors, had been satisfied, issued an execution against the said executors for the taxed costs of the proceedings so had and determined against them, and which they had refused to pay. The execution was lodged in the Sheriff's office, but was never put into operation.

At the sitting of the Court of Equity in February, 1847, the Solicitor for the said Charles Myers and Wm. Perry, executors, presented a petition to His Honor Chancellor Caldwell, setting forth, at length, all the proceedings had in the progress of this case, from the filing of the bill in 1843 to the date of the said petition, and praying that all proceedings against the said executors, for costs, might be enjoined, and that an order might be made as to the direction of costs. On hearing the said petition read, and after argument, His Honor Chancellor Caldwell ordered the said petition to be referred to

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J. W. *Gray, Esq., one of the Masters of this Court, "to inquire and report upon the facts therein stated, and upon the bill of costs that should be taxed in the case of T. B. Chaplin v. Benjamin Chaplin, Senr. and Charles Myers and Wm. Perry, executors, et al., and that the execution heretofore issued for costs

in this case be henceforth enjoined until the further order and decree of this Court on the question of costs."

In pursuance of this order, the Master made his report, and therein submitted that the costs be equally divided between Thomas B. and Saxby Chaplin, and appended thereto a schedule of the costs. His Honor Chancellor Caldwell confirmed this report; and the complainant appealed, and moved to rescind the several orders, aforesaid, made by Chancellor Caldwell, in this case, at the sitting of the Court of Equity for Charleston, in February, 1847.

1. Because the decretal order, made by Chancellor Johnston at the sitting of the Court of Equity for Charleston, in June, 1846, after argument on exceptions to the Master's report in the above entitled case, was final, and ought not to have been opened again for new and further discussion.

2. Because the petition, ex-parte the executors of Jenkins, exhibited at the sitting of the Court of Equity for Charleston, in February, 1847, was not filed until some months after the making of said decree or final order of June, 1846; and professed to be an application for a re-hearing to determine a question of costs only.

3. Because the said petition being an application either for a bill of review or for a re-hearing, did not make out a case to entitle the petitioners to relief, or to induce the Court to open a case which had been maturely considered and solemnly decided.

4. Because it is contrary to the rules and practice of this Honorable Court, to grant a petition for the re-hearing of a case, after final decree, unless the application is founded upon error apparent in the decree itself, or upon new matter arising after the decree.

5. Because the application for a re-hearing of the above entitled case, if well founded, and within the rules, ought to have been made before the Chancellor who made the final decree or order in June, 1846.

E. DeTreville, for the motion.
Northrop, contra.

E. DeTreville, for appellant. The decretal order of June, 1846, was final. It was acquiesced in by defendants. No appeal was taken—no motion to amend or modify was made. The decretal order is made final by the words of the A. A. 1808—7 Stat. 304. "The orders and decrees of the said Judges in all cases wherein appeals shall not be

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*made to the Courts of Appeals, shall have the same effect with decrees sanctioned by the Court of Appeals," and is illustrated by *Harrison v. Jenkins*, cited in *Price, Ex'or, v. Nesbit*, 1 Hill Ch. Rep. 459. The decretal order of June, 1846, was not intended to be interlocutory, because it was made when all proceedings which could be had touching the case, had been ended and closed, and was

made upon exceptions to the Master's final report of matters of account, and was not an order quod computet, but a decree declaring a certain sum of money due, and ordering the same to be paid. It was such a decretal order as might have been enforced by execution;¹ cited *Travis v. Waters*, 1 John. Ch. Rep. 85. If the decretal order of June, 1846, is final, then all subsequent action upon it was extra-judicial. In *Price, Ex'or, v. Nesbit*, the Court said that "if the decree could be regarded as final, it never could be again examined, either by appeal, by a bill of review, or a re-hearing," and in [*Manigault v. Deas' Adm'r*], Bail. Eq. 284, the same proposition is asserted.² He argued that the object of the petition filed in Jan'y, 1847, was a re-hearing on a question of costs alone. That the petition could not be regarded in the nature of an appeal—lapse of time had taken away the right of appeal. The decree of 1846 had passed and been entered, and no notice of appeal ever given. Petition was not filed until some months after the decretal order had passed, and after execution had been taken out. This petition must be regarded either in the nature of an application for a re-hearing or for a bill of review. But it is a rule in Equity, as well settled by our own decisions as by the English practice, that the Court will not entertain an appeal or re-hearing for costs only.³ Nor will the Court grant a bill of review unless upon the ground of new matter discovered,⁴ and which could not have been used in the first instance; quoted *Burns v. Adm'r. of Poag* 3 Des. 616, and in this last case the court refused to open a case after a full and final decree. The petition at bar does not allege new matter or error, but professes to be an application for a re-hearing on the subject of costs alone. Bills of review have never been favored in this State, and are only granted in England on account of the expense attending an appeal.

As to the purport and effect of the decretal order of 1846. The decree gave no direction as to costs—prima facie costs follow a decree. In the absence of an order, the complainant is always entitled to his costs, if the bill has been sustained. "Costs necessarily follow a decree for principal and interest." The order of 1846 was that executors must pay principal and interest. The rule is that an executor must pay costs de bonis testatoris, si non de bonis propriis, when his defence is groundless and litigious, and this rule was adopted in *Black v. Blakeley*, 2 McCord Ch. Rep. 9. In the case at bar

¹ McCord's Rep. 32.

² Bail. Eq. 98.

³ *Windham v. Kent*, 1 Brown's Ch. Rep. 140. *Lewis v. Wilson*, 1 McC. Ch. Rep. 210. *Harper's Eq.* 260. 1 Hill's Ch. Rep. 92. *Cobman and Sarrell*, 2 Cox. 206, and *Mad. Ch.* 537.

⁴ 1 McCord's Ch. Rep. 22, and note p. 30. *Bail. Eq.* 284. 3 Atkyns, 34 and 35.

the exceptions taken by executors to Master's report were groundless and litigious, and were consequently overruled.⁵

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*DUNKIN, Ch., delivered the opinion of the Court.

The grounds of appeal are founded on a misapprehension of the decree of June, 1846. The exceptions of the executors were overruled and the report of the Master was confirmed, but no order was made in relation to the costs.

In *Muse v. Peay*, Dudl. Eq. R. 236, the Court say, "the Act of Assembly, providing that when no direction is given with respect to costs, they shall follow the event of the suit, can only be held to apply when the decree is wholly in favor of one or the other party; when, on one side, all the relief is given which is claimed, or on the other, the bill is dismissed." The Court then show that when various claims are made, some of which are allowed, and some rejected, the rule is inapplicable. The Act cannot be supposed to have intended that the party should pay the expense of litigating claims which he has successfully resisted. In such case neither party is entitled to costs as of course, or under the provisions of the Act. They can only be obtained by either party from the other under a special order of the Court on a rule taken for that purpose. This was the course adopted in *Muse v. Peay*, is in accordance with the practice, and should have been pursued in this case. The bill of costs amounted to three hundred and seventy-nine dollars, of which eight-one dollars were due to the register alone. It appears from the special report of the Master, made under the order of Chancellor Caldwell, that the litigation was for the adjustment of the relative rights of the two brothers, Thomas B. Chaplin and Saxby Chaplin, in the estates of their father Saxby Chaplin and of Mrs. Jenkins; that, in the language of the report, "the executors were always ready and willing to account, and nothing like default could be attributed to them." Under these circumstances the Chancellor ordered that the costs should be paid by Thomas B. Chaplin and Saxby Chaplin, and that the execution against the executors of Mrs. Jenkins should be stayed or set aside. All the grounds of appeal proceed, not on the allegation that the judgment of the Court was erroneous in relation to the costs, but that the decree of June, 1846, was final and conclusive in fixing the executors of Jenkins with the payment of the costs of the proceedings, and could only be opened by petition for re-hearing, or by bill of review.

For the reasons stated, this Court is of

⁵ Bail. Eq. 95, 2 Mad. Ch. 555, 1 Atkins. Rep. 467, 1 McCord Ch. Rep. 248, 2 Hill Ch. Rep. 377, Bail. Eq. 95.

opinion that such is not the effect of the decree of June, 1846, and that this appeal must be dismissed, and it is so ordered.

CALDWELL, Ch., and DARGAN, Ch., concurred.

Appeal dismissed.

2 Strob. Eq. *101

*EDWARDS et al. v. EDWARDS et al.

(Charleston, April Term, 1848.)

[*Deeds* ⇐120.]

The grant in the deed was to A, "his heirs and assigns forever," but should A die "without leaving issue of his body," then over, &c.—held that A took a fee simple, and not a fee conditional, at common law.

[Ed. Note.—Cited in *Ex parte Yown*, 17 S. C. 537; *Glenn v. Jamison*, 48 S. C. 319, 26 S. E. 677; *Jacobs v. Mutual Ins. Co. of Greenville*, 52 S. C. 119, 29 S. E. 533; *Clinkscales v. Clinkscales*, 91 S. C. 61, 74 S. E. 121; *Egan v. Touchberry*, 93 S. C. 572, 77 S. E. 706; *Smith v. Clinkscales*, 102 S. C. 248, 85 S. E. 1068.

For other cases, see *Deeds*, Cent. Dig. § 440; *Dec. Dig.* ⇐120.]

[*Equity* ⇐239.]

[Where there are several defendants to a bill in equity, a demurrer of the principal defendant admits the facts alleged only as between the complainants and himself. It furnishes no basis for a decree as between the co-defendants.]

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 494; *Dec. Dig.* ⇐239.]

Before Dunkin, Ch., at Charleston, July Sittings, 1847.

The bill was filed by some of the residuary devisees and heirs at law of Daniel Cannon, for partition of the southern moiety, or equal half part of a lot of land in Cannonsborough, and their title to it sufficiently appears by the Decree, copied below.

The executor and devisees of Wm. Doughty are parties defendants. The heirs of the remaindermen are also parties defendants. And the other residuary devisees and heirs at law of Daniel Cannon are defendants.

On the 14th January, 1848, his Honor filed the following decree, which sets forth such other matters as are necessary to be stated.

Dunkin, Ch. On the 3d of November, 1784, Daniel Cannon executed a deed, by which he conveyed to Wm. Cannon Doughty the southern moiety, or equal half part, and to Thomas Doughty, the northern moiety, or equal half part, of a lot of land in Cannonsborough. To hold "the southern moiety, or half part, to the said Wm. Cannon Doughty, and the northern moiety, or equal half part, to the said Thomas Doughty, their respective heirs and assigns forever; under and subject to this proviso, that if the said Wm. Cannon Doughty, or Thomas Doughty, should die without lawful issue of their bodies, then, their or either of their respective moieties, is hereby given and granted unto Martha Doughty, Mary Doughty and Rebecca Doughty,

ty. (daughters of the said William Doughty.) their heirs and assigns forever, as tenants in common and not as joint tenants." In 1816, Wm. Cannon Doughty conveyed in fee to his father, William Doughty, his moiety of the said lot, and afterwards, to wit, in 1836, departed this life without issue.

It is insisted on the part of the complainants, (who are some of the residuary devisees and heirs at law of Daniel Cannon, deceased,) that, on the death of Wm. Cannon Doughty without issue, the estate reverted to the grantor.

If the estate of Wm. Cannon Doughty was absolute, or if the limitation over be valid, the result is equally fatal to the claim of the complainants. But I think that both these points are definitely ruled in *Adams v. Chaplin*, 1 Hill's Eq. R. 265. It is true the cases are not precisely analogous; but the difference does not aid the complainants.

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That was an adjudication on a *will, in which the intention of the testator is much favored; and it was there necessary also to resort to the Act of 1824, to enlarge the estate of the first taker. The devise was to the testator's "son, John Chaplin, but if he should die without an heir lawfully begotten by him, then I desire that the said tract of land be given to my brother, William Chaplin." The testator died in 1776. John, the devisee, died in 1826, leaving no issue, and never having been married. The complainants claimed as heirs at law of William Chaplin, if the limitation should be held good, or that failing, as heirs at law of the testator, if the reversion was in him. It was held by the Court of Appeals, first, that the limitation over, being after an indefinite failure of issue, was too remote and void; secondly, that the devise took a fee simple absolute; "for the testator," say the Court, "has used words which in legal contemplation mean that the land should not go over to the remainderman only upon an indefinite failure of issue, and then that it should not revert to him. These words are equivalent to a grant of the fee to him, and as much import a fee simple as if he had used the words forever." The bill of the heir at law was dismissed, and the purchaser from the devisee declared entitled to a fee simple estate in the land. It is scarcely necessary to add that a deed is construed most strongly against the grantor, and that the terms are sufficiently comprehensive to express not only "the amplexness and greatness of the estate, but also the perdurableness of the same." In any view it would be very difficult to maintain that this was a fee conditional at common law. There is no express gift to the issue of the body, nor is there any reason for implying it. When an estate is devised to A generally, and for want of issue, remainder over to B, A shall take an estate tail by implication. Because as A had

only a life estate by the devise, and B could not take while there was issue of A, the intermediate interest would be undisposed of; the Court, therefore, implied an intention that A should so take that the property might be transmissible through him to his issue. The grant in this deed is not to A for life, or to A generally, but to A "his heirs and assigns forever." If he had died, leaving issue of his body, they could no more claim, *per formam doni*, than could the remainderman in such an event. In case of his intestacy it would be disposed of as any other estate of which he died seized in fee simple. Lord Coke says that where the gift is to the donee and to his heirs generally, subject to a condition that there should be heirs of his body, the person to whom an alienation was made would have a fee simple, and not merely a fee determinable, on failure of heirs of the body of the donee.¹

It is very strong, and not strictly warranted by the terms, to say, that the fee simple

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to William Cannon Doughty was *subject to the condition that there should be lawful issue of his body. The grant was ample and absolute; but it is provided that, in a certain event, the estate thus given to him, should be given and granted to another. This the law does not permit. But the donor, by the terms of the deed, has parted with his whole interest, and forever. The conveyance of Wm. Cannon Doughty to his father, vested a perfect title in the alienee, and the bill of the complainants must be dismissed, and it is so ordered and decreed.

The complainants appealed from the above decree, on the following grounds, viz:

1. Because the deed of gift of Daniel Cannon to Wm. C. Doughty created a fee conditional at common law, and, therefore, upon the death of Wm. C. Doughty without having been married, the estate reverted.

2. Because his Honor erred in concluding that the conveyance of Wm. C. Doughty to his father vested a perfect title in the alienee.

3. Because the decree is otherwise repugnant to Law and Equity.

H. Pinckney Walker, complainant's solicitor.

The defendants, Edward Harleston, Francis D. Quash, Sarah Quash, Susan Quash and Francis D. Quash, Jun. also appealed from the decree, upon the following ground:

Because the correct rule, as laid down by Lord Eldon, and adopted by this Court, is that "where a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a Court of Equity is entitled to make a decree between the defendants, and is bound to do so. And the rule was applicable, and should have been applied to this case, and the bill retained, and a decree

¹ 2 Fonbl. 56. 1 Inst. 385. Cited by Preston on Estates, 306.

made between co-defendants, in conformity with the opinion of his Honor the Chancellor, as expressed in the Circuit decree.²

J. B. Campbell, for appellants.

H. P. Walker—In support of his grounds of appeal, cited 2 Bl. Com. 210, Bacon's abridgement, Title Estate Tail, Co. Lyt. 10 and 206; 1 Preston on Estates, 475; 2 Preston on Estates, 289, 292, 4, 5, 302, 7, 8, 320, 346, 505, 7, 8; Idle v. Cook, Lo. Raymond, 1152; Agar v. Agar, 12 East, 259; and the Circuit decree of Chancellor DeSaussure, in Cave Johnston and wife v. Executors and Devisees of Wm. Doughty, deceased—being the construction this Court put upon the same deed in 1822, vide M. S. Charleston District. He particularly brought to the notice of the Court, the cases of Simpson v. Simpson, 4

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Bingham, 333, and Blesard v. Simpson, 3 Manning and Grainger, 930, and compared and contrasted the decisions in those cases, with that made in the case of Adams v. Chaplin, 1 Hill's Ch. R. 265.

Petigra, contra.

J. M. Walker, in reply.

DUNKIN, Ch., delivered the opinion of the Court.

If this question had arisen on a will and not on a deed, and were to be decided at Westminster Hall and not in South Carolina, there would be much authority to sustain the claim of the complainants. But the rule of law is to construe a deed most strongly against the grantor—and the policy of this country, the course, both of legislation and judicial decisions, has been to unfetter estates and declare the interest absolute in the first taker. It was not doubted in the argument, nor is it open to question, that the point made by the pleadings, and determined by the Circuit Court, was distinctly adjudicated in Adams v. Chaplin, [1 Hill, Eq. 265;] but it was strenuously pressed on the Court, that the decision in that case was not well founded in authority, and should be reviewed and reversed. Adams v. Chaplin was decided in 1833, and by the unanimous concurrence of a Court consisting of Justices Johnson, O'Neill and Earle. It has been repeatedly adverted to in subsequent decisions. The general principles are recognised in Bedon v. Bedon, 2 Bailey 246; and in Edwards v. Barksdale, 2 Hill, E. R. 199, the case itself is quoted, its authority recognised, and the principles there adjudicated re-affirmed. The Court is not aware that the authority of the case has ever been questioned in any subsequent decision—it is not a decision in relation to the practice of the Courts, but is, substantially and practically, a Rule of Property, and, after so long an acquiescence, the Court is indisposed to dis-

turb what has been settled, in the vain attempt to conform our decisions to artificial and technical rules, in the application of which the ablest jurists have differed, and continue to differ.

Some of the defendants have appealed, on the ground that the Court, having sustained the demurrer, should have made a final decree between the co-defendants. The authorities cited are inapplicable. The demurrer of the principal defendant admits the facts only as between the complainants and himself. As between the co-defendants, no case whatever was made "by the pleadings and the proofs."

The decree of the Circuit Court is affirmed, and the appeal dismissed.


The whole Court concurred.

Decree affirmed.

2 Strob. Eq. *105


*THOMAS PYE and Wife v. WILLIAM CARR.¹

(Charleston, April Term, 1848.)

[Parent and Child  8.]

Where defendant, instead of hiring out a female slave who had been given to his infant daughter, retained possession of her and treated her as his own; and after the daughter's marriage delivered to her and her husband five slaves, the issue of the said female—the Court allowed the expenses of supporting and rearing the young slaves customary in defendant's neighborhood, to be discounted against the value of the hire of all the slaves, for the time of his possession.

[Ed. Note.—Cited in Lewis v. Price, 3 Rich. Eq. 198.

For other cases, see Parent and Child, Cent. Dig. § 110; Dec. Dig.  8.]

Before Dunkin, Ch., at Walterborough, February Sittings, 1847.

The bill states that complainant, Thomas Pye, intermarried with Emeline M. E. daughter of Dr. Wm. Carr, the defendant, in the year 1844. That on the 10th of October, 1825, one Eliz. Dawson, by her bill of sale, duly executed, gave, granted and sold to complainant, Emeline M. E. Pye, then Emeline M. E. Carr, a certain female slave, named Sue, with her issue and increase, to her the said Emeline M. E. Carr, her heirs and assigns forever, and referred to said bill of sale, a copy whereof was filed. The bill further states, that the said Emeline M. E. Pye, being, at that time, an infant of tender years, her father, the defendant Wm. Carr, took the said slave, Sue, into his possession, and has kept possession of the same ever since, together with a large issue and increase thereof, a part of whom are named Molly, Sam, Phillis, Leah and infant, and used and worked the same as his own, and applied the proceeds of their labor to his

² 2 Sch. & Lef. 718, and 1 Richardson's Eq. Reports, 295.

¹ This case was decided at the January Term, but the Brief was not obtained in time to put it in its proper place.

individual use,—and that complainant, during all this time, being an infant of tender years, remained ignorant of her rights, and of the mode of asserting them, until her intermarriage with complainant, Thomas Pye.

Bill prays that defendant, William Carr, may set forth the names of all the slaves aforesaid; that he may be compelled to deliver up to complainants the same, and to account for the annual hire of all the said slaves, from the time they came into his possession.

The defendant admits the marriage of complainants: admits the execution of the bill of sale of Sue, by Eliz. Dawson, as set forth in the bill, but denies that said Eliz. Dawson ever made a gift or sale of said slave to complainant,—but that Eliz. Dawson, having considerably overdrawn her portion of the estate of her deceased husband, John Carr, he, the defendant, paid the appraised value of Sue, and had the bill of sale executed by Eliz. Dawson to his daughter, in order to protect her from the heavy claims

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then preferred against him. *The defendant admits that he took possession of Sue in the year 1825, and the following are her issue: Molly, born in 1826; Sam, born two years and a half after Molly; and Phillis, born some time after; Lea, born in 1837, and Sue died in 1838; Molly also had an infant in 1844. These, defendant states, are all the issue of Sue, and he avers that he has delivered all of them to complainants. The answer further states, that he supported and educated the complainant up to the time of her marriage with Thomas Pye.

Defendant denies his liability to any account for the hire of Sue and her children, inasmuch as the entire income arising from their labor was not sufficient for the support and education of complainant, after deducting expenses, and the bringing up of five negroes, in so short a time; and submits that the bill of sale of 10th October, 1825, should be regarded as a deed of trust from Eliz. Dawson to this defendant, reserving the right to him to employ the clear income arising from the hire or labor of the slave Sue, to and for the sole benefit of complainant.

After hearing the case, his Honor, Chancellor Johnston, pronounced the following decree:

Johnston, Ch. On hearing the bill and answer in this case, and it being admitted that the slaves were delivered before bill filed, on motion of De Treville & Perry, for complainants, it is ordered that it be referred to the commissioner to inquire and report, what is the value of the hire of the negroes named in the bill and answer; for how much of it the defendant, Dr. Carr, ought to be made responsible; and how much money was expended by the defendant for the support and education of the complainant's wife during her minority, and for the support and rear-

ing of the young negroes, the issue of the negroe Sue: and whether the said Dr. Carr was of sufficient substance and means to support and educate his said daughter, without employing, for that purpose, the wages and profits of the said negroes. It is further ordered, that all the equities of the case be reserved until the coming in of the report.

Commissioner's Report.

The Commissioner respectfully submits the following report of his investigations, under the decretal order of this honorable Court.

First. As to what is the value of the hire of the negroes named in the bill and answer: for how much of it the defendant, Dr. Carr, ought to be made responsible, and, how much money was expended by the defendant for the support and rearing of the young negroes, the issue of the negro Sue, he reports:

That he has been attended by the solicitors of the parties at references from time to

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time down to the 10th instant, and *from the testimony before him, it appears the woman Sue came into the possession of Dr. Carr about Oct. 10th, 1825, and that she died in the summer of 1838. Her child Molly, was born early in 1826; Sam, the latter part of 1828, or beginning of 1829; in 1831 she had another child, that died in the month; her daughter Phillis was born about the year 1833; Leah in the summer of 1837; and Sue's daughter, Molly, had a child, Abram, born on the 30th of October, 1844. These negroes, with the exception of Sue, who died, were delivered by the defendant to the complainants, before the bill in this case was filed. The woman Sue, and her children, as they grew up, were employed generally about the farm.

There was no evidence of what the defendant actually made by their services, such as accounts of proceeds of crops; nor sufficient evidence on which to base a calculation of what he made, by comparing the amount of property he had when he took them in charge, and that which he had when he delivered them to complainants. Nor does it appear that there were any lands of complainant on which these slaves could be employed in making crops.

It appears that the defendant treated these negroes as if they were his own property; that he was a prudent and humane master, and attended well to his business.

It appears further, that it is the custom, in the defendant's neighborhood, of persons who have the management of estates consisting of negroes only, to hire them out (near to defendant's residence) to the highest bidder; or, if no offer be made for their services on account of the condition of the negroes themselves, then, to him who will maintain them at the lowest rate—the owners paying taxes and doctor's bills.

If this plan were adopted, as the rule by which to charge in this case, it would appear from the testimony of Daniel Utsey, Dr. William Murray, William Warner, and Rhode, that the defendant would not owe any thing to the complainants for the services of the negroes in question.

Another class of witnesses, Jacob Whetsell, David Appleby, Alfred Appleby, and Dr. M. T. Appleby, who lived in the neighborhood, and knew the negroes, but most of whom were neither in the habit of hiring out, or paying hire for negroes themselves, gave their opinions as to what the services of the negroes is worth: The result of a calculation based on this testimony would be,

For Sue's wages, 11 years at \$54.....	\$594	
Molly " per schedule	131½	
Sam " do.	44	
		\$769½
From which take estimate of taxes..	\$ 60 07	
food for small ne-		
groes	360 75	
clothing of do....	74 00	

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*Dr. Carr's medical attendance, as estimated by Dr. Murray.....	360 00	
		\$854½

Would leave due defendant..... \$ 85

But should it be considered that Dr. Carr, acting in this case as a trustee, is not entitled to any thing for his personal services,—then after deducting the \$360 above allowed, a balance of two hundred and seventy-five dollars would be found due the complainants.

Evidence was given as to the amount expended for clothing and educating the defendant, Mrs. Pye; but, as the Commissioner considers the evidence of Dr. Carr's ability, being sufficient to shew that he could support and educate his daughter without resorting to the income of the slave in question for that purpose, he does not think it necessary to report the amount.

All of which is respectfully submitted,

A. Campbell, Com'r. in Equity.

February 16th, 1847.

The complainants excepted to the commissioner's report on the following grounds:

1st. Because the Commissioner has taken the lowest estimate for the hire of the negroes, or the testimony of a single witness against the unimpeached evidence of three witnesses.

2d. Because the Commissioner should have allowed the complainants interest on the hire of the negroes from the end of each year until they were surrendered.

3d. Because the Commissioner has allowed the defendant the sum of \$360 for medical services, said to have been rendered by him to the negroes while in his possession, though there was no evidence that the negroes required his services, or that he rendered any to them if they did.

4th. Because the Commissioner has charged for the expense of feeding and clothing

the negroes, Sam and Phillis, until they were ten years of age, and has refused to allow the complainants any thing for their hire, until the one was 12, and the other 13 years of age.

5th. Because the sum of \$9.75 per annum allowed by the Commissioner for feeding the young negroes, is extravagant and not founded upon testimony taken on the reference, February 16th, 1847.

De Treville & Perry, complainants' solicitors.

Upon the exceptions to the Commissioner's report, his Honor, Chancellor Dunkin, decreed as follows:

Dunkin, Ch. The complainant, Mrs. Pye, is the daughter of the defendant. In No-

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vember, 1825, when she was an infant, about eight months old, a negro woman, by name Sue, was given to her. She was between thirty and thirty-five years of age. She died in the summer of 1838, having, in the interval, given birth to five children, all of whom, except one who died soon after its birth, were raised by the defendant, and together with another infant, the child of Sue's eldest daughter, were delivered over to the complainants some time after their marriage, which took place in November, 1844; this bill was filed for the delivery of Sue, with her issue, to the complainants, and for an account of the hire. It was proved that Sue was dead, and it was admitted that before the bill was filed, all her issue, consisting of five negroes, had been delivered to complainants.

In February, 1846, a reference of inquiry was directed to the Commissioner, reserving all the equities of the parties.—Among other things, the Commissioner was directed to inquire "what was the value of the hire of the negroes, and for how much of it the defendant ought to be made responsible;" and also, "how much was expended for the support and rearing of the young negroes, the issue of the negro Sue," &c. A very minute and satisfactory statement has been submitted by the Commissioner, as the result of his investigation. Several exceptions were filed on the part of complainants, which it may not, perhaps, be necessary to consider in detail. The general inquiry is, whether the defendant has or has not discharged his duty; and, if not, to what extent, and in what manner should he be held responsible?

As has been elsewhere said, every case of this character, must, from necessity, depend on its own circumstances.—The defendant was a physician, practising in St. George's, Dorchester. When this negro woman was given to his daughter, what was his duty? On the part of the complainants, it was insisted in the argument that it was his duty to have hired her out, each year, to the highest bidder, and not having done so, he must account for the hire, with annual interest.

What would have been the result in Nov. 1844, if this course had been adopted, must necessarily be a matter of speculation. The Court gathers from the testimony that Sue was the gift of Mrs. Pye's grandmother; without some special direction to that effect, it could hardly be supposed that the donor intended this course to be adopted. In the absence of testimony it would rather be presumed, that it was left to the discretion of the father, to pursue such plan as might be deemed most for the interest of his child. Has the result approved the judicious exercise of this discretion? In November, 1825, Dr. Carr received one negro woman, who died in 1838. In 1844 he delivered to his daughter five negroes, one of whom had just given birth to her first child. According to the testimony, Dr. Carr "is a prudent and

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hu*mane master, and these negroes were treated as if they were his own property." The Commissioner adds, "it appears further, that it is the custom, in the defendant's neighborhood, of persons who have the management of estates consisting of negroes only, to hire them out (near the defendant's residence) to the highest bidder; or, if no offer be made for their services, on account of the condition of the negroes themselves, then to him who will maintain them at the lowest rate, the owner paying taxes and doctor's bills."

This seems to come up to the severest rule of duty on which the complainants insisted. "If this plan were adopted (proceeds the report) as the rule, by which to charge in this case, it would appear, from the testimony of Daniel Utsey, Dr. William Murray, Wm. Warner and ——— Rhode, that the defendant would not owe any thing to the complainants for the services of the negroes in question." It is true, that another class of witnesses thought their services worth more; but, says the Commissioner, "most of these witnesses were neither in the habit of hiring out or paying hire for negroes themselves." On examination of the evidence, the conclusions of the Commissioner seem well warranted; many circumstances must be taken into consideration; something depends on the custom of the country; it seems it is the habit in St. George's to treat with much indulgence a woman like Sue, giving birth to a child every two years. The witness, Wm. Warner, who was trustee for an estate, consisting of negroes, said, that for a woman having five children, he had, in a succession of 5 or 6 years, paid from \$18 to \$40 per annum, besides their services, for their rearing, &c.; that he paid doctor's bills and taxes, and furnished blankets every two years. Dr. Wm. Murray said he had paid thirty-six dollars per year for the support of a negro woman

and three children, and this at public outcry to the lowest bidder; other witnesses of respectability and experience who lived in the vicinity, concurred with these witnesses, that taking the series of years together, the defendant ought not to pay any thing for hire. In addition to his character for prudence and humanity, the defendant was a physician in excellent repute. The Court is of opinion that the interest of his child was best promoted by the course which he adopted, and that his stewardship was faithfully and fully discharged, when he delivered over the five negroes, after the marriage of his daughter.

The bill must be dismissed; each party to pay his own costs.

Complainants appealed on the following grounds:

1st. Because the Chancellor sustained the report of the Commissioner, who took the

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lowest estimate for the hire of *the negroes, on the testimony of a single witness, against the unimpeached evidence of three witnesses.

2d. Because the Chancellor sustained the report of the Commissioner, allowing the defendant the sum of three hundred and sixty dollars for medical services, said to have been rendered by him to the negroes, while in his possession, although there was no evidence that the negroes required his services, or that he rendered any to them if they did.

3d. Because his Honor erred in deciding that defendant was not liable for the hire of the slaves of complainant; whereas complainants submit, that he was not only liable for hire, but also for interest on the hire from the end of each year.

4th. Because his Honor, in making up his decree, has relied on the testimony of Wm. Warner, Dr. Wm. Murray and other witnesses (who stated that they did not know the negroes) against the testimony of Jacob Whetsell, Dr. Appleby, Alfred Appleby and others, who knew the negroes, and testified from their knowledge of the same.

5th. Because his Honor has overruled the decree of Chancellor Johnston, which sustained the bill and ordered a reference.

6th. Because the decree of his Honor is, in other respects, contrary to law, equity and the evidence.

DeTreville & Perry, for complainants.
J. D. Edwards, for defendant.

JOHNSTON, Ch., delivered the opinion of the Court.

This Court perceives no error in the decree of the Chancellor, and it is ordered that the same be affirmed for the reasons therein contained, and the appeal dismissed.

The whole Court concurred.
Decree affirmed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1848.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN,
" J. J. CALDWELL,
" G. W. DARGAN.

2 Strob. Eq. *113

*WHITFIELD BROOKS et al. v. G. L. & E. PENN et al.

(Columbia. May Term, 1848.)

[*Husband and Wife* ⇨47.]

A husband purchased negroes and paid a part of the purchase money, taking the bill of sale to his wife's trustee, without having him named in it as such: the trustee subsequently paid the balance due out of the proceeds of the wife's trust property; afterwards, upon the sale of the husband's whole estate by the Sheriff, it was announced that these negroes were held in trust, and they were accordingly exempted from the sale. The Court *held* that, after seventeen years unchallenged possession under this title, they were not liable generally for the husband's debts, but that his creditors were entitled to the amount paid by him on their purchase, with interest from the sale of his property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 236; Dec. Dig. ⇨47.]

[*Husband and Wife* ⇨125.]

A father, for the benefit of his married daughter, bought at the Sheriff's sale of her husband's property, two plantations and a number of slaves, but neglected to take titles from the Sheriff for more than three years after his purchases, during which time he allowed the premises to be managed by his daughter's husband, (the husband never setting up any claim, but managing solely in the right of his wife's father). The father then executed a deed of the property to a trustee for the sole and separate use of his daughter, &c.—(the husband still continuing to manage on the same terms under the trustee.) Upon judgments being obtained against the husband, some eleven years after the execution of this deed (which had been duly regis-

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tered,) the Court ordered a perpetual injunction to restrain the sale of any part of the proceeds of the property under executions levied thereon, and to prevent all interference with any and every portion of the said property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 455; Dec. Dig. ⇨125.]

[*Execution* ⇨51.]

The actual custody of personal property, though frequently denominated possession, is not possession for all purposes. Unless there be something in the case which excludes for a determinate time the control of the real owner, he may at any time claim the actual custody; and, as owner, his right of property draws to it the legal possession; and the possession of the bailee or agent may be claimed as his own.

[Ed. Note.—Cited in *Nelson & Co. v. Good*, 20 S. C. 236.

For other cases, see *Execution*, Cent. Dig. § 119; Dec. Dig. ⇨51.]

[*Adverse Possession* ⇨112.]

It may be laid down as a universal truth that the law always considers the real owner in possession, except where the property is held adversely to him.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 653; Dec. Dig. ⇨112.]

[This case is also cited in *Brown v. Wood*, 6 Rich. Eq. 173, on the question of fraud.]

Before Johnston, Ch., at Edgefield. June Sittings, 1847.

Johnston, Ch. The bill is brought by Whitfield Brooks and his sister, (the wife of the defendant, Barkley M. Blocker,) to protect two bodies of property, which the said Brooks alleges he holds in trust for the separate use of Mrs. Blocker and her issue, from executions obtained by the defendants, Penn & Co. and Presley, against their co-defendant, Blocker. And the real question raised in the cause is, whether the property sought to be protected belongs in law to the trustee or to Blocker.

It is alleged, and proved, that Blocker, who was in possession of a considerable property, consisting, among other things, of two tracts of land and a number of slaves, set out in the pleadings, became deeply em-

barrassed toward the end of the year 1828; and, as the event proved, insolvent for a large amount of his debts. Numerous judgments had been obtained against him, and suits were in progress, upon which judgments were impending and afterwards rendered. Under these circumstances, a negro woman, Elsey, who had, for the preceding 6 or 7 years, been hired, and employed occasionally as a house servant, but principally as a wet nurse for the children of Blocker, was (with her two children, named in the pleadings,) purchased from Hankins their owner. The circumstances of this purchase will be particularly noticed hereafter. For the present, it is sufficient to state that the bargain was made by Blocker, and the bill of sale written and taken by him, in the name of Brooks, who was not present.

It is in the following terms:

"Received 9th January, 1829, of Whitfield Brooks, six hundred dollars, in full payment for a negro woman, Elsey, and her two children, Caroline and John; which said negroes I warrant and defend to the said Whitfield Brooks, his heirs and assignees, against myself and heirs and all persons whomsoever claiming the same.

Witness my hand and seal, the day and date above written,

Samuel M. Hankins, [L. S.]

Signed in presence of Wm. Moore."

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*These slaves, with their issue, named in this bill, constitute the first trust property in the case. The bill alleges that they were purchased upon consultation with Brooks, with the express intention that he should hold them in trust, for the separate use of his sister, Mrs. Blocker, and her issue; and the bill prays to have the trust declared and established, and the property itself protected against the executions and claims of Blocker's creditors. This property, after the purchase, remained, as before, where Blocker and his family resided. The second trust in the case embraces the two tracts of land and a considerable number of slaves belonging to Blocker, and particularly described in the pleadings, which were sold by the Sheriff of Edgefield, the 6th and 8th of May, 1829. This sale was made under executions against Blocker, in virtue of which the whole of his visible property was levied on and disposed of by the Sheriff. At the sale on the 6th, Col. Brooks, the father of Mrs. Blocker, bought the lands and a number of the negroes; others being bought by third persons. There was still a negro at Blocker's house remaining to be sold (being too much indisposed to be brought to the court house,) as also, his furniture and plantation tools, and stock. These were sold on the 8th at Blocker's residence, and Col. Brooks also bought at that sale.

Notwithstanding creditors and their agents attended the sales throughout, and the prop-

erty brought its full value, there remained a large amount unsatisfied on the executions against Blocker.

The slaves purchased by Col. Brooks on the 6th were returned to the plantations, which he had also bought, and, with the slaves and other property bought by him on the 8th, remained there. He purchased one or two other negroes from other persons, which were also placed on the same premises. This was the state of affairs until the 30th of Oct. 1832, when Col. Brooks, having (as I think then recently) obtained conveyances from the Sheriff for the property bought in May, 1829, (as already stated,) executed a deed by which he conveyed the same to the plaintiff Whitfield Brooks in trust, "for the sole and separate use of Nancy Blocker, for and during her natural life, (in no wise liable or subject to the debts, contracts or engagements of her present or any future husband;) and upon the death of the said Nancy Blocker," &c., over to her issue, &c., with power to the trustee to sell and reinvest, &c., and an obligation that he would allow the possession and enjoyment of the trust property to Mrs. Blocker during her life. This deed was duly registered. I have stated that Col. Brooks, as I conceived, had not taken titles from the Sheriff at the time of his purchases, nor probably before the date of his trust deed in 1832. My reason for this conjecture is that the deeds from the Sher-

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iff, when produced at the hear*ing, bore date more than a month before the sales were actually made, to wit: the 1st of April, 1829; and were never registered. I notice this failure of Col. Brooks to take titles to himself at the time of his purchase, not because I deem it of much importance, but because one of the defendants' counsel made it the ground of a very ingenious argument, which I shall probably notice hereafter.

We have now distinctly before us the creation of both the trusts, and the state of the trust property, up to 1832. It continued in the same state until recently; when it was disturbed in the following way. On the 9th of July, 1842, the defendant Presley recovered and entered up a judgment against Blocker for \$186.36, with interest and costs; and on the 14th of Oct. 1843, another judgment for \$52.81, also with interest and costs. And, on the day last mentioned, the defendants, Penn & Co., also recovered and entered up a judgment against the same party for the sum of \$1,086.49, with interest on \$741.85, and costs. On these three judgments executions were taken out, and levied the 20th Decr. 1843, on the slave Elsey and all her descendants but two, (mentioned in the bill) and upon 16 bales of cotton, the produce of the trust plantation. This bill was filed for an injunction the 17th of January, 1846.

It may be well, while stating the case in this general way, to observe that the bill

contains the following charge of notice on the part of the creditor defendants. "Your orator and oratrix charge, that the debts due to Enoch B. Presley and G. L. & E. Penn & Co., as above stated, were not incurred upon the faith that the property thus levied on, or any part of the same, was in any wise liable for the debts of the said B. M. Blocker; but, on the contrary, insist that notice of the rights of your oratrix, not only in respect to the property embraced in the said deed from her father, but also in regard to the slave Elsey and her descendants, was had by the creditors of the said B. M. Blocker, previously to his debts to them being incurred;—and to these points full and explicit answers are required." No answer was required to be put in by Blocker. The joint answer of Penn & Co. and Presley to the above charge is as follows. "These defendants further answering, say that they never would have extended credit to the said B. M. Blocker, if he had not been in possession of the property which is now sought to be made liable for their demands,—and as to the allegation in the bill, that these defendants had notice of the deed pretending to settle a portion of said property on the wife and children of said B. M. Blocker, and of the claims now set up to said Elsey and her children, they answer:—that they were not aware, until very recently, and long since their debts were contracted, of the real character of the transaction concerning the pur-

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chase of the negro *woman Elsey and her children, nor when and from whom the said B. M. Blocker purchased them; or that they had any notice of the claim now set up to the said Elsey and her children.

"And although it seems to be the case, that the deed from Z. S. Brooks to Whitfield Brooks was recorded some years ago, these defendants have heard that doubts were entertained as to the validity of said deed; but were not themselves informed of facts, which they are advised render it ineffectual to cover the property from the claims of the creditors of said B. M. Blocker, until within a short time past."

The general statement, applicable to both trusts, will enable us now to take them up separately, and consider each in connection with its peculiar circumstances. And I shall invert their order, and examine,

First, the trust deed of 1832.

This may be decided, by considering the objections brought against it. It appeared in evidence, that the Fall Court of Common Pleas for Edgefield District, in the year 1832, fell on the 1st Monday after the 4th Monday in October; and that Col. Brooks executed this deed on the eve of its sitting. At that time there were pending a number of suits against Blocker for debts due by him, upon which judgments for large amounts were recovered against him at that term.

It was argued, as Col. Brooks had never until this time taken titles to himself for the property, and had allowed Blocker the possession of it, it was evident his purchases were not made for his own benefit, nor for the benefit of his daughter, but with an intention to set Blocker up again by a gift of the property to him; and that this purpose was relinquished only when it was found that judgments were about being obtained which would defeat the bounty intended. That as to the personality at least, (and the personality was all that was contended for under this argument,) it was then too late for Col. Brooks to take a title from the Sheriff. The title to it was already in Blocker, by over 3 years possession, and there was none in the Sheriff to convey.

This argument assumes, that the possession had been for the whole interval in Blocker, without any interference or claim on the part of Col. Brooks. This, as we shall see, is not only unsupported, but contradicted by the evidence. To this I shall attend hereafter. The argument assumes, again, that Col. Brooks sent the property to the plantation, with an intention to make a donation of it to Blocker; and that this intention was changed only in view of the judgments about to be obtained at Fall term, 1832. But to say nothing of the evidence showing that the intention was not to make a gift to Blocker—it will be observed, that while the argument ascribes to the judgments obtained in the

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autumn of *1832, a controlling influence over the conduct and intentions of Col. Brooks, even to the extent of wholly changing them; it denies to the large judgments, left unsatisfied at the sale in 1829, their natural influence to prevent him from adopting at that time the conduct and intentions attributed to him.

If the judgments about to be obtained in 1832, constituted a sufficient prudential motive to recall an intention to give, why were not those existing in 1829, an equally sufficient guard against the forming of such an intention? The argument depends for its force entirely upon Col. Brooks' prudence.

Might not a prudent man, (it was asked,) be moved by approaching incumbrances to revoke his gift? But it was well retorted; would the same man, and therefore possessing the identical degree of prudence, have made the gift, in the face of existing liens, to the full value of the property, which stood ready, the next moment, to sweep it away and frustrate the charity?

The natural inference from the unsatisfied liens of 1829, and the debts and incumbrances of 1832, seems to be, that the former were sufficient to deter Col. Brooks from making a gift of the property to Blocker, and to move him to keep the control of it until ready to settle it on his daughter, and that the latter only increased that motive by increasing the

necessity for carrying it into execution. They both tended harmoniously to the same result.

The bill confesses that the plaintiffs are unable, at this distance of time, to remember the reason why titles were not immediately taken from the Sheriff and made over to the trustee; and suggests that the delay may have arisen from the fact that Col. Brooks lived at a considerable distance from the court house, where Whitfield Brooks resided, and seldom visited that place; and that Whitfield Brooks, who may have been looked to to draw the trust deed, was in very feeble health, during the years that elapsed between the purchase and the conveyance to himself.

It seems from the evidence, that Col. Brooks was occasionally at the court house, and that Whitfield Brooks, although very feeble, did in fact attend to his own business, and could have drawn the deed. But it turns out that Col. Brooks was obliged to resort to his credit for the means of making his purchases; and when he placed the property under an overseer, he instructed him "to push the crop" to enable him to pay the debt that he contracted.

Now suppose that Col. Brooks may have wished to retain his control of the property, and to postpone the settlement, until he saw at least a considerable part of his debt paid; and that he may, at this time, have contemplated creating the trust by a direct conveyance from the Sheriff to the trustee; or suppose, again, that Whitfield Brooks, al-

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though able to draw the deed, may have hesitated to undertake so large and burdensome a trust, until his health became less precarious, and that his father may have been willing to indulge him in deferring the acceptance of the trust, in his then state of health;—would either of these solutions of the delay which occurred be strained or unnatural?

But these are matters which do not essentially involve the merits of the case. Col. Brooks was undoubtedly well entitled to the property, when he purchased and paid for it, as there is ample proof he did; and he was as well entitled, at that time, to do with it as he pleased. If he had taken titles and made the settlement when he purchased, certainly no one could have rightfully complained, and probably no one would have contested his disposition of the property. The only question is, whether, when he came to take titles in 1832, and to convey to the trustee, he had done any thing to forfeit the right of property which he indubitably had in May, 1829. If he was still the owner of it, he was justly entitled to, and might have enforced, a conveyance from the Sheriff; and, as owner, might as justly settle it upon his daughter.

It will be observed, that these observations are confined to the personalty. No objection is urged as to the land. But it is objected

that he allowed the personal property to remain in the possession of Blocker from 1829 to 1832, and that this vested it in Blocker, at least so far as to make it liable to Blocker's creditors. It will be observed that the creditors existing at the time, received the price of this very property; and that Col. Brooks holds it under a sale made by them, acting through their agent the Sheriff. And it will also be observed that not one of that class of creditors has ever attempted to molest the property; neither between 1829 and 1832, nor for the 15 years that it has been held by the trustee. The creditors who seek to subject it, are creditors who began to trust Blocker for the first time, in Sept. 1836, nearly 4 years after the execution and public registration of the trust deed. And surely if they seek to avoid the instrument, in virtue of the rights of the pre-existing creditors, and not in virtue of their own proper rights, they must be affected by the acquiescence of the existing creditors.

It is remarkable, also, that these defendants, when expressly charged with notice of the rights arising from the trust deed, and called upon for an explicit answer, do not deny the notice. When asked if they trusted upon the faith that the property levied on was liable for the debts of Blocker;—of course as being his property;—they do not say that they considered it liable for his debts, or as his; but that they would not have trusted him if he had not been in the possession of it. Not a word as to the right which they conceived he had to the property.

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That they had notice of the deed is as good as confessed. After admitting its registration, they say they have heard that doubts were entertained of its validity, but were themselves, until lately, ignorant of facts calculated to render it invalid. This is certainly not a denial of the notice of the deed; and if they had notice of that, they extended credit at their peril, whatever doubts may have been expressed by others. But still it is urged that Blocker had possession. This can only affect the personalty, as I have repeatedly said. This matter of possession, is often allowed an undue influence. It was a barbarous state of the law, unsuited to commerce, and therefore unpropitious to creditors, when the actual custody and the right of personal property strictly coincided. If ever such was the universal rule of that species of property, it has long since been much modified. The actual custody, though frequently denominated possession, is not possession for all purposes. If unaccompanied with the right of property absolutely, as in the case of a bailee or agent, it only subserves to vindicate the property against the interference of strangers, to the intent of enabling the person holding it to answer, as in the law he is bound to do, to the real owner for the time being.

When the custody is accompanied with the right, either temporary or general, this is known as possession, in a legal sense. If a bailee or agent have the custody, he is also invested with the legal possession, as far as that is necessary to the purposes of his bailment or agency. But unless there be something in the case which excludes for a determinate time the control of the real owner, he may at any time claim the actual custody; and as owner, his right of property draws to it the legal possession, and the possession of the bailee or agent may be claimed by the owner as his own. Thus, it may be seen by the cases, the law constantly recognizes the ownership as the leading and important idea. It allows the ownership to one, though the actual custody may be in another; and it couples the legal possession with the ownership, whenever that is necessary to the vindication of the right of property. And it may be laid down as a universal truth, that the law always considers the real owner in possession, except where the property is held adversely to him. The case of a negro loaned at the discretion of the owner, or hired for a determinate period, or placed under an overseer, to be managed, are all familiar cases, where the custody involves no idea of ownership in the custodian, and where it would be as destructive of the interests of society as repugnant to justice, to subject the property to the debts of the custodian, or to allow him to alien it in any form, without the consent of the owner. True, if the owner allows the custody to another *mala fide*; if he knowingly permit him to claim the property, and hold it out or treat it as his own;—this is a

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case of fraud, and he shall not be allowed to reclaim the property against a party whom he has wrongfully deceived. He shall not make advantage by his own wrong. This is the current of decision both in England and America.

Our own case of *Smith v. Henry*, 1 Hill, 16, as qualified in *Jones and Blake*, 2 Hill, Eq. 629, allows such a possession as Blocker had in this case, to be explained by testimony. And the case of *Archer v. McFall*, [Rice, 73,] quoted in argument, has been represented to me as having been decided upon grounds and facts which do not appear in the report; and therefore leaves the doctrine, as I have stated it, untouched. I feel at liberty under our decisions to hold, that if there had appeared in Blocker a possession undisturbed, unquestioned and exclusive, his creditors might have availed themselves of the presumption of property in him, arising *prima facie* from this, to subject the property. But this presumption may be rebutted and explained away by proof of the real state of the case.

The burden of explanation lies of course upon Col. Brooks, in this case. The fact that he purchased the property, and paid the

existing creditors for it, is indubitable. An attempt was made to raise a presumption that the means are derived from Blocker, but completely failed. It was attempted to show that Blocker might have raised the funds from a mercantile establishment and a tan yard, in which he was a partner some years before. But the proof was, that these had both been wound up without profits, and indeed with loss; and so complete was the failure of both, that towards the close of the mercantile concern, the partners were reduced to the necessity of paying 20 per cent. for the use of money; even the wages of the Clerk were obliged to be raised by the sale of a negro.

Another attempt was made. It was proved that Blocker went to the West just before the sale of his property in 1829, to get money from his brother to enable him to avert the sale, or buy in the property. But he was unsuccessful and returned without the money. Col. Brooks was himself examined and proved that he paid every dollar of his purchase out of his own money; and indeed after the proofs were gone through this seemed to be no longer disputed.

The question we are now considering, is whether Colonel Brooks retained the possession and control of the property after his purchase, or gave the property back to Blocker; and the fact that he advanced his own money for it, may aid in the solution of this question;—for it is not to be supposed that he would have strained his means for the purchase of property, to be given back to a man so encumbered by judgments and so loaded by debts that he could not possibly hold it.

But Col. Brooks in his examination sets

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this matter at rest. *He says that he purchased expressly for the benefit of his daughter, and that he openly announced this purpose before and at the time of his purchase.

All the facts afterwards, harmonise with this testimony.—Blocker's overseer, who was thrown out of employment by the sale, was instantly re-engaged under a new and different contract by Col. Brooks; and installed over the property, with precise instructions, that Blocker was not to interfere with the plantation. The overseer continued throughout that year. It is true, that when he left the plantation no other overseer was engaged. Blocker managed the premises. But it is put beyond a doubt, that he did not manage them in his own right, but in that of Col. Brooks. He never claimed the property, nor was he reputed to be the owner of it. Col. Brooks always intervened when acts of ownership were to be performed;—thus exhibiting a continued assertion on his part, and a constant recognition of it on the part of Blocker. It was supposed that Blocker sold some of the negroes to Mr. Bauskett,

until the bill of sale was produced, executed by Col. Brooks. So of a contract made by Col. Brooks with the late Mr. Key. He also bought other negroes and put them on the plantations. The intention ascribed to Col. Brooks to give the property to Blocker has no foundation in the testimony. There was no ground for creditors to trust the latter on the faith of the property, other than would have existed if Brooks had expressly placed it under his management as an overseer. The naked custody was all that they had, from which to infer that there was any right of property in him. He was the husband of Mrs. Blocker, for whose sake Col. Brooks bought the property; and must be allowed to reside on the premises with her; unless the law is so harsh as to deny a father the privilege of conferring a charity on his married child, without requiring a divorce and separation of the married parties. Not only was there no ground for creditors to trust Blocker on the faith of the property, but we have no evidence that during the 3 years intervening between the Sheriff's sale and the execution of the trust deed any creditor did so. This fact is aided by the further fact, that no creditor existing at the time of the sale, nor any of the creditors who obtained judgments even in 1832, have ever attempted to draw in question Col. Brooks' right to the property. Thus matters stood in 1832, when the world was advertised of the state of the property by the registration of the trust deed. Of this deed the defendants have not denied express actual notice. The trustee exercised acts of ownership by selling part of the land, as authorised by the deed, and substituting other land in place of it. It is true that Blocker remained on the premises, and occasionally sold the crops, as the overseer had done before. Does it appear that

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*he sold them as his own, or misapplied the proceeds? By the terms of the deed, the enjoyment was to be allowed to the cestuque trust, Mrs. Blocker. Her husband was with her, and his position and conduct was necessarily that of the head of the family and overseer. On one occasion he hired out one of the negroes; but he passed off the note taken for the hire in payment for necessities furnished the cestuque trust and her family. If he misapplied the funds or property, he was accountable to the trustee, as whose agent he assumed to act; but there is no ground, from the evidence so far as it goes to conclude that there was an application not warranted by the objects of the trust. In the face of all these facts the defendants have chosen to extend credit to Blocker. And can there be any hesitation in declaring that they did so at their own peril? Common justice requires this. They, in the face of the trust deed, chose to trust to Blocker's naked possession; when the

law notoriously makes the mere fact of possession a very fallacious criterion of property.

If they suffer, they suffer in consequence of their own rash speculation upon a point, the uncertainty of which should have induced greater caution and further enquiry.

Here we have an actual and bona fide purchase of personal property; the property is delivered to the purchaser by the agent of the creditors, to whom he paid the full market value; it is placed by the purchaser in the custody of his overseer, and put upon lands indubitably his own; his possession is kept up by a continual claim to and control of the property; selling and disposing of such portions as he pleased.

During all this time no creditor interferes or complains.—He then conveys it, by a deed, duly registered, to a trustee, who, as authorised by the conveyance disposes of a part of the premises and substitutes other property for it, subject to like trusts. Can a subsequent creditor of a third person, who almost in terms admits actual notice of the deed, and who was bound to take notice of it, as spread upon record for his information; can such a creditor have any just claim to subject this property? It would be a reproach to the law, if it sanctioned any such thing.

This brings us to consider the trust of Elsey and her issue. The bill, after alluding to the condition of Blocker's affairs in the fall of 1828, which resulted in the sale of all his property in May, 1829, states that "at this juncture in the pecuniary affairs of the said B. M. Blocker, one Samuel M. Hankins, the owner of a negro woman slave, named Elsey, which slave had for many years previously been hired by the said B. M. Blocker, declined longer to let the said slave to him, and announced his purpose, either to sell or to carry her from this State to one of the western States, whither the said Hankins had removed. That the said slave, whilst

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in the possession of the said B. M. Blocker previously to that time, had been employed as a house servant, and chiefly in attendance about the person of your oratrix, and as a wet nurse for her children. That your oratrix had become attached to the said slave, was extremely reluctant to part with her, and requested the said B. M. Blocker to have the said slave and her two children, Caroline and John, then infants, bought and secured to her. That the said B. M. Blocker did accordingly bargain with the said Hankins for the said slaves;—and with the view of fulfilling your oratrix's wishes in this regard, applied to and conferred with your orator (Whitfield Brooks) upon the subject. That your orator, moved by the earnest desire of your oratrix in respect to the said slaves, advanced, of his own money, the sum of one hundred dollars, towards the

payment of the purchase money, and thereupon received from the said Hankins, on the 9th of January, 1829, a bill of sale of the said 3 slaves, bearing date the day and date last aforesaid," (exhibited); "that the residue of the purchase money, \$300, with interest, was paid by your orator, some two years after the said purchase, to Elijah Bird, the brother-in-law of the said Hankins, to whom the said Hankins had transferred that demand. That your orator was afterwards reimbursed his said advance, out of the profits and issues of the lands and personalty of the said B. M. Blocker, purchased by Z. S. Brooks for the benefit of your oratrix and her children, as hereinafter mentioned; but at what dates, or in what sums, your orator is unable to recall; but your orator affirms explicitly that he was never, in any wise, reimbursed by the said B. M. Blocker, or out of any funds, effects or estate belonging to him. That your orator has no recollection or knowledge of how much money was paid by the said B. M. Blocker, towards the purchase of the said 3 slaves; nor can your orator collect any information upon the subject. But as the consideration recited in the bill of sale, above exhibited, is \$600, and as he feels assured that he himself advanced but \$400, your orator concludes that the remaining \$200 must, of necessity, have been, in some mode, advanced by the said B. M. Blocker.

"That your orator observed, by reference to an addition, in his own hand writing, to the said B. M. Blocker's schedule of his estate hereinafter mentioned, that the said sum of \$300, the residue of the purchase money aforesaid, is there stated to have been secured by a mortgage of the said 3 slaves. —But your orator frankly admits that he is entirely unable to remember whether the said mortgage, or the note upon which the same was probably founded, (if either ever existed) was executed by the said B. M. Blocker or by himself; though, as the legal title to the said slaves was vested in your orator, it would seem that both must have

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been executed by him**self*. But neither is now in the possession or control of your orator; nor does he remember their having ever been delivered up to him; nor has he any idea of what has become of them or either of them. That though no trust is expressed in the said bill of sale, it was nevertheless, distinctly announced and declared, at the time of its execution;" "and your orator and oratrix believe it was then, and has been, ever since, generally known and understood that the said 3 slaves were had and held by your orator upon the like trusts with the property conveyed to your orator by the said Z. S. Brooks for the benefit of your oratrix and her children, as is hereinafter mentioned. That the contract of purchase entered into by the said B. M.

Blocker was abandoned and renounced by him, in consequence of his inability to pay the price of the said slaves.

"That your orator and oratrix, at the time of the purchase by your orator of the said 3 slaves, regarded your orator as invested with the full ownership and property of the said slaves:—subject, perhaps, to the equity of reimbursing the said B. M. Blocker the sum of \$200, advanced by him as aforesaid. That the said slaves since their purchase by your orator, &c. have been in the possession and control of your orator," &c.

From this statement, so admirable for its candor, so dissimilar to the colored and perverted representations frequently found in the pleadings of litigating parties, but so consonant to the character of Mr. Brooks, we should be led to expect much uncertainty in the evidence relating to the purchase of these slaves; and we shall not be disappointed.—The whole transaction is covered with obscurity and mystery.

The extract which we have made from the bill, refers to a schedule made by Blocker after the purchase. It appears that among the judgments obtained against Blocker in 1828, were two, particularly referred to in the pleadings:—one entered up by Smith & Robbins, the 25th of September, and the other by Hoyt & Co. the 25th October, 1828.—the former for \$285.68½, and latter for \$229, besides interest and costs. Upon ca sa's issued in these causes Blocker was arrested; and desiring to take the benefit of the Prison Bounds Act, filed his schedule of his whole estate the 4th of April, 1829, valued at \$12,597.62.

To this list of property originally contained in the schedule, the following addition was made in the hand-writing of Whitfield Brooks:

"In addition to the foregoing schedule, I have the possession of a negro woman and two children named Elsey, for the purchase of whom Whitfield Brooks paid \$100, and the title taken in his name, and also a mortgage was given for the payment of \$300, which

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still remains due and unpaid. Mr. *Brooks holds the negroes as bound for his \$100; and they are bound for the \$300, which was a part of the purchase money."

This schedule, subject to prior incumbrances, was assigned to the arresting creditors, and Blocker was discharged on the 16th of the same month. The slaves were not levied on, or, if levied on, were not included in sales of Blocker's property made by the Sheriff the ensuing month; but remained at his house with his family, as before; and are still there, with all their increase, except two, who went into the possession of Blocker's daughter upon her marriage. These two are not embraced in this suit. It is remarkable that Hankins, who was examined, knows nothing of the mortgage spoken of.—He says

that he sold the negroes to Blocker, who stated, as well as he could recollect, (though his memory is very indistinct,) that he desired to have them for his daughter.

On the other hand the condition of Mrs. Blocker requiring the services of Elsey, whom she had had about her from 1822, and whose qualities rendered her very desirable, are all proved. Mrs. Blocker was proved to be in feeble health, and to have borne twin children, requiring the accustomed services of Elsey. Her skill and fidelity were proved to be such that the house and the children were left to her care, in Mrs. Blocker's occasional absences; yet there is no proof of Mrs. Blocker's having any knowledge of or privity with the bargain when made by Blocker. The bill of sale was drawn by the latter at his own house, and perhaps a small part of the price was paid by him at the time. A note was given for the balance; and from the evidence it is probable (though this is not expressly stated by the witness,) that it was given by Blocker. Hankins says he received a letter from Blocker to Mr. Brooks, upon the delivery of which Brooks paid him \$100.

He carried the note out of the State and traded it to Bird, his brother-in-law. Bird testifies that he called on Brooks with the note after it fell due, who paid him the money; observing with an oath, "if these negroes are not paid for I'll sell them." Although I have supposed that Blocker paid part of the purchase money at the date of the bill of sale, Hankins does not say so. Putting his testimony and that of Bird together, the payment of the whole price of the negroes is attributed to Mr. Brooks, contrary to the statement of the bill which supposes that he paid but a part of it. There is something, however, in the depositions of the witnesses which makes a contrary impression. The depositions are in writing, and will serve to explain what I mean, and also to correct me if I mistake their import.

One additional fact will close the statement in relation to these slaves, and it is,

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that when the Sheriff went to levy on *the other slaves, the bill of sale was in Blocker's possession, who showed it to him, with a view, as I suppose, of exempting the slaves covered by it from being levied on. Mr. Brooks was then in Florida.

Certainly there is more difficulty about this point of the case, than in relation to that which I have already considered. I place more reliance upon the statement of facts appended to the schedule than upon any other branch of the evidence.

This statement was made by Mr. Brooks and concurred in by Blocker, within about three months after the negroes were purchased; when all the facts were fresh in the recollection of both of them. My conclusion from the evidence, is that the purchase was

made by Blocker, on his own account and for his own purposes, "among which was probably the settlement of the property on his wife or daughter," and that being obliged to resort to Mr. Brooks for money, he took the title to him, as a security for the advances, as well as to serve the purpose of creating a title subservient to the settlement contemplated by him. I cannot read the schedule in any other light, than as an assertion of property by Blocker, and a concession of it by Brooks. "Mr. Brooks holds the negroes (the title of which is taken in his name) bound for his \$100." This is all the claim he asserts. Nothing is intimated of his holding the title as trustee.

This is one incumbrance:—the other is a mortgage given for \$300 of the purchase remaining unpaid to Hankins. The property is assigned as Blocker's, subject to these two liens. What can I make of this, but that at that time Mr. Brooks had no claim but for the \$100, advanced by him. I verily believe Mr. Brooks has entirely forgotten this matter; for he is as incapable of a wilful mis-statement, as he is of fraudulent intentions or dishonorable or dishonest dealing. But that the state of affairs, at the date of the schedule, was as I have stated it, is the best I can make of the evidence before me.

It may be that after this time a trust in favor of Mrs. Blocker was projected, and that this took place when Blocker, as the bill says, "abandoned and renounced the contract of purchase entered into by him, in consequence of his inability to pay the price of the said slaves."

But that Blocker in his own right did purchase them, and that he framed the bill of sale to operate as a security to Brooks for his advances, appears pretty plainly from the evidence.

Brooks subsequently paid the remaining \$300; and undoubtedly no creditor of Blocker can take the property from him without reimbursing him what he advanced, with interest. But he admits that he has been reimbursed. Of course his claim of title is

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gone, at least in this Court;—for it is a *familiar principle of equity, that that which is given as a security shall never be set up as an absolute title.

But in the admission of reimbursement, it is said that the repayment was not by Blocker out of his own funds. This may be so. The fund may have come from the income of the other trust property.

In that case a trust may have resulted in that quarter.—But this is not to be presumed. It must be proved. And I take it for granted it cannot be proved; because the bill says, there is a total oblivion of all the particulars. The trustee or the cestuy que trust (one or the other) is charged with a knowledge of the accounts of the trust estate. If a resulting trust is insisted on, the

burden of establishing a foundation for it is upon them.

The opposite party is not bound to disprove it. Lastly, it is said in the bill, that Blocker's right in these slaves, whatever it was, legal or equitable, passed by assignment to his arresting creditors in April, 1829. What is meant by this? How does it operate to protect this property from the executions of the defendants? If it be meant that the assignees have a preference over the defendants, that is a topic which the plaintiffs are incompetent to urge. If it be meant that Blocker, by a possession adverse to his assignees, has barred them; then even supposing that a debtor in possession can bar his judgment creditors, that only makes the property more clearly his own, and as such, liable to the executions now brought against him. If the meaning be, that his possession inures to the benefit of Brooks, who held the title, this proceeds upon a total misconception of the equity of the case. Brooks's title is to be contemplated only as a security; and his demands being satisfied, the possession is to be counted only for the pledger who owned and held the property, subject only to the debt while that existed. If I were to give up the impression I have received, in part from the express testimony, but perhaps more from the internal evidence of the case, respecting the nature and character of the purchase from Hankins; still there is too much obscurity resting upon the right now set up, to admit of its being made the ground of a positive interference with the legal process levied on the property.

The Court cannot interfere where so much doubt exists of the rights of the parties claiming its aid. It is ordered and decreed, that the bill be dismissed, as to the slave Elsey and her issue, levied on by the defendants; and that an injunction do issue to restrain the defendants from selling the cotton levied on by them, as stated in the bill, and that the said defendants do deliver the same to the plaintiffs: and that the defendants be also enjoined from interfering with any and every portion of the property, covered

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by the trust deed executed by Col. Brooks to the plaintiff Whitfield Brooks in 1832. Each party to pay his own costs.

The plaintiff to be allowed his costs out of the trust property last mentioned.

The plaintiffs appealed, and moved the Court of Appeals to reverse or modify the Chancellor's decree, so far as relates to the slaves Elsey and her descendants, and will endeavor to maintain: That the legal title to said slaves was in Whitfield Brooks, and he might declare, as he did and does, that he held for the use of Nancy Blocker and her children—that Brooks paid the whole purchase money, and has been reimbursed exclusively from the profits of the trust estate of Mrs. Blocker and her children, and a trust

in said slaves results to said Mrs. B. and her children—that if B. M. Blocker paid any portion of the purchase money of said slaves, his right to recover such money, and any consequent title in him to said slaves or lien upon them, passed to his assignee in 1829, and the assignee is barred, in favor of Brooks as trustee of his beneficiary, by the Statute of Limitations and the lapse of time—that even if Brook's claim to said slaves was a mere lien or incumbrance, there is no evidence of the discharge of this lien by the payment of the debt, except Brook's admission in the bill, that his advances have been repaid from the profits of the trust estate of Mrs. B. and her children, and this statement, taken altogether, proves a resulting trust to Mrs. B. and her children, or at least an incumbrance on the slaves for two-thirds of the purchase money—that the exemption of said slaves from the sale by the Sheriff of B. M. Blocker's property, in May, 1829, for the reason that they were then declared to belong, and did belong, to Mrs. Blocker's separate estate, and the acquiescence of B. M. Blocker's creditors in that view of the facts, from that time until 1845, establishes the right of plaintiffs to the said slaves.

The defendants, Penn & Co. and Presley, appealed from so much of the decree as supports the deed of Oct. 1832—and moved to reverse that part of the decree, for the following amongst other reasons:

1st. That the possession by B. M. Blocker of the negroes embraced in the deed referred to, from May, 1829, rendered said negroes liable to the claims of his creditors.

2d. That the said B. M. Blocker acquired title to the said negroes under a gift from his father-in-law, evidenced by his long possession, and the exercise of acts of ownership over them.

3d. Because the deed of Oct. 1832, was executed to protect the said negroes from their liability to the creditors of B. M. Blocker, and was therefore void.

4. Because in any view the demands of these defendants, or at least so much of them

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as was properly chargeable on the trust property, should have been ordered to be paid out of said property, or its income.

Carroll and Wardlaw, for plaintiffs.
Griffin and Bauskett, for defendants.

DUNKIN, Ch., delivered the opinion of the Court.

In respect to the property included in the deed of 1832, the Court concur entirely in the judgment of the Chancellor, and for the reasons stated by him. It is deemed necessary to add anything to what he has said, only in consequence of the defendant's last ground of appeal. It is said that "in any view, the demands of the defendants, or at least so much of them as was properly chargeable on the trust property, should have been ordered

to be paid out of said property, or its income."

It would be out of place, or at least premature, to discuss here at large the principles on which this Court acts, in subjecting trust property to the payment of debts. They have been very fully considered and declared in the case of *Reid v. Lamar*, [1 Strob. Eq. 27.] decided in December, 1846. In *Iorr v. Hodges*, Speers' Eq. R. 598, the defendant had levied on property secured by a marriage settlement. The Court rendered the injunction perpetual, declaring that whatever might be the equitable interest of the husband, or whatever the rights of his creditors, they should be brought to the notice of the Court in proceedings properly instituted by them for that purpose. If an execution at law can be levied on the property, "I do not perceive," says Chancellor Harper, "what purpose is answered by having a trustee or marriage settlement. If creditors are compelled to come into Equity for the purpose of making the husband's interest liable, there are various equities by which their claims might be rebutted."

Some of these remarks are not inapplicable to the property embraced in the bill of sale from Samuel M. Hankins to Whitfield Brooks, bearing date 9th January, 1829, which I now propose to consider. There are some leading facts in relation to this transaction, which the Court think abundantly sustained by the witnesses and corroborated by circumstances.

The important inquiry is whether this was a purchase made by B. M. Blocker, "on his own account and for his own purposes," as supposed by the decree, or whether it was a purchase for the wife and children of Blocker; and supposing the latter to be the true character of the transaction, a subordinate enquiry arises, whether any part of the purchase money was paid, or agreed to be paid, by B. M. Blocker. The bill of sale executed by Hankins at the time, is in the name of Whitfield Brooks as vendee, and acknowledges the consideration money to have been

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paid by him, or to have been received from him. This creates a presumption, that at least the purchase was not made for Blocker. Mr. Brooks being one of the complainants on the record, was not examined as a witness, although the defendants relied much on the statements of the bill, so far as they seemed to impair his claims as trustee. Certainly the bill, as such, is not evidence, either for or against the complainant. In this case the bill is sworn to by Mr. Brooks, and therefore is admissible, as an acknowledgment by him under oath. But in this character I think it should be received like all other admissions of a party, that is to say, the whole admission, the whole affidavit, should be taken together. He states, in the most unequivocal terms, that the slaves, Elsey and

her children, "were purchased upon consultation with him, and with his privity, with the express intention that he should hold them in trust, for the separate use of his sister, Mrs. Blocker, and her issue." The Chancellor, very properly, does not reject this part of his statement, but comments upon it, and comparing it with the other circumstances so fully discussed in the decree, adopts the conclusion that "Mr. Brooks" (in the language of the decree,) "had forgotten all about this business, for (says he) he is as incapable of a wilful mis-statement, as he is of fraudulent intention or dishonorable dealing."

Passing by, for the present, the statements of Mr. Brooks, and bearing in mind only the indubitable fact that the bill of sale was taken in the name of Brooks, there were three other witnesses as to the character of the purchase, to wit: Hankins, the vendor, Elijah Bird, and William Moore, who is a subscribing witness to the bill of sale. Hankins was a young man, was about to remove to Tennessee at the time of the sale, and has ever since resided there. He speaks of a transaction which took place some seventeen years prior to his examination. He says that Blocker bargained with him for the negro Elsey and her children; that he told him at the time, that his wife wished his daughter to have Elsey, as she was a favorite negro; that it has been witness's impression ever since, that he at that time secured the title to his daughter, though he might be mistaken; thinks that Blocker gave him a letter to Brooks for part of the purchase money; that his impression has long been, that he made the bill of sale for the negroes at Blocker's house, to his daughter. Knows that Blocker told him at the time, that he wished it so made. The full examination of this witness forms part of the decree.

In the cross examination of Elijah Bird, he was asked if he had ever heard any thing about these negroes being the trust estate of Mrs. Blocker and children, until an attempt was made by Blocker's creditors to make them liable for his debts. The witness had previously stated, that Hankins, in returning from South Carolina to Tennessee, in Janu-

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ary, 1829, had stopped a few days at witness' house, in DeKalb county, Georgia. In reply to this cross interrogatory he says, among other things, that "he is of the opinion, that Hankins did state to himself and wife, in January 1829, that the negroes were bought by the request and for the benefit of Mrs. Blocker."

But William Moore was the subscribing witness. He had been a Clerk of Blocker's and was then living in the house, and continued to live there till the Fall of 1830: "thinks that Blocker purchased the negroes from Hankins, at the request of Mrs. Blocker, and, as witness believes, for Mrs. Blocker's benefit." There was a bill of sale for the

negro woman and her children, executed to Whitfield Brooks, to which the deponent was a witness. He further testifies that he was living with Blocker in May, 1829, at the time his property was sold by Edmund Belcher, Sheriff of Edgefield District; that he was present at the sale of the property; that, at the day of sale at his house, Col. Z. L. Brooks, or Whitfield Brooks, remarked that the negro woman Elsey was not liable for B. M. Blocker's debts; that they were purchased for the separate use and benefit of Mrs. Blocker; that the slaves Elsey and her children were not sold at the Sheriff's sales of B. M. Blocker's property, in 1829, and for the reasons he has stated. In his cross examination he says that "the negro woman Lusey was not sold at Sheriff's sales, but was exempted, as the property of Mrs. B. M. Blocker." He further says, that the bill of sale was written by Blocker at his house, but does not know whether it was delivered to Blocker, or to whom; Brooks was not present. Witness saw Hankins execute the bill of sale, and he subscribed the same as witness.

After the sales of Blocker's property in May, 1829, a very considerable amount of judgment debts remained, and yet remain, entirely unsatisfied. When it is a conceded fact that, from May, 1829, when, according to Moore's testimony, Elsey and her children were excepted as the property of Mrs. B. M. Blocker; that they have remained in her unchallenged possession until the levy of this execution in 1845, it seems to the Court very difficult to entertain any doubt as to the nature of the transaction, or the notorious character of the complainants's claims. It is true that the amendment to Blocker's schedule in April, 1829, made in the handwriting of Mr. Brooks, affords much ground for the observations of the decree. But how is it possible to reconcile the construction put upon this act, with the depositions of the witnesses? with the announcement at the Sheriff's sales the very next month? (for Moore does not say that notice was given of a mortgage, or of any other claim of that character, but that Elsey and her children were not liable for Blocker's debts, because they had been purchased for the separate use and bene-

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fit of Mrs. *Blocker, and they were accordingly exempted from the sale for that reason;) or how, with the acquiescence of urgent and enquiring and disappointed creditors for seventeen years afterwards?

But the loose manner in which the amendment to a schedule of an insolvent debtor is often made, is well known to all who have had occasion to be familiar with such proceedings. While the omission to insert the property in the original schedule, is rather an argument that the debtor did not believe it formed any part of his estate, it may be put in the amendment, because an after-

thought, or the suggestion of others, may create a question whether he has not some right, and there is no harm in inserting it; and this leads to the enquiry whether, although the purchase was made for Mrs. Blocker and her children, and the title taken to Whitfield Brooks, to carry that object into effect, B. M. Blocker may not have paid some part of the purchase money, for which he, or his creditors under the assignment, might have an equitable claim on the negroes. Relying on the testimony of Hankins and Bird, it is quite clear that the whole purchase money was paid by Brooks, and not a dollar by Blocker. But Mr. Brooks says that he paid but four hundred dollars, with interest, of the purchase money, which was refunded from the profits of the trust estate of Mrs. Blocker, settled upon her by her father, and he, therefore, concludes that the residue of the purchase money, (two hundred dollars,) was in some way advanced by B. M. Blocker. It is not remarkable that, after such a lapse of time, and amid the multiplicity of pecuniary transactions, Mr. Brooks should fail to recollect the fact of payment by Blocker, or the mode of payment. If any thing could add to the credit of his testimony, it is, that he does not affect to recollect these particulars. His evidence may well be reconciled with that of Hankins and Bird, and also afford some solution to the amendment of Blocker's schedule. All the purchase money was received by the witnesses from Brooks, but he may have collected money to the amount of two hundred dollars for Blocker, or Blocker may have placed that sum, or chose to that amount, in his hands. Mr. Brooks concludes, however, knowing what he himself paid, and which had been refunded from the trust property, that, in some mode, two hundred dollars was advanced by Blocker. In April, 1829, he may very well have considered him as having a claim on the negroes to that extent, and the amendment to the schedule was made. But that he, at that time, well knew that the negroes, Elsey and her children, were not the property of B. M. Blocker, but were held by him as trustee for his sister and her family, is proved, not merely by his acknowledgments now, but by the testimony of the witnesses, and by the declarations at the Sheriff's sales a few weeks afterwards.

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*It is a familiar rule, that a party asking the aid of this Court, must do equity. Blocker's creditors are entitled to the two hundred dollars, with interest from April, 1829. But the assignee under the Prison Bounds Act, is not before the Court. The assignment was made nearly twenty years ago, and embraced choses in action to a considerable amount, which were not bound by the lien of executions and from which the assignee may have been satisfied. In that event this fund may be liable to distribution among

the general creditors of Blocker, among whom are the defendants. The Court, under these circumstances, can make no definitive order as to the appropriation of the fund, but it must be paid into Court by the complainants, with liberty to the creditors to apply by petition, or otherwise, for a further order.

It is ordered and decreed, that the complainants pay into Court the sum of two hundred dollars, with interest from April, 1829; that the injunction heretofore granted, to restrain the sale of Elsey and her children, be made perpetual; and that, in all other respects, the decree of the Circuit Court be affirmed, and the appeal dismissed.

CALDWELL, Ch., and DARGAN, concurred.

JOHNSTON, Ch. I concur in so much of this judgment as relates to the property covered by the deed of 1832; but I feel too much doubt in relation to Elsey and her issue, to go as far as my brethren.

Decree modified.

2 Strob. Eq. 134

WILEY PULLIAM et al. v. THOMAS B. BYRD et al.

(Columbia. May Term, 1848.)

[*Powers* ⚡9; *Wills* ⚡694.]

Testator, by his will, left to his wife a life estate in his whole property, with power to dispose of one-half at her death; and she died without having made any appointment under the power; *held*, that at her death, the whole property, as intestate, became distributable, one moiety to the next of kin of the testator, and the other moiety to the next of kin of the wife.

[Ed. Note.—Cited in *Boyd v. Satterwhite*, 10 S. C. 54.]

For other cases, see *Powers*, Cent. Dig. § 10; Dec. Dig. ⚡9; *Wills*, Cent. Dig. § 1662; Dec. Dig. ⚡694.]

[*Wills* ⚡616.]

Where there is a gift to one for life, with a general power of appointment, the power of appointment does not enlarge the life estate into an absolute interest, and nothing passes under the clause conferring the power, unless it be exercised.

[Ed. Note.—Cited in *Scott v. Burt*, 9 Rich. Eq. 360; *Aaron v. Beck*, Id., 413; *Wilson v. Gaines*, Id., 421; *Boyd v. Satterwhite*, 10 S. C. 51; *Bilderback v. Boyce*, 14 S. C. 541; *Withers v. Jenkins*, Id., 609; *Canedy v. Jones*, 19 S. C. 307, 45 Am. Rep. 777; *Wallace v. Craig*, 27 S. C. 523, 4 S. E. 74; *Blount v. Walker*, 31 S. C. 28, 9 S. E. 804; *Sires v. Sires*, 43 S. C. 272, 21 S. E. 115; *Humphrey v. Campbell*, 59 S. C. 43, 47, 37 S. E. 26.]

For other cases, see *Wills*, Cent. Dig. § 1424; Dec. Dig. ⚡616.]

[*Executors and Administrators* ⚡379.]

The title acquired from an Administrator at a sale ordered by the Ordinary, is a good title, which a co-distributee of the intestate is as

much at liberty to purchase and to depend on as any other person.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1552; Dec. Dig. ⚡379.]

[This case is also cited in *Humphrey v. Campbell*, 59 S. C. 39, 37 S. E. 26, and distinguished therefrom.]

Before Johnston, Ch., at Abbeville, June Sittings, 1847.

Johnston, Ch. The leading questions in this case originate in the will of James Pulliam. This testator died the ——— of ———, 1832, leaving the following very laconic will:

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"My will and desire is that after all my Jest debt Is paid That all my probity Rale and personal Shall Remane in the hands of my beloved wife during her natural life and that she shall have the disposal of one half of it at her death.

"I nomenate Constitute and appinte my Beloved wife Rhody Pulliam Executrix and my Belov'd friend Zachrey Pulliam my Executor to this my last will an Testament in Witness Whereof I have heareunto set my hand and seale this March one thousand Eight hundred and twenty three."

At his death the testator left the children of a brother and the children of a sister, with his wife, Rhody, surviving him. And he left a tract of land and several slaves, mentioned in the pleadings, together with other personal property and assets.

The Executor and Executrix named in the will having declined their appointment, the defendant, Thomas B. Byrd, was duly appointed and qualified as administrator, with the will annexed, and assumed the duties of his trust.

After selling, under an order of the Ordinary, a portion of the perishable property, and also one of the negroes, named Leah, he turned over the rest of the estate to the widow, Rhody; to whom he also paid over \$1048.34, the balance of the proceeds of the property sold by him, after paying the debts of the testator, as appears by her receipt produced before the commissioner, bearing date the 3d of June, 1834.

Rhody, the widow of the testator, died intestate the ——— of June, 1846; and Byrd became her administrator. She left several next of kin.

Upon her death a contest has arisen between her next of kin and the next of kin of James Pulliam, the testator, in relation to the interest which she took under his will; and the statement I have made will enable us to take up the general questions presented at this stage of the case.

The next of kin of the widow contend, that the words of the will are sufficient to give her one half of the estate absolutely; and that the other half is given to her during life, but not disposed of beyond her life, wherefore the remainder in this latter half

after her life estate, is intestate estate of Pulliam, the husband; and by the statutes of intestacy she is entitled to a moiety thereof, the other moiety going to Pulliam's nephews and nieces. The sum of this is that a claim, on her behalf, is set up to 3-4ths of the estate.

The next of kin of the husband contend, on the other hand, that no part of the estate is given to the widow, even for life, but the words of the will amount only to a direction to the executor to allow her the use of it; that as to one half, a naked power of appointment was conferred on her, to be exercised at her discretion, and that having failed to exercise it, that half, as well as the

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other half, of the estate was distributable as intestate estate, in equal moieties, between the widow, and nephews and nieces of the testator; but as she had the usufruct of the whole, during life, with a power of disposing of one half, this suspended the distribution until her death; when her distributive right vested in her next of kin, who thus became entitled to one half of the whole estate; the other half belonging to the next of kin of her husband.

These were the grounds seriously taken by the husband's next of kin. To be sure they did suggest other views; but it seemed to me they placed little dependence on them. Such, for instance, as this: that the usufruct given to the wife in the whole estate, operated to prevent her from setting up any claim as to the estate after her death, considered as intestate. That no part of the estate descended until after her death, and then descended exclusively to the testator's next of kin. That if any part descended at his death, it was the half over which no power was given to her; and of course she could take only a moiety of that. That as to the other half, to which her power was attached, it could not descend (the power prevented it from descending) during her life; and when it descended, at her death, it was distributable among Pulliam's next of kin, &c. But I considered these pretensions as beyond the serious opinion of the counsel. It was too clear to admit of doubt, that if there was nothing to prevent the estate from descending (using that word for want of a better,) but the wife's usufruct and her power of disposition, it descended at the death of the testator, subject to the usufruct and her power; and as to the wife's being excluded by the interests she took under the will, from claiming by intestacy also, the law was too well settled to be otherwise, to admit of argument.

Coming back, therefore, to the real questions in the case:—it will be seen that the contest is whether the widow was entitled to 3-4ths or only to 1-2 of the estate that became distributable, as intestate, at her death.

As to one half of the estate, it is clear

that there is no provision in the will in relation to it, beyond the giving the wife a life estate, or allowing her the usufruct during her life. This half, subject to her interest in it, was clearly distributable; she taking one moiety and Pulliam's next of kin the other.

And the same rule must apply to the other half, unless there is something in the provisions relating to it, to prevent.

The question which first naturally arises, in considering this point, is what is the nature and extent of the grant made by the testator to his wife; for it is settled that whatever he did not grant remained in him, and reverted to his heirs and distributees, after the dispositions actually made by him were over.¹

Then, do the words of the will admit of a

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construction *vesting his property in the wife, during life, as her property: or did it remain his property, and parcel of his estate, subject only to her enjoyment of it for life, and subject to a power of appointment, to be actively exercised by her, by which she might, as his agent, transfer it to other persons, at her death?

If the property was given to the wife for the period of her life to be her property, with a power to dispose of one half of it, at her pleasure, beyond her life; such a grant falls, as to that half, within all the definitions that can be conceived of an absolute title.²

But if the testator intended to give her the mere enjoyment of the whole, for life, with a power, (however unlimited,) of disposal as to one half of it, at her decease, she never had a title to any part of the estate, and her power of disposal was a naked power, requiring to be exercised in order to convey a title from the testator, (for the title was in him, upon this supposition,) after her death.

This distinction is very important here, for as the wife never exercised her power, it is only upon the assumption that the title was in her, that it can be held to have devolved, by operation of law, upon her next of kin, at her decease.

If the right of property remained in the testator (so to speak) nothing could take it out of him, but such an actual exercise of the power as would constitute the appointee a devisee or legatee under the will, claiming under the testator and not under the appointor:—for all the cases say, and upon the soundest principles, that the instrument evidencing an appointment, in such cases, is to be considered as parcel of the will of the testator: and that the appointee takes from him and not from the appointor; the latter being merely the agent of the former, acting under a power of attorney.

¹ 4 Kent 353, sect. 53.

² Croft v. Stu, 4 Ves. 66.

authorizing him to make a will, quoad hoc, for him.

The principles of law are clear enough, but when I come to apply them to this will, I experience considerable difficulty.

It is argued that there are no words in the will creating an express life estate, or vesting the title, even for a moment, in the wife. That the words employed are very inappropriate to that purpose. That the direction of the testator that his property remain in his wife's hands until her death, is indicative rather of a negative than of a positive intention. That they do not so much indicate an intention to give to the wife, as to abstain from giving to her; or indeed to any other person, at least during her life. That the testator does not give to her, nor even lend:—he makes no positive disposition whatever, in her favor. And that it is impossible, upon any safe construction, to make out of this mere inaction on the part of the testator, any color of right or property in the wife, to be connected with the power given her, so as to make it any thing else than a naked power.

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*But, on the other hand, it is impossible to read this will without being struck with the liberality of the testator towards his wife. Whatever may be the legal effect of the terms he employs, they show that he intended her to have the enjoyment of his whole estate during her life, with the fullest power to dispose of half of it beyond her life, without limitation as to the mode or object of the disposition.

Now, the dominion and control thus given was, as to one half of the estate, precisely the dominion and control of an owner. No owner could have greater. As the enjoyment and use were given to herself during her life, it follows that the superaddition of an unqualified power of disposition beyond her life, gave her the same latitude of disposition during her life also. It would not have been so if the enjoyment or right of possession, during her life, had been given to a third person. But being given to herself, and not to a stranger, it is so. For supposing her to have alienated or to have injured the property during her life, no stranger could complain: and supposing that the distributees of the husband had interfered with her for the wrong: how easy would it have been for her to silence them, and practically demonstrate the impertinence of their clamour, by bringing into exercise her power of ulterior appointment? And if any objection arose because the property remained at the time in common, how easy to have removed that objection by a partition? What objection could the next of kin have interposed to the partition of the estate into moieties, that the wife might do what she pleased with one of them?

Here, then, was the right of enjoyment

and of free disposition during life, and afterwards, in perpetuity. What is this but absolute property?

Nor is so much dependence to be placed in the mere words of the will as was placed in the argument. Whether a life estate was given, does not depend entirely on the words employed. Any form of expression by which the incidents of title or property are created and secured, will serve to confer title or property. For what purpose could the testator have given the enjoyment for life, if not to secure the benefits of a life estate? to confer all the interests which could have been conferred by creating a life estate in express terms? And when a life estate is created in terms, and to this is added a power of ulterior disposition, unconfined as to mode or object, no case has been produced suggesting that this power is a naked power, and requiring to be executed in order to divest the grantor of the fee. Such a power, united to such an interest, is not a power requiring to be actually executed: but the two together are descriptive of the most absolute title known to the law.

It will be very proper that such a question

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as this should be *carried to a higher Court; and as I anticipate that it will be done, I abstain from further remark. My conclusion is, that as to one moiety of the testator's estate, the wife took an absolute estate under the will; and that she took one half of the other moiety as intestate, under the statute: and that these, amounting to three-fourths of the estate are distributable among her next of kin. The remaining fourth is distributable among the next of kin of the testator.

This does not cover the slave Leah. There is a question in the case respecting her. She was sold by Byrd, the testamentary administrator of Pulliam, in 1832, to one Forshee, for \$400. This was a public sale, ordered by the Ordinary. The administrator received the purchase money from Forshee, and included it in his returns upon the estate in January, 1834. Forshee held the slave for twelve months, and then sold her (she then having a young child, or being on the point of having one,) to Rhody, the widow of the testator for \$500. Mrs. Pulliam, about three years afterwards, sold her, with whatever children she had, to one Coleman, for about \$1200; who after holding them two or three years being about to remove out of the State, resold them to Mrs. Pulliam, at an advance of 300 dollars, over what he had given her for them. This slave (and her said issue, I suppose,) are claimed as parcel of Pulliam's estate. It is said that there was no necessity on the part of the administrator to sell her. That the debts of the testator did not render it necessary; because as the result proved, the administrator raised \$1048 beyond the amount of the debts; and must,

therefore, have had an excess of over 600 dollars in his hands before he sold this wench. Suppose this to be so; what has it to do with the title to the negro? Forshee, it must be admitted, got the legal title of the administrator, and, so far as appears, without any notice of the equity now set up to avoid the sale. How was he to know whether the administrator was selling an unnecessary amount of property? How does it appear that Leah was sold, after, and not before, the necessary amount was raised? If Forshee got a good title, Mrs. Pulliam got his, and it was matured by a most abundant possession.

But then it was said "she bought with the sum paid over to her by the administrator in June, 1834." This sum was \$1048, and included the price at which Leah was unnecessarily sold. It appears, by the testimony, that about the time and after she received the \$1048 from the administrator, she paid out to distributees of Pulliam, now raising this claim, \$820 of the money; leaving only \$228 in her own hands: and it appears, also, that her crops enabled her to raise the \$500 at which she purchased from Forshee. But passing all this by, and conceding that she not only had notice of the excess committed by the administrator, in the sale, but assist-

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*ed in it (which is not surmised) is it necessary to quote authority to show that that does not affect Forshee's title, which she was as much at liberty to purchase and depend on, as any other person? This claim is therefore overruled.

There is a report of the Commissioner in the case: and if it were as full in its statements and details as it should be, it would have saved a great deal of trouble. I have to search through the whole record for facts which I should find in the report. I know that, if this had been anticipated or suspected by this officer, his report would have contained a clear statement of the case, and of every fact, with day and date, necessary to understand the report and the exceptions to it. A report should be self-explanatory, and explanatory, also, of all points to which the exceptions refer.

As it is, I have endeavored in vain to get the facts together, which are necessary to adjudicate the exceptions. I suppose I had a proper conception of them from oral statements made at the argument: which, but for my illness shortly afterwards, I might now recall. But I cannot recollect them; and cannot get them from the report.

It is therefore recommitted.

Parties are at liberty to prepare any order upon which they may agree, or which may be necessary to carry out this opinion. The costs to be paid out of the estate of James Pulliam.

The complainants appealed, and moved to

reverse the decree of his Honor, on the following grounds:

1st. It is submitted that the widow, Rhody Pulliam, could not, under the will, take an estate for life in the whole property, and at the same time one half of the reversion in fee, as distributee under the statute.

2d. It is respectfully submitted, that under the will "no part of the estate is given to the widow, even for life," but only the possession, with a merely superadded power of appointment as to one half at her death. She had a power only and not an interest.

3rd. If any estate at all be given to the widow, it is an express estate for life in the whole, and the mere superadded power of appointment as to one half, whether limited or unlimited, does not enlarge it to a fee.

4th. That the widow's power of appointment under the will, is not, as regarded by his Honor, "unlimited and unconfined as to mode;" and if it be so, the bequest to her of an express estate for life, even with an unqualified power of appointment, superadded, does not, as is assumed, give her a fee.

5th. If the next of kin of the widow be entitled to any thing, they can only claim the portion which she may have taken, as distributee under the statute.

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*6th. Because the slave Leah and her increase should still have been regarded as part and parcel of the estate of James Pulliam, deceased.

Wilson, for the motion.

Perrin & Thomson, contra.

DARGAN, Ch., delivered the opinion of the Court.

James Pulliam died in the year A. D. 1832, leaving some real and personal estate, which he disposed of by his will, which was duly executed. The will is remarkable for its brevity, and is couched in language which shews that the testator was a very illiterate person. The disposing part of the will is in one sentence, and is as follows: "My will and desire is that after all my just debts is paid that all my probity Rale and personal shall remain in the hands of my beloved wife during her natural life and that she shall have the disposal of one half of it at her death." The will concludes by appointing testator's wife, Rhody Pulliam, executrix, and his friend Zachary Pulliam, executor. The executor and executrix named in the will having declined the appointment, administration with the will annexed was granted to Thomas B. Byrd, who, having qualified, assumed the duties of his trust. At his death, the testator left the children of a brother and a sister, and his wife, Rhody Pulliam, surviving him. He also left a tract of land and several slaves, mentioned in the pleadings, and some other personal property and assets. Rhody Pulliam died in June,

1846, intestate, and Thomas B. Byrd administered upon her estate. She also left several next of kin, who, with Byrd the administrator, are the defendants in the bill, which is filed by the heirs at law and distributees of James Pulliam, for a partition of the land and negroes devised and bequeathed to his wife Rhody Pulliam in the clause of the will already recited.

For the next of kin of the widow it is contended, that the will gives her an absolute estate in one moiety, and a life estate in the other, and that the whole of the former is distributable among her relations as her own estate, while the moiety in which she took a life estate, after the termination of the life estate is intestate property of James Pulliam, of which she, as widow, is entitled to half, which on her death must go to her next of kin; thus constituting in them a valid claim to three-fourths of the lands and negroes which were of the estate of James Pulliam. On the part of the heirs and distributees of the husband it is urged, that the will gave to the widow a life estate in the whole of the testator's property, with a power of appointment as to half, and that the widow having failed to execute the power of appointment, the whole property that passed under the will, on her death becomes the intestate estate of James Pulliam, of

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which they are entitled to one moiety, and the defendants, as the representatives of the widow, are entitled to the other moiety.

The Chancellor who heard the case adopted that construction which was presented in behalf of the next of kin of the wife, and by his decree gave them three-fourths of the estate, and the next of kin of the husband one fourth thereof. And this is an appeal from that decree on the part of the complainants, who are the heirs at law and distributees of the husband.

The only question which this Court deems it necessary to consider, will be presented and discussed in the remarks which I am now about to submit. The decision must turn upon some nice and rather artificial distinctions, and an appeal be made to the authorities for the purpose of ascertaining the principle which has governed the Court of Equity in the determination of questions of this character.

Upon what appears to this Court to be a correct construction of this will, the wife took an estate in the whole property, which by the terms of the will is limited to her life, with a general power of appointment, as to the other moiety, without restriction as to time or mode for the exercise or execution of that power. And if the estate had not been limited to her life, there is no doubt that she would have taken an absolute inter-

est in one moiety. For the proposition is undeniable, that a devise or bequest to one generally and indefinitely, with an unlimited power of appointment, gives an absolute estate. But though the view taken by the Chancellor in his decree is not unsupported by authority, it appears from the general current of decisions and the opinion of eminent jurists, that where there is a gift to one for life, with a general power of appointment, the power of appointment, though general, does not enlarge the life estate into an absolute interest, and nothing passes under the clause conferring the power, unless it be executed.³ As was said by Sir William Grant in the case of *Bradley v. Wescott*, 13 Vesey, 451, "the distinction is perhaps slight, which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded, power to dispose by deed or will. But the distinction is perfectly established, that in the latter case, the property vests. A gift to A, and to such persons as he shall appoint, is absolutely property in A, without any appointment. But if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment to entitle that person to any thing." This manner of stating the proposition is in conformity with the opinion of this Court, and the distinction drawn, though narrow and refined, is fully sustained by the decided cases. It is unnecessary to enlarge upon a question, the decision of which rests so entirely upon authority. Nor is it necessary

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to encumber this opinion by a reference to the numerous authorities which might be cited in support of it. It will be sufficient to say, that the distinction here recognised is sustained by the most eminent authors on Powers, and by a very uniform current of decisions.

In reference to the complainants' last ground of appeal, this Court concurs with the Chancellor in the views which he has taken, and for the reasons stated in the decree.

It is ordered and decreed, that the decree of the Chancellor be modified, and that the complainants, as heirs at law and distributees of James Pulliam, are entitled to one-half of the real and personal estate described in the bill, and which was given by his will to Rhody Pulliam for her life. In all other respects the decree of the Chancellor is affirmed and the appealed dismissed.

JOHNSTON, Ch., DUNKIN, Ch., and CALDWELL, Ch., concurred.

Decree modified.

³ *Barford v. Street*, 13 Vesey, 135. *Irwin v. Farrer*, 19 Vesey, 86.

2 Strob. Eq. 143

MAJOR B. CLARK v. J. N. BAILEY et al.

(Columbia. May Term, 1848.)

[Witnesses \S 338.]

It is incompetent to offer evidence of defendant's general bad character, for the purpose of invalidating his answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1114, 1115; Dec. Dig. \S 338.]

[Equity \S 345.]

The denials of an answer cannot be rebutted by a single witness, unaided by corroborating circumstances.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. \S 345.]

[Evidence \S 588.]

A witness who, although competent, is under a manifest bias, is liable to suspicion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. \S 588.]

[Evidence \S 588.]

It is a circumstance of suspicion where one of the defendants, whose bias is in favour of the plaintiff, re-echoes the bill; especially when he goes beyond the bill to promote the plaintiff's cause.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. \S 588.]

[Fraudulent Conveyances \S 295.]

[Clear proof is required to show that a judgment is fraudulent as against other creditors.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 867; Dec. Dig. \S 295.]

This cause was heard at Edgefield, June Sittings, 1847, by His Honor Chancellor Johnston.

The plaintiff filed his bill originally against the defendants Bailey and Abney, setting forth that he was a judgment creditor of Abney, whose property was insufficient to satisfy the debt, by reason of the prior lien of a judgment held by Bailey against his said debtor. The bill charged, that the judgment was for a greater amount than was really due by Abney; that the sum really due on it had been paid, and that it was kept on foot for the fraudulent purpose of covering the property of Abney the debtor, against the claim of the plaintiff.

Bailey, in his answer, denied all the charges of the bill. Abney's answer sustained the charges fully, and proceeded to corroborate them by a circumstantial detail of facts, beyond the statements of the bill.

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*Upon the death of Bailey, the suit was revived against his executor, who, in his answer, relied on the answer which had been put in by his testator.

The case was heard on the pleadings and proofs.

At the hearing Abney was examined in support of the plaintiff's claim. Being apprehensive that his testimony might not be sufficient, the plaintiff proposed to prove

Bailey's general bad character, by way of doing away with the effect of his answer. The Court rejected the testimony; and delivered its judgment as follows:

Johnston, Ch. This is a bill standing, formally, in the name of a junior judgment creditor, and seeking to enjoin a senior judgment creditor from enforcing his demand against the common debtor. There is strong inherent evidence, however, that it is really the bill of the debtor, who by his answer and his deposition gives a very earnest support to the plaintiff's cause.

The answer of Bailey, the senior creditor, very fully denied the charges exhibited against him by the original bill in his lifetime; and his executor relies on that answer.

Abney, the debtor, has, as I have stated, sustained the bill throughout in his answer; in which he enters into a detailed statement, much beyond the bill, of all the circumstances: and this answer he has reaffirmed, in all its particulars, on his examination at the hearing.

The general scope of the bill is that the senior judgment of Bailey has been paid and satisfied, and is kept on foot to hinder the plaintiff in the collection of his junior judgments. Assuming that Abney is a competent witness, it is impossible not to see that he is under the bias of a strong interest. But admitting that he is not only competent but reliable, there is but the one witness against the positive denials of the answer, and if the circumstances arising from the other evidence in the case concurred with his testimony (whereas their tendency is rather the other way) there is still too much doubt left, to warrant the Court in interfering with the legal rights of the parties. The Court should require clear proof in such cases; but, to make the most of the circumstances in this case, they leave the transactions of the parties in great obscurity and liable to much suspicion.

It is proposed to impeach the general character of Bailey, as a means of shaking the credit of his answer. But I exclude the evidence, as unwarranted by the principles and practice of this Court. But if the most successful assault had been made on his veracity, I must still say that the case would have been left in too great doubt to allow of my interfering.

It is ordered that the bill be dismissed with costs. Abney to pay his own.

The plaintiff appealed, and moved the

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Court of Appeals to *reverse or modify the decree of his Honor the Chancellor, on the following grounds:

1. Because his Honor erred in overruling and rejecting, as incompetent, the testimony offered and tendered by the plaintiff, to show the general bad character of the defendant:

Bailey, and that he was unworthy of belief in a Court of Justice.

2. Because his Honor erred in not ordering an issue at Law, as desired by the plaintiff at the hearing of the cause, to try and determine the question of fact, whether the judgment of Bailey v. Abney, as stated in the pleadings, was not paid off and satisfied in full.

3. Because it respectfully submitted that the testimony of Abney, sustained and corroborated as it was by the letters, offered in evidence, of Bailey to Abney, and of Abney to Bailey, and by the final settlement made by them in the Sheriff's office, was abundantly sufficient to outweigh and overturn the answer of Bailey, even if he had been of ordinary good character; and therefore the plaintiff's bill should have been sustained, and the relief granted, as prayed for.

Bauskett, for the motion.

Wardlaw and Carroll, contra.

PER CURIAM.—This Court concurs in the decree of the Chancellor; and it is ordered that the same be affirmed and the appeal dismissed.

Decree affirmed.

2 Strob. Eq. 145

JONATHAN G. STEEDMAN v. SOVEREIGN H. WEEKS.

(Columbia. May Term, 1848.)

[Partition ⇨77.]

On appeal from the decree of the Circuit Court, refusing partition of standing timber, the Court reversed the decree, and ordered a writ of partition, without regard to the character of the estate of either party, or the difficulty of executing the commission.

[Ed. Note.—Cited in *Dorn v. Beasley*, 7 Rich. Eq. 92; *Cannon v. Lomax*, 29 S. C. 371, 7 S. E. 529, 1 L. R. A. 637, 13 Am. St. Rep. 739; *Rivers v. Atlantic Coast Lumber Corporation*, 81 S. C. 494, 62 S. E. 555.

For other cases, see *Partition*, Cent. Dig. § 221; Dec. Dig. ⇨77.]

[Partition ⇨77.]

In South Carolina, interests may be severed and the share of each ascertained and set off, where the subject matter is not susceptible of division. Whether the mode be just or practicable is a matter for the commissioners; and if in their judgment no division can be made without manifest injustice, they are at liberty to recommend a sale for the purpose, and the Court will judge of the propriety of confirming such return.

[Ed. Note.—Cited in *Gresham v. Atlantic Coast Lumber Corp.*, 96 S. C. 67, 79 S. E. 799.

For other cases, see *Partition*, Cent. Dig. § 219; Dec. Dig. ⇨77.]

[This case is also cited in *Railroad Co. v. Leech*, 33 S. C. 182, 11 S. E. 631, without specific application, and in *Holliday v. Glover*, 36 S. C. 419, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883, as a recognition of the doctrine that power of court of equity to order sale in partition existed prior to the act of 1791.]

This was an appeal from the decree of Dargan, Ch. at Barnwell, February Sittings, 1848, refusing to grant a writ for the partition of standing timber. The following decree of the Appeal Court will sufficiently explain the facts of the case.

Bauskett, for the motion.

Bellinger, contra.

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*DUNKIN, Ch., delivered the opinion of the Court.

The defendant is the owner of a tract of land containing some seventeen hundred acres, situate on Shaw's creek in Barnwell district. On the 27th of February, 1846, he and the plaintiff entered into an agreement to build a saw mill on the said tract at their joint expense, with two saws, and after the mill was completed, each party was to use one saw on his own separate account, with other stipulations for the right of way through the lands of each other, &c. On the same day the defendant, by another deed, in consideration of the sum of one thousand dollars, sold and conveyed to the plaintiff "one-half of all the timber suitable for sawing lumber on all the said tract of land, together with all the right and privilege of cutting said timber, together with the privilege of roads to and through said lands, for the purpose of hauling said timber for mill purposes," &c. as appears by a copy of the deed filed with the pleadings.

The mill was completed; and, in March, 1847, the saws were started, each one taking his own saw and sawing on his separate account, and continuing to do so from that period. But in a very short time strife arose in selecting the timber and procuring the greatest quantity most convenient to the mill—complainant alleges that the defendant has employed an unusual and unnecessary number of axemen in felling the best of the timber, in larger quantity than his saw can cut, and does it with a view of appropriating it now to his exclusive use, and, in the language of the bill, "with the waste, speed and strife with which the defendant has been cutting said timber, the most valuable portion of it will soon be exhausted." Under these circumstances the complainant asked the aid of this Court in making a fair and equal division of said timber.

The defendant admits the strife, but ascribes it to other causes, and enters into matters of recrimination, which it is not necessary to consider, but denies that it is a case for partition.

His Honor, the presiding Chancellor, made a short order, refusing the partition, and dismissing the bill. From this decree the complainant appealed, on the ground that he was entitled to a decree for partition of the timber standing on said tract of land, as assured to him by the defendant's deed, so that

each may hold and enjoy his own in severalty.

In the view which this Court takes of the case it does not seem very material to enquire what is the character of the complainant's estate—whether real or personal—whether tenement or hereditament—whether savouring of the realty, or altogether personal. The argument of the defendant was that the interest of the complainant does not fall within the description of estates authorised

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to be partitioned by the Statutes 31 and 32 Henry 8th. But the powers of the Court of Chancery in South Carolina have never been supposed to be limited to the cases mentioned in those Statutes.

The Act of 1791 authorises the Courts of Law or Equity to make partition both of real and personal estate. It has been authoritatively ruled that this Act applied only to the distribution of intestates' estates.¹ In all other cases it is the invariable usage to resort to the jurisdiction of the Court of Equity for the partition both of real and personal property. In *Pell v. Ball*, 1 Rich. Eq. 387, it is said to have been the practice of the Court of Equity in South Carolina, "long before the Act of 1791, to order partition not only of real estate, but of slaves, and to order a sale, when necessary for the purpose of partition."

Again, it was urged that there would be difficulty in executing the commission. But since the decision of *Warner v. Baynes*, Amb. 589, by Lord Hardwicke in 1750, it has been uniformly held, even in England, that the difficulty of making partition has formed no objection in this Court. In *Parker v. Gerard*, Amb. 236, Sir Thomas Clarke, Master of the Rolls, says that partition is a matter of right, and that there is no instance of not succeeding in it but where there is not proof of title in the plaintiff, and he cites the case of *Warner v. Baynes*, which was for partition of a water spout, cold bath, &c., and "where" says he, "the strongest arguments of inconvenience imaginable were used, but did not prevail." Instances of partition of an advowson, of titles, &c. are cited in the books; and in *Agar v. Fairfax*, 17 Ves. 344, the proceeding was for partition of Bilbrough Moor among a number of persons having a variety of interests, and where there had been a covenant not to enclose. It was held that the variety of interests was no obstacle: that partition did not render enclosure necessary, but that, if it amounted to a covenant against partition, it was against common right. The commission was accordingly ordered by Sir William Grant, and the decree affirmed, on appeal, by Lord Eldon. In *Turner v. Morgan*, 8 Ves. 143, the Commissioners allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase, and all

the conveniences in the yard. The Lord Chancellor, nevertheless, overruled the defendant's exception. He "had granted the commission" he said, "with great reluctance, but he was bound by authority. But the parties ought to agree to buy and sell." In England the Court has no authority to order what the Lord Chancellor thus recommends to the parties.—But in *Pell v. Ball* this authority of the Court was vindicated, on the ground of long established usage and great practical convenience. The rule in England is that whatever can be divided is the subject of partition. But, in South Carolina, interests may be severed, and the share of each

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*ascertained and set off, where the subject matter is not susceptible of division, as in the instance of a slave belonging to two persons. It not only secures peace but promotes industry and enterprise, that each should have his own. The defendant sold one-half of the timber for the valuable consideration of one thousand dollars. He is bound to afford his vendee every practicable facility for enjoying the benefit of his purchase. The complainant suggests that a fair and equal division of the timber may be made by drawing a line through the tract of land so that each might use the timber exclusively on the part or lot that should be thus assigned to him. This mode may, or may not, be just or practicable, but this is a matter for the Commissioners. If, in their judgment, no division can be made without manifest injustice, they are at liberty to recommend a sale for the purpose, and the Court will judge of the propriety of confirming such return.

It is ordered and decreed that the decree of the Circuit Court be reversed, and that a writ of partition issue, according to the prayer of the bill.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

DARGAN, Ch., dissented.

Decree reversed.

2 Strob. Eq. 148

WILLIAM MURREL et al. v. B. L. & J.
MURREL, Adm'rs.

(Columbia. May Term, 1848.)

[*Descent and Distribution* ⌘117.]

Lands conveyed by a father to his eldest sons, not to advance them, but declared by him to be, as in fact they were, in remuneration for their faithful and valuable services to him, were held not to be advancements, in the sense in which the statute uses the word.

[Ed. Note.—Cited in *Cooner v. May*, 3 Strob. Eq. 191.

For other cases, see *Descent and Distribution*, Cent. Dig. § 428; Dec. Dig. ⌘117.]

¹ *Crompton v. Ulnier*, 2 N. & McC. 429.

[*Descent and Distribution* ⇐117.]

Though a parent is entitled to the services of his children, while under age, he may waive his right and make those services the consideration of a contract or promise, and he may give property bona fide, in the performance of such obligation of justice, without its being subject to a claim on the part of the other children to consider it in the light of an advancement.

[Ed. Note.—Cited in *Douglass v. Brice*, 4 Rich. Eq. 326; *Rees v. Rees*, 11 Rich. Eq. 108; *Rickenbacker v. Zimmerman*, 10 S. C. 115, 121; *Hughey v. Eichelberger*, 11 S. C. 54.

For other cases, see *Descent and Distribution*, Cent. Dig. § 428; Dec. Dig. ⇐117.]

[*Executors and Administrators* ⇐516.]

After distributees have had a settlement with the administrator, they have no right to open that settlement, except upon the allegation and proof of fraud, misrepresentation, concealment, or mistake of facts. And the bill should state the specific ground upon which it is sought that the account should be opened and relief be given, in order that the defendant may meet the case made in the bill fairly.

[Ed. Note.—Cited in *Fraser v. Hext*, 2 Strob. Eq. 257; *McDow v. Brown*, 2 S. C. 108, 111, 113; *Annelly v. De Saussure*, 12 S. C. 521; *Mitchell v. Pinckney*, 13 S. C. 213; *Dunsford v. Brown*, 19 S. C. 570; *Kennerty v. Etiwan Phosphate Co.*, 21 S. C. 235, 236, 53 Am. Rep. 669; *Waldrop v. Leaman*, 30 S. C. 447, 9 S. E. 466; *Coates & Sons v. Early*, 46 S. C. 228, 24 S. E. 305; *Howlett v. Garner*, 50 S. C. 11, 27 S. E. 533; *Cape Fear Lumber Co. v. Matheson*, 69 S. C. 90, 48 S. E. 111; *Blossingame v. City of Laurens*, 80 S. C. 43, 61 S. E. 96; *Cline v. Farmers' Oil Mill*, 83 S. C. 207, 65 S. E. 272; *Miley v. Deer*, 93 S. C. 69, 76 S. E. 27; *Mobley v. Quattlebaum*, 101 S. C. 235, 85 S. E. 589.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2226; Dec. Dig. ⇐516.]

Before Johnston, Ch., at Edgefield, June Sitings, 1847.

The following decree of his Honor contains all that is necessary to a sufficient understanding of the facts of the case:

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*Johnston, Ch. This is a bill filed by seven of the nine children of Randolph Murrel, against the remaining two, who administered on his estate.

The distributees had a settlement with the administrators, in the Ordinary's office, on the 10th of January, 1846; on which occasion the balances due by the administrators to their co-distributees, respectively, and vice versa, were struck, and settled by notes or money, and receipts executed.

On this occasion a fund of \$1,000 was left in the hands of the administrators, the income of which was to be applied annually to the support and maintenance of the intestate Randolph Murrel's mother, an aged, infirm woman, of about ninety-one years of age, upon whose decease the said fund was to be equally distributed among all the children of the intestate. With the exception of this fund, the settlement purported to be a full and final adjustment of the estate of the intestate, and of the administration of the defendants.

On the 16th of April, 1846, the original

bill in this case was filed, setting forth various particulars, in which it was alleged the plaintiffs were mistaken or deceived in their settlement aforesaid, by the administrators' having failed to account for certain debts, which they owed the intestate, and for certain advancements in notes, money or other personality, made to them, respectively, by the intestate; by their having taken credit for certain expenditures, to which they were not entitled; and by their having brought about the reservation of the \$1,000, for the support of the aged grandmother of the parties, by a representation that the intestate had received part of his estate, under his father's will, subject to a condition expressed in said will, that he was to support his mother, which obligation, it was alleged, the administrators represented as forming a charge upon the estate in their hands.

The bill prayed that the settlement might be opened, and the account re-stated, by charging the administrators with the amounts improperly withheld by them; including the \$1,000 reserved for their grandmother's support.

The grandmother was, at this time, still alive. To this bill the defendants put in their answer denying every charge in the bill.

The grandmother then died; whereupon the plaintiffs filed their supplemental bill, stating that fact, by which, they suggested, they were certainly now entitled to the distribution of the \$1,000.

But they also included in this supplementary matter an amendment to the original bill, in which they charged particularly that the intestate had conveyed to each of the defendants, a tract of land; which they insisted should have been included in the settlement of

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January, 1846, and should *now be charged as advancements, in reforming that settlement.

The defendants answered that they had offered to distribute the \$1,000, on the death of Mrs. Murrel, and were still ready to do so. As to the conveyance of the land, they admitted the fact, which was well known to the whole of the parties at the settlement and not concealed from any of them at that time; but the defendants insisted that the land was conveyed to them by their father, not as an advancement, but as a compensation and reward of their laborious services to him; they being the oldest of the children, and the only ones he had to work for the support of the family; and having by their toil contributed, while he was yet very poor, to give a start to his accumulations.

If it turns out, upon an examination of the testimony, that the settlement was fair and and well understood by the parties, the original bill was filed without just cause, and the plaintiffs cannot avail themselves of subsequent circumstances, entitling them to a de-

cree, to exempt themselves from cost, for having dragged the defendants into Court, prematurely and unnecessarily.

I take it, after a most attentive consideration of all the pleadings and all the testimony, that there has seldom been brought into this Court a more groundless set of charges than those contained in the first bill.

To demonstrate this would require a statement as voluminous as the pleadings and the proofs in this cause. It would require me to transcribe the pleadings and the notes of evidence. As these are in writing, and are as brief as any statement I can make, I shall refer to them as they stand, as the foundation of my conclusions.

The settlement made by the parties must stand in law, and ought to stand in justice, unless something was included in it, or excluded from it, through mistake, or in consequence of fraudulent concealment or misrepresentation. Not a vestige of either of these is found in the evidence. The Ordinary, in fact, decided nothing in the case. The account was stated and truly and accurately calculated upon facts in which there was no disagreement among the parties, and upon facts most of which must have been understood and known by every party. Indeed, on the hearing, this was hardly disputed, except as to the \$1,000 reserved for maintaining the grandmother.

With respect to this, the plaintiffs' representation is that the defendants brought about the reservation by asserting that the necessity for it existed in the terms of the grandfather's will. There is not a syllable of proof to support this. On the contrary the proof is that all the parties concurred in the desire that the grandmother should be sup-

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ported out of the estate. There was no difference of sentiment among them upon this point. The only question was as to the amount of the fund necessary to effect the object, and the mode of applying it. One of them asked the Ordinary if he could not reduce the amount, and others of them preferred that each distributee should take his portion of the fund, and give his bond for his aliquot share of an annuity; but all eventually acquiesced in the amount and mode of support suggested.

Then as to the advancements. The parties went out of the Ordinary's office, and conferred upon the subject; and came back with a statement of the advancements, upon which they had all agreed, and these were set down. This is, in effect, the whole of the proof offered for setting aside the settlement.

The advancements of land are for the first time mentioned in the supplemental bill. It would deserve consideration, whether these conveyances, considered in the light of advancements, were not concluded by this settlement. But my opinion is that the defend-

ants are not accountable for the value of these lands. They were not advanced (in the sense in which the statute uses the word) by these conveyances, although the lands were given to them by their father.

The testimony is, that the sons were the oldest of the children. That the father was poor, and his other children young. That these boys "worked like negroes, and gave him a start in the world," and that he repeatedly expressed an intention to give them each a tract of land, beyond a child's share, in remuneration for his faithful and valuable services; and that after he conveyed these lands, he declared he had fulfilled the intention he had expressed.

Whatever may be the accurate definition of an advancement (and it is not easy to frame one) these gifts, standing upon this consideration, do not fall within it. I suppose an advancement must stand clear of any such consideration.—It may, and I suppose always does, betoken the affection borne to the child advanced. That is the motive. But here the motive was not love, but justice. The act was not a gratuity, but a voluntary compensation; "it was not of grace, but of debt."

The result of the whole case is that the original bill was causeless, and would have been dismissed, but for the supervening death of the grandmother; and that there is nothing in the supplemental bill that can be sustained, except the claim for the distributing the \$1,000. It is decreed that the defendants come to an account for the sum reserved out of the settlement of the 10th January, 1846, for the support of Randolph Murrel's mother, and pay over to the respective distributees of said Randolph, their distributive portions thereof, and that the bill upon all other subjects be dismissed.

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*The plaintiffs to pay the costs of the amended bill, and the defendants those of the answer filed thereto; and the plaintiffs to pay all other costs in the case.

The plaintiffs moved the Court of Appeals to reverse, in part, the circuit decree, upon the following grounds:

1. That the lands conveyed by Randolph Murrel in his life time to his sons were such advancements to them as are within the contemplation of the 3d section of the Statute of 1791.

2. That the settlement of the 10th January, 1846, referred to in the circuit decree, does not preclude the plaintiffs from claiming, or in any wise deprive them of the full shares of the estate of Randolph Murrel, to which they were entitled at his death, except as to the portions thereof that they have actually received, as their demands in this behalf have not been discharged by payment, or accord and satisfaction, or release, or submission to arbitration and award, or compro-

mise, or in any other conceivable mode known to the law.

Carroll, for the motion.

Griffin & Bonham, contra.

DARGAN, Ch., delivered the opinion of the Court.

From the facts of the case, as reported in the bill, it appears that the distributees, who were the children of Randolph Murrel, being all of age and sui juris, had a settlement, which was stated for them by the Ordinary of the district, though not in the form of a decree, nor in his judicial character. The settlement was intended to be in full, and the parties gave discharges in full to the defendants, who were the administrators, with the exception of one thousand dollars of the funds of the estate, which by the agreement of all parties was to be left in their hands. Out of the interest of this sum, an aged grand-mother of the parties, who was without the means of support, was to be maintained during her life, and at her death the principal was to be subject to distribution, as a part of the estate of Randolph Murrel. This sum was ascertained and set apart, and left in the hands of the defendants. All the rest of the estate was intended to be settled, and a distribution made according to the rights of the parties.

But the defendants, who were the two oldest sons of the intestate, had received lands from their father in his life time, which the complainants in this bill contend were advancements, and that the value of these lands, as advancements, was not included, but should have been included, in the aforesaid settlement. In this settlement, advancements were taken into the estimate and were rendered in by the parties themselves. The lands given by the testator to the defendants were not on that occasion claimed to be considered in

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the light of *advancements, though the consideration upon which they were given must, from the evidence, have been known to the complainants. The consideration alleged by the father for the conveyance of these lands to the defendants, was that they were his oldest sons, and that he being poor, they had worked for him like negroes, and had greatly assisted in laying the foundation of his estate, and that they were fairly entitled, as a matter of justice, to an extra share. It also appeared, that during the time the services were being rendered the father held out promises of remuneration to his sons for their extraordinary exertions, to be realized in the distribution of his estate, and thus stimulated them to an uncommon degree of activity in his service.

The Chancellor, under this state of facts, considered that though a parent is entitled to the services of his children while under age, he may waive his right and may make the services of his children the consideration of

a contract or promise, and that he may give property bona fide in the performance of such obligation of justice, without its being subject to a claim on the part of the other children to consider it in the light of an advancement. The Chancellor says "it would deserve consideration whether these conveyances, considered in the light of advancements, were not concluded by the settlement. But my opinion is that the defendants are not accountable for the value of these lands. They were not advanced (in the sense in which the statute uses the word) by these conveyances, although the lands were given to them by their father."

This Court is entirely satisfied with what the Chancellor has said on this question of advancements, and it is deemed unnecessary to add any thing to the views he has presented on that subject.

But it is deemed of importance to say that in the opinion of this Court the complainants are concluded from making the question as to the alleged advancements, in consequence of the settlement which they had, and which was intended to be final and conclusive, save only as to the thousand dollars reserved for the use of their grand-mother during her life. They have no right to open that settlement except upon the allegation and proof of fraud, misrepresentation, concealment or mistake of facts. And as a matter of pleading, the bill should state the specific ground upon which it is sought that the account should be opened and relief be given, in order that the defendants may meet the case made in the bill fairly. If parties come to a settlement, and will not see their rights in their true character, or use proper diligence in ascertaining them, or perceiving their rights, think proper by their silence to waive them; there is no reason why this Court or any other should be called upon to

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protect them from the consequences of their own default or folly. There are but few settlements or accountings in which, by a searching scrutiny, some errors or omissions might not be detected. And this Court will not open them when by a proper vigilance they might have been guarded against, and unless some of the circumstances above adverted to as affording grounds for relief are alleged and proved. A party fully competent to protect himself; under no disability; advised as to all circumstances by which he may be saved in his rights; or in a situation where he might, by due diligence, be so advised; not over-reached by fraud, concealment or misrepresentation, nor the victim of a mistake against which prudence might have guarded; has no right to call upon Courts of Justice to protect him against the consequences of his own carelessness, and to disturb the peace of society by his clamors for that justice which he has voluntarily or negligently surrendered. More especially is it

wise that these family settlements should not be disturbed upon light grounds. The criminations and recriminations incident to such proceedings oftentimes sunder forever the ties of consanguinity and result in the disruption of the friendships of a long life. What is true as to families in this particular, is true as to the interests of society in general. The rule, from the foregoing considerations, is vindicated upon principle. It is not less strongly sustained by authority. For it will be perceived, that every thing which I have said is supported by decisions which are directly in point.¹

The decree is affirmed and the appeal is dismissed.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

DUNKIN, Ch., absent at the hearing.

Decree affirmed.

¹ Pratt v. Weyman, 1 McCord Eq. Rep. 161; Radcliffe v. Wightman, Ib. 408; Porter v. Cain, McMullan's Eq. Rep. 81; 1 Story's Eq. Sec. 138; Stockley v. Stockley, 1 Vesey and Beams, 29.

2 Strob. Eq. *155

*H. SUMMER, Executor of Clement Nance, Deceased, v. R. & J. CALDWELL et al.

(Columbia. May Term, 1848.)

[*Equity* ⚡135.]

If, in a bill to marshal assets and obtain the instructions of the Court, the complainant seeks any information from the defendants, his bill should be framed with that aspect, and with apt charges, and the discovery should be made with those guards, to the protection of which a defendant is entitled.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 315; Dec. Dig. ⚡135.]

[*Discovery* ⚡12.]

It cannot be expedient to give the plaintiff, in the first instance, a sweeping order for the inspection of the books and documents in the possession of the defendants, and belonging to their ordinary business transactions, merely to see if the plaintiff, or the other parties referred to in the order, cannot discover something in them which will afford a ground of defence to the defendant's claim.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 13; Dec. Dig. ⚡12.]

Before Harper, Ch., at Newberry, July Sittings, 1847.

This was a bill to marshal assets and for relief.

It is stated in the bill, amongst other things, that the firm of R. & J. Caldwell, of Charleston, had given notice of a large demand against F. A. Nance, a son and legatee of the complainant's testator; and that they hold the testator's estate liable as guarantor of said debt, which, if established against said estate, would render it insufficient for the payment of the other debts and legacies.

And the complainant has been notified by some of the simple contract creditors and legatees, not to pay the demand of said R. & J. Caldwell.

The bill prays to have the assets marshalled; and that the said R. & J. Caldwell, and all the other creditors, may establish their demands against the estate, and that the legatees may contest said demands; and that the administrator might be instructed how to pay out the funds of said estate.

The defendants, R. & J. Caldwell, by their answer, admitted that they had given notice of a claim against the estate, on a guarantee given by testator to them, for his son, the said F. A. Nance, and insisted that the estate of said testator was liable to pay the amount due thereon.

The case was heard on bill and answer, whereupon the following order of reference was made:

Harper, Ch. On hearing the pleadings: ordered, that it be referred to the Commissioner to take an account of the estate of Clement Nance, deceased; and that he ascertain and report the debts outstanding against said estate, and their rank; and for this purpose, that he call in the creditors, to present and establish their demands before him, by a day to be fixed by him—giving thirty days notice in one of the newspapers published in Columbia.

And as to the demand set up by the defendants, R. & J. Caldwell, it is ordered, that

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they bring into the Commissioner's office, for the inspection of the other parties, all the books, letters and papers in their possession or power, which may be necessary to enable the other parties to understand how and when their demand arose, and how much it was at the various stages in its progress, and how it now stands.

The defendants, R. & J. Caldwell, appealed, and moved the Court of Appeals in Equity to reverse so much of the above order as requires them "to bring into the Commissioner's office, for the inspection of the other parties, all the books, letters and papers in their possession or power, which may be necessary to enable the other parties to understand how and when their demand arose, and how much it was at the various stages in its progress, and how it now stands," on the following grounds, viz:

1st. Because the defendants were not bound, in Law or Equity, to furnish information to the other creditors or legatees, to enable them to understand this claim; provided these defendants furnished sufficient evidence of their claim, and the liability of the testator's estate to pay it.

2d. Because His Honor erred in requiring the defendants to establish their claim against the estate in any other way than by legal evidence, as in any other case.

3d. Because this part of the order is contrary to the established practice of the Court.

Fair, for the motion.

Pope, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The rule in regard to the production of books and papers is discussed by Lord Eldon in the *Princess of Wales v. the Earl of Liverpool*, 1 Swanst. 121, and the authorities are reviewed by Chancellor Kent in *Watson v. Renwick*, 4 Johns. C. R. 383. It is indispensable that the party should show, or make it appear, that he has an interest in the papers called for, to entitle him to the production of them. The most ordinary case is in suits between partners, or between principal and agent. That in 1 Swanst. was a bill of discovery. The answer must contain an admission that the books, &c., are in possession of the defendant, and they must be so referred to in his answer as to become incorporated into it and become a part of it. This is not a bill of discovery, but to marshal assets and obtain the instructions of the Court. If the complainant seeks any information from the defendants, his bill should be framed with that aspect, and with apt charges, and the discovery should be made with those guards to the protection of which a defendant is entitled.

It is merely stated that they have a claim against the estate. It cannot be expedient,

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(as was suggested in *Watson v. Renwick*.) to give to the plaintiff, in the first instance, a sweeping order for the inspection of the books and documents in the possession of the defendants, and belonging to their ordinary business transactions, merely to see if the plaintiff, or the other parties referred to in the order, cannot discover something in them which will afford a ground of defence to the defendants's claim.

It is ordered and decreed that the motion be granted, and that the order requiring the defendants to bring into the Commissioner's office their books, letters and papers, be rescinded.

JOHNSTON, Ch., and DARGAN, Ch., concurred.

CALDWELL, Ch., having been of counsel, gave no opinion.

Order rescinded.

2 Strob. Eq. 157

ABNER D. JOHNSON et al. v. The EXECUTORS OF WILLIAM LEWIS.

(Columbia. May Term, 1848.)

[*Use and Occupation* ⌘10.]

Where one had obtained possession of lands and negroes, not as a trespasser, but believing

the right of property to be in himself; and it had been decreed that he was in possession under a contract to hold for others, to whom he should account before the Commissioner; on appeal from the decree, upon exceptions taken to the Commissioner's report, it was held that he was responsible only for what was made in each year of his possession, and not for the estimated hire of the negroes and rent of the lands.

[Ed. Note.—For other cases, see *Use and Occupation*, Cent. Dig. § 26; Dec. Dig. ⌘10.]

[*Use and Occupation* ⌘10.]

The rule is, that if one come tortiously into possession of an estate, he ought not to be spared, and ought to be charged to the extent of what it was capable of producing; but if he enter rightfully, and can show what the actual income was, that will determine the extent of his liability. The same principle ought to apply where the party in possession believed that the right of property was in himself, and has been thrown off his guard, by the belief that he was not liable to account, and consequently kept no accounts.

[Ed. Note.—Cited in *Rabb v. Patterson*, 42 S. C. 536, 20 S. E. 540, 46 Am. St. Rep. 743.

For other cases, see *Use and Occupation*, Cent. Dig. § 26; Dec. Dig. ⌘10.]

[*Executors and Administrators* ⌘206.]

Where a grand-father, after the death of their parents, took his grand children to his own home, and from the evidence and the circumstances, it appeared that no charge was intended to be made for their board; the Court refused afterwards to allow it.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 733; Dec. Dig. ⌘206.]

[*Assumpsit, Action of* ⌘7; *Executors and Administrators* ⌘206.]

What was intended as a gratuity cannot afterwards be converted into a charge.

[Ed. Note.—For other cases, see *Assumpsit, Action of*, Cent. Dig. § 41; Dec. Dig. ⌘7; *Executors and Administrators*, Cent. Dig. § 733; Dec. Dig. ⌘206; *Contracts*, Cent. Dig. § 130.]

[*Equity* ⌘408.]

It is not necessary, in his report, that the Commissioner should detail all the evidence. It is sufficient to specify so much as will enable the Court to see with certainty the evidence upon which he acts. He is, through the medium of evidence, to certify facts, upon which the Court is to adjudicate. If either party, by exceptions, question the sufficiency of the evidence to warrant the facts so certified, the Court should have before it the means of looking into such evidence, in order to judge of the legality or sufficiency of it to sustain the finding.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 901, 902; Dec. Dig. ⌘408.]

[*Equity* ⌘408.]

In the Commissioner's report on the exceptions, he should point to the particular evidence which has been heard by him, and on which his judgment is based in sustaining or overruling such exceptions.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 901; Dec. Dig. ⌘408.]

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*Before Johnson, Ch., at Fairfield, June Sittings, 1846.

On appeal from a decree of the Circuit Court, dismissing a bill filed for that purpose, the Court of Appeals, in 1841, held that the

property hereinafter referred to was purchased by William Lewis, the defendant's testator, on the agreement that it was for the benefit of the family of J. R. Pickett, and according to a decretal order of the Court, made in the case, all matters of account between the parties were referred to the Commissioner to examine into and report upon. A part of the accounting was in relation to a mercantile co-partnership between James R. Pickett and William Lewis, under the style of Pickett & Lewis, entered into some time in the year 1817, and continuing only for a short time in active business, as by the evidence the last stock was taken in the spring or summer of A. D. 1819.

James R. Pickett, whom the complainants represent, died in the year 1822, before there was any regular and final settlement between himself and his co-partner, William Lewis. At the time of his death, as appears from the proceedings in this case, there were debts to a considerable amount existing against the firm of Pickett & Lewis, upon the most of which judgments had been obtained and executions lodged in the lifetime of Pickett. In the early part of the year A. D. 1823, the first year after the death of Pickett, all of his property, consisting of some eighteen or twenty slaves, two tracts of land and other property, was levied on and sold by the Sheriff of Fairfield District, under these executions against himself and his co-partner. The land and negroes and all the other property so sold was bid off by Lewis, (except about \$124 worth,) who paid off the executions, and returned the negroes to the land so purchased, and upon which the widow Pickett, (daughter of testator) lived. They thus continued for about three years, after which time Lewis took them directly into his own possession. The last decree in this case set this purchase up as one in trust for the benefit of Pickett's widow and children, and directed this accounting and a restoration of the property to the heirs of Pickett. In the accounting the complainants claimed the price of the cotton raised upon the land, and by the slaves of Pickett, for the years, 1822, 1823, 1824 and 1825, which it was proved went into the possession of Lewis, and was sold and appropriated by him to the payment of debts existing against himself and Pickett as co-partners, and for which payment he was allowed credit.

That Lewis got this cotton is not disputed; the only dispute was in relation to the quantity. There was no evidence as to the precise amount raised, especially for the years 1823

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and 1825. From the evidence of the produce of the years 1822 and 1824, the Commissioner placed the amount for each year at 35 bales, and ascertained the value of it by reference to the sales of cotton made for Lewis for these years, by his factor, John

Robinson of Charleston, a statement of which was in evidence.

After examining closely all the evidence on the question of hire, the Commissioner placed it at \$80 per annum for men, and \$45 for plough boys and \$60 for women, ranking boys as men after they arrive at eighteen years of age.

There seems to be no dispute as to the number of negroes that went into the possession of Lewis. The time when some of them died was admitted, and also that several of them have run away from defendants and gone into the possession of complainants, at sundry times during this period; the names of which, and the dates at which they left, were also admitted. One witness in his evidence furnished the ages of the several negroes in 1822, at the death of Pickett. With this evidence and admissions the Commissioner made out the number of negroes employed each year, their sort, and the amount for which the whole of them hired annually.

The land for which defendants are chargeable for rent is known in these proceedings by the names of the Brown, Lot and Woodward tracts.

The Commissioner placed the rent of the several places at the following prices. The Brown tract \$1.00, the Lot tract at \$1.50, and the Woodward tract at \$2.00 per acre, and with these data made out a table of rent, showing the number of acres cultivated on each place each year and the price.

The credits claimed by defendants on account of overseers' wages, taxes and raising young negroes, were considered in fixing the quantity of cotton, the rents of land and the hire of negroes.

It was in evidence that the five children of Pickett, after the death of their mother, went and lived for several years with Mr. Lewis, who fed, clothed and educated them.

The amount allowed for each child by the Commissioner per annum, during the time Lewis kept them, was seventy dollars. The time they each remained, and the amount with which defendants were credited each year on account of board, appeared by reference to a table made out and appended to the report.

Taking the foregoing as data for the calculations, the Commissioner stated the accounts between the parties with much care and labor, and the result was, that the defendants were due to complainants the sum of eleven thousand three hundred and forty-one dollars and twenty-seven cents.

Many exceptions were taken to the report

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of the Commissioner, by both parties. Those involving the principles adjudicated, will be sufficiently specified in the following decree.

Clark and McDowall, for complainants.
McCall, for defendants.

Johnson, Ch. The exceptions to the Commissioner's report, seventeen on the part of the complainants and twelve on the part of the defendants, apply for the most part to the details of the account between Pickett and Lewis, involving no principle of law, and depending, as might be expected from the loose manner in which the accounts were kept and the length of time that has elapsed, in many instances on very doubtful and equivocal evidence. I have gone over the evidence, and although there may be instances in which the conclusions of the Commissioner might be doubted, I have found nothing that would justify me in saying that they are decidedly wrong. I propose, therefore, generally to adopt them where the questions raised depend on the facts. There are some, however, which involve principle, and deserve more particular notice. I refer particularly to the 9th and 10th exceptions of complainants, and the 1st and 2nd of defendants. The question involved is, whether, in stating the account between the administrator of Pickett and defendants' testator, the hire of the negroes and the rents of the land ought to be charged according to their estimated value; or according to the sales of the crops. The rule is that if one come tortiously into possession of an estate, he ought not to be spared, and ought to be charged to the extent of what it was capable of producing; but if he enter rightfully and can show what the actual income was, that will determine the extent of his liability. In the case of *Rainsford v. Rainsford*, the latter rule was adopted under very peculiar circumstances. The defendant had kept no accounts, nor was he able to show the annual sales of the crops, but he had used great economy, practiced great industry, carefully invested all the income, and the result proved that there had been a reasonable profit, and it was held that this constituted a rule by which he ought to account.—The same principle ought, I think, to apply, where the party in possession believes that the right of property was in himself, and has been thrown off his guard, by the belief that he was not liable to account, and consequently kept no accounts. That Lewis believed that the property was in himself is proved by his conduct, and that this was not without some foundation may be fairly deduced from the circumstance, that numerically there was an equal division of the Court upon the question of right. Now I hazard nothing in saying, that not one planter in a hundred realizes annually one-half of the estimated value of the rents of his lands and the hire of his negroes, and ruin must follow when that

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rule of account*ing is adopted. The only reason given by the Commissioner for adhering

to it in this case is, that he had no other data; and although Lewis' account of his factor's sales was exhibited, there was no proof that he did not sell elsewhere than in Charleston. The proof is that Robinsons' house, in Charleston, were his factors, and their accounts show annual sales, and it is not often that a planter changes his factor or his market in the same season. If it had been otherwise in this instance, the complainants ought to have shown it. The position assumed by the Commissioner requires defendants to prove a negative, and this could not have been done unless they had called every dealer in cotton in the State—not even then, as by possibility he might have sold to some one else. It is only necessary to look into the results of this account to show that injustice has been done to the defendants. At the time Lewis took possession of Pickett's estate, its estimated value, all told, was, to speak in round numbers, \$9000.00—the number of workers at no time exceeding sixteen, and ranging from that down to nine, including men, women, and boys; and in a comparatively short time he paid debts to the amount of \$10,000, and the balance found against him in this account is \$11,000. No such results as this can be shown in the District from the mere operation of planting. There is something wrong in this, and the only mode of correcting it is, to substitute the factor's account of sales, and I shall direct the account to be stated on that principle.

The only other exception requiring especial notice is the defendant's ninth. The Commissioner states in his report on the exceptions that the note referred to was not brought to his notice until after the report was framed, but as the accounts will have to go back for a further report, he will consider this exception open for future examination.

It is ordered and decreed, that the report be recommitted to the Commissioner, and that he restate the accounts, in conformity with the principles of this decree, debiting the defendant's testator with the factor's account of sales, instead of the hire of the negroes and rents of the lands. All other exceptions are overruled.

The complainants moved to reverse the decree of the Circuit Court, on grounds, the following of which were considered by the Court:

Grounds of Appeal.

1. Because the rule laid down, in the decree, as to the mode of making up the accounts between the parties, the complainants and the defendants, is entirely erroneous, under any circumstances of the case; and diametrically repugnant to the direction given by the Court of Appeals, as to the manner in which the said accounts should be made out.

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*2. Because the Commissioner in Equity, in making up his report in the case, charged the defendants with the rents of the lands and hire of the negroes, as directed by the Court of Appeals, and the Circuit Court had no authority to direct a different mode of making up the accounts.

3. Because the manner directed by the Circuit Court, to make up the accounts between the parties, is entirely impracticable, as the testator of the defendants kept no account of his annual cotton crops; and the sale bill of his factor of the number of bales of cotton he annually sold for him, furnishes no certain evidence of the quantity of cotton he annually made; and to confine the complainants to the evidence furnished by the sale bills alone, would operate as a fraud upon complainants, as it would preclude them from going into further evidence, to show the number of bales of cotton the testator really annually made.

4. Because the Circuit Court should have sustained the 9th and 10th exceptions of the complainants to the report of the Commissioner, and which exceptions relate to the rents of the lands and the hire of the negroes; as it was clearly established that Lewis, the testator, was guilty of a trespass, in dispossessing Mrs. Pickett and her children of said lands and negroes. The Commissioner, therefore, should have charged the defendants with the highest rent and hire the lands and negroes were proved to be worth.

The defendants appealed, on the ground that their exceptions should have been allowed.

Clarke and Gregg, for the motion.

McCall and DeSaussure, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The decree of this Court, pronounced in May, 1841, established the contract alleged by the complainants to have been made by the testator of the defendants in 1822. The decree affirmed that, at the Sheriff's sales of Pickett's property, William Lewis purchased, on the agreement that it was for the benefit of the family of Pickett, whose wife was the testator's daughter, and that, after the payment of the partnership debts of Pickett and Lewis, and the private debts of J. R. Pickett, the property should be returned to the family. From the time of the sale in 1822, until the marriage of Mrs. Pickett in 1825, the property remained in her possession; William Lewis receiving the proceeds of the crops, and applying them to the payment of debts. On the marriage of Mrs. Pickett to Dr. McCullough, in 1825, Wm. Lewis took exclusive possession of the property. Mrs. McCullough died in 1826, the year after her marriage, and her five children, who were

very young, lived for some years with their grandfather, the testator.

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*The Commissioner adopts the conclusion that the decree of the Appeal Court had declared the testator, Wm. Lewis, to be a trespasser, and he infers that it was intended he should account as such. This is certainly a misapprehension. The Court held that he was in possession under a contract to hold for the benefit of Pickett's family, and the object was to make him comply with this contract, and account as he would have accounted if he had fulfilled his engagement. The principal property, purchased by William Lewis, and for which he was thus held accountable, consisted of three tracts of land and a gang of negroes, in which there were about sixteen workers, and among them a blacksmith, two carpenters, and two boat hands. The Commissioner's account is made up by ascertaining for how much each negro could probably have been hired, and at what rate per acre the land could have been rented. The Chancellor, we think very properly, sustained the exception to this mode of raising the account. In the three or four first years Mrs. Pickett and her family resided on the plantation, and Wm. Lewis is charged in the account with the proceeds of the cotton crop of those years. When Mrs. Pickett married Dr. McCullough, Mr. Lewis deemed it proper to take exclusive charge of the estate. Assuming that he was prudent and diligent, he is responsible for what was made in each subsequent year.—There may be difficulty in ascertaining this, and no specific rule can be laid down which is applicable to all cases and under all circumstances. Mr. Lewis was not an executor, whose duty required him to make annual returns to the Ordinary, nor was he such trustee as is required to account annually to the Court of Equity, but he should have kept such accounts as would enable him to show satisfactorily the manner in which he has discharged his trust. Having failed to do so, the Court is obliged to resort to such testimony as the circumstances afford. In respect to the cotton crop the Court sees no reason to object to the mode adopted by the Commissioner, for the years 1822, '23, '24, and '25, and the same principle may be applied to the subsequent years, varying the amount according to the testimony. But it may be, and it was so urged by the complainants, that there were other sources of profit which should be taken into consideration in estimating the annual value. It was said there were carpenters and a blacksmith which were hired out, or were employed about the business of Mr. Lewis, and boat hands who were employed in the same way—all this, and any other source of profit, should be estimated by the Commissioner, and should be charged in the account.

The Court has declined to sanction the

measure or mode of accountability adopted by the Commissioner, because the defendant's testator did not hold the negroes under

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a contract *of hiring, nor did he hire out the gang of negroes or the lands to third persons; nor was it his duty to do so—on the contrary, it was understood that they were to be kept together, and Mr. Lewis acted on this understanding. There are advantages in the improvement of the condition of the property, which more than compensate for the diminished money income, and trustees should be encouraged to keep the estate together when it is thus situated. But there are advantages beyond the mere improvement of the property. While Mrs. Pickett and her children resided on the place, they derived their support from it, without any diminution of the income. And this brings the Court to the consideration of the complainant's exception, in relation to the board of J. R. Pickett's children. He died in 1822, leaving five children, to wit: four daughters, the eldest of whom was ten years of age, and one son, an infant. On the death of their mother, four years afterwards, 1826, their grandfather, instead of leaving them with their stepfather, or on the plantation with an overseer, kindly and naturally took them home. "Mr. Lewis," says one of the witnesses, (George S. Peay,) "was as wealthy as any man in his section of the country, except Col. Peay or Reuben Harrison." The eldest daughter was married in 1832, the second in 1833, and the three other children left him in 1836. They never went to any other than a neighborhood school. The question arising out of the exception, is whether Mr. Lewis is entitled to any, and if any, what, charge for the board of his grandchildren while with him. From what has been said it is quite manifest that, for the ordinary means of livelihood, the children were entitled to depend on the productions of the property which belonged to them, and which do not affect the income. In this way they had been hitherto supported, and, so far as can be ascertained, without charge. Evidence was offered as to the price at which each of these children could have been boarded out. But this assumes that the person who takes them to board furnishes everything, provisions, &c., and moreover that he makes a profit from it. And this leads to the inquiry whether Mr. Lewis, when he took the children home on the death of his daughter, intended to charge them board, or acted from the impulses of his heart, and voluntarily assumed the place of a parent to the orphan children. If it was intended as a gratuity it is hardly necessary to say that it cannot afterwards be converted into a charge. It is not enough to say that he found his benevolence misplaced, and that the objects of his bounty proved ungrateful. If, from the circumstances of the case, it is manifest

that he received and entertained them, intending to make no charge, he must be satisfied with the reward of an approving conscience.

There is no evidence whatever that Mr.

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Lewis ever contemplated such charge until long after his grandchildren had left him, or until the rupture between them and himself.—The estate of Pickett was much involved, and in no view that can be taken of the accounts, was it disembarassed until after his children had left their grandfather in 1836. According to the mode of accounting adopted by the Court, Mr. Lewis is placed in the favorable condition of the owner of an estate, setting forth the profits of it. All the ordinary sources of maintaining a family, in the condition in which the children of Pickett were maintained, are derived, or might be derived, from the plantation, and for the other comparatively inconsiderable expenditures, if any such were incurred, the Court is of opinion, on the evidence and the circumstances, that no charge was intended to be made, and should not, therefore, be now allowed. On all the other points considered in the decree of the Circuit Court, and ruled by that decree, this Court concurs in the judgment of the Chancellor.

The Court avails itself of this occasion to make an observation in regard to the practice in the Commissioner's office. There are twenty-nine exceptions to the Commissioner's report, seventeen on the part of the complainants, and twelve on the part of the defendants. The evidence comprises about two hundred pages of closely written foolscap paper. Now the duty of the Commissioner, in such cases, is well stated in *Johnston v. Reardon*, 12 Eng. C. C. R. 32. "It is not necessary in the report to detail all the evidence. It is sufficient to specify so much as will enable the Court to see with certainty the evidence upon which the Master acts. The Master is, through the medium of evidence, to certify facts upon which the Court is to adjudicate. If either party, by exceptions, question the sufficiency of the evidence to warrant the facts so certified, the Court should have before it the means of looking into such evidence, in order to judge of the legality or sufficiency of it to sustain the finding." In the Commissioner's report, on the exceptions, he should point to the particular evidence which has been heard by him, and on which his judgment is based in sustaining or overruling such exceptions. It is in cases of the character now under consideration, that a report on the exceptions is particularly necessary, as the Commissioner, who is familiar with the testimony, however complicated and voluminous, may easily classify and arrange it for the inspection and examination of the Court.

It is ordered and decreed that the decree of the Circuit Court be reformed, and that

the account be restated by the Commissioner according to the principles herein before declared and prescribed.

JOHNSTON, Ch., CALDWELL, Ch., DARGAN, Ch., concurred.

Decree modified.

2 Strob. Eq. *166

*JOHN C. SINGLETON v. J. D. ALLEN.

(Columbia. May Term, 1848.)

[Bonds \hookrightarrow 63; Interest \hookrightarrow 59.]

When a general payment is made, in anticipation, upon an instrument securing the payment of money at a future specified time, with interest thereon, from a prior date, the interest is computed up to the time of the payment, and the payment is deducted from the aggregate of the principal and interest, first applying it to the interest, and then to principal if it exceeds the amount of interest; but if the payment does not exceed the interest, then it is applied towards its extinguishment.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 66; Dec. Dig. \hookrightarrow 63; Interest, Cent. Dig. § 132; Dec. Dig. \hookrightarrow 59.]

[Covenants \hookrightarrow 128.]

The covenants for quiet enjoyment, included in our ordinary conveyances, begin to run only from eviction; and where a grantee, after being evicted, subsequently acquires a good title, having, in the mean time, otherwise sustained no loss, nor been deprived of any privilege by the eviction, he is entitled to compensation only for the actual injury done the premises during the time they were held adversely to him.

[Ed. Note.—Cited in *Stegall v. Bolt*, 11 S. C. 524.]

For other cases, see Covenants, Cent. Dig. § 243; Dec. Dig. \hookrightarrow 128.]

[Appeal and Error \hookrightarrow 119; Costs \hookrightarrow 234.]

An appeal relating to costs alone, will not be sustained. But where the decree is found to be erroneous on other points, the Court is to adjudge the costs upon the principles of the decree as reformed.

[Ed. Note.—Cited in *Bratton v. Massey*, 18 S. C. 561; *Scott v. Alexander*, 23 S. C. 126; *Jenkins v. Bennett*, 40 S. C. 401, 18 S. E. 929.]

For other cases, see Appeal and Error, Cent. Dig. § 823; Dec. Dig. \hookrightarrow 119; Costs, Cent. Dig. § 892; Dec. Dig. \hookrightarrow 234.]

Before Harper, Ch., at Columbia, July Sittings, 1847.

It appears in this case that John C. Singleton, the complainant, on the 22nd day of January, 1836, purchased from William M. Myers his plantation and negroes on the Congaree River, for \$75,000, and gave his bond conditioned for the payment of that sum, with interest thereon annually, on or before the 22nd day of January A. D. 1846. The bond was further conditioned that complainant should be at liberty to pay the said bond, or any part thereof, in such sum or sums, and at such time or times, as it might suit him to do so, within the ten years. The complainant gave mortgages of the land and slaves to secure the payment of the bond, and received titles with the usual warranty. Aft-

erwards James O'Hanlon set up a claim to fifty acres of the land and commenced using the timber which was upon it, when in March, '42, the complainant brought an action of trespass to try title against him. The jury found a verdict for O'Hanlon, and in January, 1845, Myers bought the fifty acres from O'Hanlon for the sum of \$750, and transferred the title to complainant.

In 1844, the bond with a balance still due upon it was assigned by Myers to Joseph D. Allen, the defendant.

In his bill, complainant claims a deduction from his bond, of interest upon the value of the fifty acres, from which he had been evicted, from the date of the original deed of Myers to him, to the period of time at which he subsequently received a good title, and that the payments made in 1836, should be applied wholly towards the extinguishment of the principal sum. At the maturity of the

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bond he tendered in *payment of it an amount calculated upon those data. The defendant refusing to receive the sum tendered, as the true amount due, ordered the mortgaged negroes to be sold in satisfaction of his debt.

The bill prays a writ of injunction to restrain the sale of the negroes, and an order that the bond should be delivered up to be cancelled. On hearing the application on bill and answer, his Honor Chancellor Caldwell delivered the following decretal order:

Caldwell, Ch. This is an application on bill and answer to enjoin defendant from selling seven slaves that complainant mortgaged to William M. Myers, Esq., to secure the payment of a bond for seventy-five thousand dollars. The bond and mortgage have been assigned to defendant, who claims over one thousand dollars as yet due, and has instructed his agent, Theodore Stark, Esq., to sell the slaves to satisfy his demand. The bond was dated the 22d of January, 1836, and was due 22d January, 1846, with interest from the date, "payable annually;" its condition contains the following stipulation. "That the said John C. Singleton shall be at liberty to pay the said sum of seventy-five thousand dollars, or any part thereof, as he may think proper, and in such sums as he may find convenient, at any time or times within the said ten years, when it may suit him to do so, and to have credit therefor endorsed upon the said bond when such payment shall be made," &c. From this amount the parties agreed to deduct four thousand dollars, the value of twelve slaves retained, at the date of the bond. In the year 1836 complainant paid on the 18th of February, twenty thousand dollars, on the 12th of April, twelve thousand dollars, and on the 23d of July fifteen thousand dollars, making in the aggregate forty seven thousand dollars; several payments were subsequently

made, and complainant, on the 17th of July last tendered defendant forty-three dollars and ninety-three cents as the balance due, which defendant refused to accept. The first question is, shall the interest, as the defendant insists, be calculated from the date of the bond to the first payment, and the payment be applied to the interest, and the balance of the payment be credited on the principal? The general rule for calculating interest where partial payments have been made, is to apply the payment in the first place to the interest due and the surplus to the principal; subsequent interest is to be calculated on the balance of principal remaining due; if the payment be less than the interest, the surplus of interest is not to be added to the principal, but to be kept in a separate column, and the next payment is to be applied to extinguish it, so as not to compound the interest. This principle has been deduced from cases where principal and interest are due, or the interest is due, and

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where there is no special contract *between the parties as to the appropriation of the payments; it cannot therefore be considered as strictly applicable to this case, which must be determined by the construction of the contract, the intention and act of the parties, and by the credits entered upon the bond. In addition to the common law right that the debtor has, where his creditor holds different demands on him, to apply his payment as he pleases, this contract gives complainant the express right to pay the whole or any part of the debt at any time within the ten years when it may suit him to do so, and to have credit therefor endorsed upon the bond when such payment shall be made. The interest was accumulating from the date of the bond to the end of the year, but the debtor was not bound to pay it before it became due; it was neither his duty or his interest to do so, and the creditor had no right either to expect or exact it; the debtor by appropriating his money to pay the interest before it was due, would lose its use until it became due; not so with the payment of the principal, any sum so applied would stop the interest pro tanto from the time of payment. When we consider the large amounts of the payments so promptly made and within such short periods of each other, when no interest could be required by the creditor, and such payments would, if applied to extinguish the interest, give an advantage to the creditor, and work an injury to the debtor inconsistent with the right which he had so carefully reserved in the contract, there seems to be little doubt as to the intention of the debtor to appropriate his payments in 1836, to the discharge of the principal. As his right was clearly expressed it cannot be waived by implication; such a construction would defeat one of the prominent objects of the contract, and con-

vert that which was intended as a benefit into a burden: the promptness of payment was intended to secure the privilege of stopping the interest, and shall equity make that the means of accumulating it? The phraseology of several of the credits strengthens this conclusion; the first, "as part of the within bond," the third, "in part of this bond," and the fourth on the 23d of January, 1837, for twenty hundred and forty-eight dollars and eighty cents "in part of the interest due on the above bond." According to the defendant's mode of calculation, there could not then be near that amount due for interest, but if the previous payments ought to be deducted from the principal, as complainant contends, that sum would be only in part of the interest due. If the declarations of the debtor at the time he pays money to his creditor be sufficient to control its application, the acquiescence of the creditor in the appropriation may fairly be inferred from his acts cotemporaneous with his receipt of the money; and when the construction of the contract and the apparent intention and

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repeated acts of the parties in performing it, correspond, the conclusion is inevitable. In the three credits nothing is said about interest; in the fourth credit the amount paid is applied to extinguish interest "in part," as it was then due and had become an interest-bearing demand. There must be some error in the estimate connected with the fifth credit on the 26th of May, 1837, as there is no mode of calculation that will make the interest on the 23d of January, 1837, amount to twenty-six hundred and forty-eight dollars and eighty cents: the terms of this credit are in corroboration of the complainant's calculation, and the receipt purports to have been made for interest due at the previous payment. There are comparatively few cases where the debtor pays either principal or interest before due; if he do, there is generally some express stipulation from which he, as well as the creditor, derives a benefit; hence the difficulty of finding an analogous case. In *Tracy v. Wicoff*, 1 Dal. Rep. 124, Chief Justice McKean says "the rule of computing interest must be such that the interest of money paid in before the time must be deducted from the interest of the whole sum due at the time appointed by the instrument for making the payment. For instance a bond to pay £100 with annual interest at 6 per cent., and at the end of six months £50 are paid; this payment shall not be apportioned at £3 to the discharge of the half year's interest, and £47 to the diminution of the principal, so as to calculate the remaining interest at six per cent. upon £53 for six months, but the interest shall be charged at the end of the year upon £100, the payment of £50 shall then be deducted from the aggregate sum of £106, and the obligor receive a credit of £1.10 as interest of

£50 for six months." If the account were stated on the contrary principle, the obligor would not only pay £1 11s. 9½d. more in the year, but the obligee would gain £3 more upon his £100 if he put out the £47 at interest when he received it. The illustration of the rule renders the reasonableness and propriety of its application in this case much stronger than in that quoted; in the latter there was no reservation of the right of the debtor to extinguish the principal before due, nor any evidence that he so applied the payment at the time, nor that it was so accepted by the creditor. This mode of calculation is not a novelty; it has been long sanctioned by the custom of Bankers. When a lodgement (usually a deposit of money) is made by the customer, interest up to that day is calculated upon whatever balance is due, this is entered in a separate column in the account, and the lodgement deducted from the principal sum then due, and so on with any succeeding lodgement; at the end of a year, a balance is struck on foot of the principal and interest, and the consolidated sum is introduced as the first item in the subsequent account, and carries interest. The

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mode of stating an account between *debtor and creditor only differs in this, no balance is struck until the accounts are closed. No objection can be sustained on the ground that if the principal be paid, interest on it cannot be recovered, as the rule is now well settled that where there is a stipulation for interest it may be recovered after the principal debt has been paid. The payments made by complainant in 1836 are to be applied to the principal; and the interest accumulating to the different periods are to be set down in a separate column and aggregated at the end of a year; from that time the interest being "payable annually" bears interest. The next question is, how shall the payments be applied that have been made subsequently to the accrual of the annual interest? If the debtor does not choose to avail himself of the terms of the contract and appropriate his payments to the principal, which he can pay when he pleases within ten years from the date, he may be considered to have expressly waived his right when the payment is not applied to the principal, and the creditor enters a receipt for it on the bond in extinguishment of the interest. The payments on the 23d of January, and on the 26th of May, 1837, as far as they go in discharge of the annual interest and its accumulating interest, stand upon the same footing. The creditor might have recovered the annual interest (which became an interest-bearing demand) when it accrued, but could not sustain a suit for the balance of the principal: the annual interest is not secured like the principal, by converting its interest into principal annually, and these circumstances no doubt controlled the appli-

cation of the payments. Every subsequent payment is embraced in these two classes of credits, and must be applied in making up the accounts between the parties agreeably to these principles.

The third question made is, shall complainant pay the interest of the purchase money of the fifty acres of land that Major O'Hanlon claimed and recovered out of the tract sold and conveyed by Myers to complainant? On the 5th of March, 1842, complainant brought an action of trespass to try titles against O'Hanlon for the fifty acres on which he had begun to cut down the timber; vouched Myers, and a verdict was given for O'Hanlon; but defendant insists that the acts and admissions of complainant in relation to the land, had great weight with the jury, and in all probability turned the scale in favor of O'Hanlon. After the trial, on the 18th of January, 1845, Myers purchased the fifty acres, for seven hundred and fifty dollars, and on the 22d of the same month transferred the title (that O'Hanlon made to him) to complainant. Complainant insists that no interest should be estimated on the seven hundred and fifty dollars of the purchase money until after the title was transferred to him, and that the land was diminished in value, from his purchase to the transfer, by O'Hanlon's cut-

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ting down and using *the timber, which was of especial value to the plantation. As it cannot be satisfactorily inferred from the pleadings what have been the admissions and acts of the complainant in relation to the fifty acres of land, or the circumstances under which Myers purchased it and transferred the title to him, or the extent of the deterioration in the value of the land while it was used by O'Hanlon, and the injury that thereby resulted to the complainant, it would be premature at present to decide the question. It is therefore ordered, That the defendant and his agent be enjoined from selling the seven slaves mentioned in the pleadings, on complainant's entering into the usual bond with sufficient surety until the further order of the Court, and that it be referred to the Commissioner in Equity of Richland District to ascertain and report what payments have been made on the bond, and what amount (if any) is still due; and that he do take and report the testimony on the points arising out of the third question involved in this case.

On the coming in of the Commissioner's report, made in accordance with the above order, his Honor, Chancellor Harper, decreed as follows:

Harper, Ch. Upon hearing this case, it is ordered and decreed that the complainant be allowed a discount upon his bond for the fifty acres of land recovered by James O'Hanlon in the action at law against him. That he be credited at the date of his bond

with the sum of seven hundred and fifty dollars, being the amount paid by William M. Myers to J. O'Hanlon for the same, and that this sum be brought into the account against the complainant on the twenty-second day of January, eighteen hundred and forty-five, when a title for the said fifty acres was made to him by William M. Myers.

It is further ordered and decreed that the report of the Commissioner, by which a balance of one hundred and ninety dollars and fifty-eight cents is ascertained to be due upon the bond on the twenty-second day of January, eighteen hundred and forty-seven, be, and the same is hereby, confirmed, and that the complainant pay to the defendant the amount so ascertained to be due, with interest thereon from the said twenty-second day of January, eighteen hundred and forty-seven; and that the defendant pay the costs of the suit. The injunction to be perpetual, upon the payment of the said balance and interest.

The defendant appealed and moved the Court of Appeals to reform the decretal order, in relation to the mode of computing interest on said bond, upon the ground that it was erroneous; and also to reform Chancellor Harper's decree, allowing a discount upon said bond for the said fifty acres of land, upon the ground that complainant voluntarily and without the consent or ap-

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probation of defendant's assignor, abandoned the use of it and acknowledged the title in another; and also upon the ground that defendant should not be required to pay the costs of suit.

Gregg & Gregg, for the motion.

W. F. DeSaussure, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

The first question to be considered relates to the interest account upon the bond. The rule is well settled, with respect to payments made upon an instrument which is over due. The interest is computed up to the time of the payment, and the latter is taken out of the aggregate, first applying it to the interest, and then to the principal. If, by this process, the interest is only partially extinguished, the residue of it does not become an interest-bearing fund, but interest runs upon the principal as before. If, however, the payment extinguishes, not only the interest, but part of the principal, the balance of principal left, continues to bear interest. This is too well understood to require further explanation.

The same rule obtains where general payments are made, in anticipation, upon an instrument securing the payment of money at a future specified time, with interest thereon from a prior date.

The case of *Gibbes v. Chisholm*, 2 N. & McC. Rep. 38, [10 Am. Dec. 560,] decides that

where the agreement is to pay a principal sum at a future day, with interest from the date, the aggregate of principal and interest, at the maturity of the obligation, becomes an interest-bearing fund; and may, for that purpose, be considered as forming, from that time, one capital or principal sum. The substance of this doctrine is, that where interest is stipulated to be paid at a fixed period, and the stipulated time has arrived, or is passed, the interest then due is no longer interest, but principal, and, as such, carries interest in future.

But until the period arrives, the interest, being contemplated by the parties as interest,—incident to and flowing from the principal debt or sum advanced, is also so regarded and treated by the Court: and general payments made upon the instrument, before its maturity, are applied first to the interest and then to the principal, exactly as payments made on a contract over due are applied. This is the doctrine of *De Bruhl v. Neuffer*, 1 Strobb. R. 426, a decision of our own Law Courts: and which must govern this case. It is contended that by the terms of the bond, Mr. Singleton stipulated that all payments made by him, before the 22d of January, 1846, should be credited exclusively, or primarily, upon the principal of the debt. But such is not our construction of the instrument. By "the said sum of \$75,000," we understand reference to have been made to the previous part of the instrument, by which that sum was to be paid "with interest thereon from this

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date, payable annually;" and this construction is strengthened by the stipulation that the payments were to be "endorsed upon the said bond," (generally) "when such payment shall be made."

The next question relates to the deduction to be made for the 50 acres taken off by O'Hanlon's title. The bill claims that interest upon \$750, the value of this land, be deducted from the bond, from the date of the contract, until Myers purchased from O'Hanlon and conveyed to Singleton, his vendee; and, also, that allowance be made to the vendee for the waste committed by O'Hanlon.

If Mr. Singleton is, in consequence of the defect of title, entitled to any remedy, reaching further back than his eviction, it must result either from the legal effect of the covenants of his deed, or from considerations purely equitable.

His deed was executed and possession taken in 1836, and his possession does not appear to have been disturbed until 1842.

It has been held that our ordinary conveyances include covenants of title and of quiet enjoyment: but there is this difference between them; that the former begin to run from the date of the conveyance, the latter only from eviction. If Mr. Singleton had

any remedy on his covenant, arising from a partial defect in his title, it was barred in 1840. So that we must take him to have waived that remedy, and to have restricted himself to such right as might arise upon his being afterwards evicted, if that should ever happen. If he knew of O'Hanlon's title before the trespass of the latter, good faith required that he should have given notice of it to Myers, and either required the defect to be cured, or that a partial rescission and abatement should be made on the contract:—unless he was willing to depend upon the other alternative of his deed, to arise upon eviction.

When the trespass was committed, and he was fully advertised of O'Hanlon's claim, he does not appear to have desired either a rescission or abatement. His course was different. He called upon his grantor to sustain the suit; evidently intending to retain his bargain, if not evicted. And when he was evicted, he did not then claim the remedy which his deed afforded, but within a few days afterwards accepted the conveyance by which his title was perfected.

We think that under these circumstances he has no legal claim for redress, if indeed he sustained any injury.

Then as to his equitable claims. The bill does not state that he was for one moment prevented from the full enjoyment of this part of the premises of which he was let into possession; or hindered, in any respect, from making any use of it which he pleased. It was not cultivated land yielding a rent; in respect to which if a party, and debarred the use, he has sustained a serious injury. But it was wild land, lying at a distance from the open lands, and even the timber

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*was only valuable, as a resource for fencing, at some remote period.

We do not perceive that he has any solid claim for compensation, beyond the trifling injury for a few days which elapsed between the eviction and the restoration of title to him; and the value of the timber cut down by O'Hanlon. For the first he is entitled to deduction of interest; and for the last the value of the trees. The last question relates to the costs. An appeal relating to costs alone, will not be sustained. But here the decree is found to be erroneous on other points; and the Court is to adjudge the costs upon the principles of the decree as reformed.

The plaintiff tendered the sum which he considered due upon the contract, and filed the bill for an injunction, because his tender was not received and the bond given up. It must depend upon the sum really due at the time, whether he or the defendant is to pay the costs. If the sum tendered be found to be all that was due, the defendant should pay them; if otherwise, they should be paid by the plaintiff: and it is so ordered.

It is further ordered, that the report be recommitted to the Commissioner, to take the accounts agreeably to this opinion.

DUNKIN, Ch., and DARGAN, Ch., concurred.

Decree reversed.

2 Strob. Eq. 174

WILLIAM HULL et al. v. ANN HULL et al.
(Columbia. May Term, 1848.)

[Wills [17](#).]

A father of legitimate children, after having been legally divorced from their mother under the laws of another State, may give to a single woman with whom he lives in illicit intercourse in South Carolina, more than one fourth of the clear value of his estate, without coming within the inhibition of the Act of 1795.

[Ed. Note.—Cited in *Ex parte White*, 38 S. C. 45, 16 S. E. 286; *McCreery v. Davis*, 44 S. C. 217, 22 S. E. 178, 28 L. R. A. 655, Am. St. Rep. 794; *Beaty v. Richardson*, 56 S. C. 190, 34 S. E. 73, 46 L. R. A. 517.

For other cases, see Wills, Cent. Dig. §§ 40–42; Dec. Dig. [17](#).]

[Adultery [1](#).]

Adultery is familiarly known in law, as the illicit intercourse of two persons, one of whom, at least, is married.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. § 2; Dec. Dig. [1](#).]

[Statutes [188](#).]

Where the words of a Statute, in their primary meaning, do not expressly embrace the case before the Court, and there is nothing in the context to attach a different meaning to them, capable of expressly embracing it; the Court cannot extend the Statute, by construction, to that case, unless it falls so clearly within the reasons of the enactment as to warrant the assumption that it was not specifically enumerated among those described by the Legislature, only because it may have been deemed unnecessary to do so.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. [188](#).]

[Statutes [186](#).]

Where the general intention of the Statute embraces the specific case, though it be not enumerated, the Statute may, nevertheless, be applied to it by an equitable construction, in promotion of the evident design of the Legislature. But when this is done, it is always presupposed that such a case was within their general contemplation, or purview, when the Statute was enacted by them; for if the case be omitted in the Statute, because not foreseen or contemplated, it is a *casus omissus*, and the Court cannot supply the defects of the enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 265; Dec. Dig. [186](#).]

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[Wills [603](#), 614.]

*Testator, by will, gave both real and personal property to one, in trust for his married daughter for life, then to the heirs of her body, but should she leave no issue, then to her husband, &c., if neither husband nor issue, then to the erection of a public school; *held* that the daughter took a fee conditional in the real estate, and a life estate in the personality.

[Ed. Note.—Cited in *King v. Aughtry*, 3 Strob. Eq. 153; *Markley v. Singletary*, 11 Rich. Eq. 396; *Bouknight v. Brown*, 16 S. C. 156, 169;

Bethea v. Bethea, 48 S. C. 441, 444, 26 S. E. 716; Mattison v. Mattison, 65 S. C. 354, 43 S. E. 874.

For other cases, see Wills, Cent. Dig. §§ 1354, 1401; Dec. Dig. ☞603, 614.]

[Wills ☞17.]

The interests of the children of a bastard daughter, who take as purchasers, (under the will of their grandfather,) distinctly from their mother, and not through her, or in connexion with her, shall not be regarded as a gift to her, within the inhibition of the Act of 1795.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 41; Dec. Dig. ☞17.]

[Wills ☞17.]

When the will of a testator is in favor of his mistress and bastard children, the estate is to be administered under the will in the usual manner. The rule for the payment of debts (Warley v. Warley, Bail. Eq. 397,) is to govern until the clear value of the legacies and devises is established; and then the Act of 1795 is to be applied, at the instance, and for the benefit, of the lawful wife and children, for the vacation of so much as has resulted in legacies to the mistress or bastards, beyond one fourth of the clear value of the whole estate.

[Ed. Note.—Cited in Bouknight v. Brown, 16 S. C. 168; Gore v. Clark, 37 S. C. 544, 16 S. E. 614, 20 L. R. A. 465; Cooley v. Cooley, 58 S. C. 175, 36 S. E. 563; Williams v. Halford, 73 S. C. 124, 125, 53 S. E. 88; Williams v. Newton, 84 S. C. 101, 65 S. E. 959.

For other cases, see Wills, Cent. Dig. § 42; Dec. Dig. ☞17.]

[Divorce ☞326.]

[Where a man, married in Connecticut, had left that state, and resided many years in South Carolina, it was held, in the latter state, that a divorce for desertion obtained in Connecticut dissolved the marriage tie for all purposes everywhere.]

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 827; Dec. Dig. ☞326.]

[Perpetuities ☞4.]

[Testator gave real and personal property in trust for A. "during her natural life, and upon her demise then to go to the heirs of her body, if any. Should she die without issue, but having a husband, then to the husband"; but should she die "without leaving issue or husband," then over to a public school. Held, that the limitation over was valid as to the personal property, but void as to the real property.]

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 26, 30; Dec. Dig. ☞4.]

[Wills ☞17.]

[Where a testator has bequeathed or conveyed property to his mistress and bastard children in violation of the act of 1795, quære whether the excess secured by that law to the lawful wife and children is to be set off by partition or accounted for ex debito.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 42; Dec. Dig. ☞17.]

Before Dunkin, Ch., at Edgefield, September Sittings, 1846.

The appeal in this case is from both the decree of his Honor Chancellor Dunkin, who first heard the case and made an order of reference to the Commissioner, and from that of his Honor Chancellor Johnston, upon the exceptions taken to the report made under this order. The first decree very fully sets forth the facts of the case, and is as follows.

Dunkin, Ch. Gideon H. Hull died at Ham-

burg in October, 1840. By his will, dated 30th August previous, he devised and bequeathed his estate, as therein specified, to the defendant Ann Hull, and her daughter Zulina, in the proportions and subject to the restrictions and limitations therein set forth. Charles Lamar was appointed Executor, but he declining to qualify, administration, with the will annexed, was, on the 24th April, 1841, committed to the defendant, Ann Hull. This Bill was filed on the 17th April, 1845. The complainants allege that they are the lawful children of the said Gideon H. Hull, dec'd—that he lived in adultery with the defendant, and that her daughter Zulina is the fruit of their illicit intercourse. The prayer of the bill is that the will may be declared null and void, to the extent and in pursuance of the provisions of the Act of Assembly of 19 December, 1795, in such case made and ordained.

The material facts are very satisfactorily established by the testimony. Hull was a native of Toland, in Massachusetts. In the Spring of 1809 he was married to Currency Osborne, in Colbrook, County of Litchfield and State of Connecticut. After the marriage they resided chiefly in the town of Colbrook, until the month of August, 1820. The complainants, William, Hiram and Charles Hull, and Zulina Langdon, are children of the marriage, and were born prior to the period last mentioned. Hull left Con-

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necticut in August 1820, went first to Baltimore, afterwards to Charleston, and ultimately settled in Hamburg, where he resided until his death. He never returned to his family, or to New England, and no intercourse or communication appears to have existed between his family and himself after 1821. The testimony was equally clear that, for several years prior to his death, Hull had lived with the defendant.—Their child Zulina, now Mrs. Bryan, was probably born in 1828 or 1829. It is suggested in the answer that Hull and the defendant were married, but no date is mentioned when the event took place, nor was any evidence offered on the subject. The Act of 1795 declares void any gift or provision, beyond one fourth of a man's estate, in favor of a woman with whom he lives in adultery, or of his illegitimate child or children, he having a wife, or lawful children, of his own, living. The gift is rendered void by the Act to the extent of the excess.

In order to determine the application of the Act it now becomes necessary to advert to other facts in the case equally well established by the proof.

According to the Statute Law of Connecticut the Superior Court of that State is authorized to grant divorces a vinculo matrimonii for the following causes, viz:—Adultery, fraudulent contract, willful desertion

with total neglect of duty for three years, or for an absence of seven years by one party not heard of. Such has been the law of that State for more than half a century, as may be seen by the report of the case of *Benton v. Benton*, 1 Day, 111.¹ At the Session of the Superior Court for Litchfield county, in August, 1829, Currency Hull filed her petition setting forth the wilful desertion by her husband since the 30th August, 1820, his absence in parts unknown, with total neglect of duty since that time, and praying that "the petitioner might be discharged from all duties to said Gideon in consequence of said marriage contract and be divorced and free from all obligations thereby." Thereupon the Sheriff was directed to summon the defendant Gideon Hull, if within his precinct, to appear at the Court on the 3d. Tuesday of August, 1829—and at that term, an order was passed, that notice of the pendency of the petition should be given by publishing the order in the *Litchfield Inquirer* and *Hartford Times*, six weeks successively, immediately after the rising of the Court. At February Term, 1830, a decree was pronounced, reciting that proof had been made to the Court of legal notice to the respondent, who had made default, and that the allegations of the petition had been fully substantiated by proof, whereupon the Court adjudged that the said Currency Hull be divorced from the said Gideon, and freed and discharged from all the duties and obligations she was under to him by virtue of the marriage contract or covenant.

Some ten years after this sentence of di-

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vorice, to wit, in *1840, Currency Hull became the wife of Samuel Sawyer, with whom she now resides in Connecticut.

It has been already remarked that there was no evidence whatever of any marriage between Hull and the defendant Ann Hull, either before or subsequent to this judgment of February, 1830. The character of their connexion seems never to have been changed.

The effect of this sentence of divorce, it becomes important to consider. Few subjects are more difficult—few questions more perplexing, than the effect of a foreign divorce. In reference to a South Carolina marriage it has been often repeated, although never formally decided, that the doctrine in *Lolley's case*, Russ. & Ry. 217, cited 2 Russ. & M. 614, is the law of this Court. It was, in that case, ruled by the unanimous opinion of the twelve Judges, that no divorce, or proceeding in the nature of divorce, in any foreign country, Scotland included, could dissolve a marriage contracted in England. That was a case of felony. The defendant, in the confident belief, founded on the authority of the Scotch lawyers, that the Scotch divorce had effectually dissolved the

English marriage, intermarried in England. —He was convicted of bigamy, and sentenced to seven years transportation. See the commentaries of Lord Chancellor Brougham in *McCarthy v. Desaix*, 2 Russ. & Mylne, 614. In *Tovey v. Lindsay*, 1 Dow P. C. 117, Lord Eldon and Lord Redesdale both expressed their opinion that no English marriage could be dissolved by any other authority than an Act of Parliament. But this marriage was not solemnized in South Carolina, nor between citizens of this State. Mr. Justice Story, in his conflict of laws, has remarked that marriage is treated by all civilized nations as a peculiar and favored contract. The common law of England, and the like law existing in America, consider marriage in no other light than a civil contract—yet, unlike other contracts, it cannot, in general, among civilized nations, be dissolved by mutual consent. It is a part of the civil institutions of a country, and is or may be prescribed and regulated by law. The general right, even of the legislative power, to authorize directly or indirectly the dissolution of the matrimonial contract, and to release the parties from all future obligations, has been much discussed. Any such proceeding has been sometimes impugned as falling within the inhibition of that provision of the Constitution of the United States against the enactment of laws violating the obligation of contracts. In *Dartmouth College v. Woodward*, 4 Wheat. 518 [4 L. Ed. 629,] the Chief Justice affirms the general right of the States to legislate on the subject of divorce. Both Chancellor Kent and Mr. Justice Story adopt the conclusion that the Legislature of each State may so far interfere with the marriage contract as to allow of divorces between its own citizens and within its own jurisdiction.—Chancellor Kent uses this language: "there can be no

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doubt *that a divorce of the parties who were married and regularly domiciled at the time in the State whose Courts pronounced the divorce, would be valid everywhere;"² and to the same effect is the opinion of Judge Story, *Conf. of Laws*, sec. 201: "there is no doubt that a divorce regularly obtained according to the jurisprudence of the country where the marriage was celebrated, and where the parties are domiciled, will be held a complete dissolution of the matrimonial contract, in every other country." The validity of such laws is also vindicated by the judgment of the Supreme Court in *Ogden v. Saunders*, 12 Wheat. 298, [6 L. Ed. 606,] and the argument seems irresistible that in such cases the *lex loci contractus*, the law of the place where the marriage is celebrated, furnishes a just rule for the interpretation of its obligations and rights, as it does in the case of other con-

¹ 3 Griff. L. R. 80.

² 2 Kent, Com. 90.

tracts. It can only be dissolved by the law under which it was formed, and by which both parties understood it to be governed.

The Legislature of South Carolina has never exercised the power of granting a divorce, nor has it vested such authority in any of the Judicial tribunals of the State. But according to the principles which seem to be well established, if Hull and his wife were domiciled in Connecticut in August, 1829, and a sentence of divorce had been pronounced for adultery on his part, or any other cause, that sentence "would be held a complete dissolution of the marriage contract in every other country." Although the fault had been entirely on his part he would be thenceforth at liberty to contract a new matrimonial engagement in Connecticut, in South Carolina or in any other community. Currency Hull was no longer his wife, nor he her husband. As such they were to each other dead in law. But when the proceedings were instituted, and when the sentence was pronounced, Hull was in South Carolina. After having committed an act of adultery in Connecticut, could he prevent the divorce by crossing the line of the State into Tolland, Massachusetts, or by abandoning his family and removing to South Carolina?

Mr. Justice Story states that "the place where a married man's family resides is generally to be deemed his domicile. But it may be controlled by circumstances." In 1829, Hull had been eight years absent from his family, and in South Carolina. For many purposes he would be regarded as domiciled in this State. But his family, his wife and children, continued to reside, as they had always done, in Colbrook, Connecticut. By his marriage vow, and by the law of the land, he was bound to support and cherish, and not to abandon them. By the same laws, which must be regarded as part of his marriage contract, it was declared that on wilful desertion with total neglect of his duty for three years, a dissolution of the marriage contract might be declared by the Judicial tribunals of the country, after

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adopting certain pre-scribed forms of notice. It was then part of the law of his contract, to submit to a judgment thus rendered. The Superior Court of Connecticut is a Court of general jurisdiction. Although beyond the limits of the State, Hull might have appeared to the process, might have pleaded, or might have confessed judgment, and it would be no impeachment of its validity that he resided beyond the jurisdiction of the Court. It was part of the law of his contract that it might be dissolved by wilful desertion of three years, or by seven years absence without being heard of. This necessarily implies that judgment may be pronounced on these facts in his absence. But if it were necessary, the Court is prepared to hold that

Hull's family having been always permanently resident in Connecticut, that must be regarded as his domicile for all the purposes of maintaining the jurisdiction of the Court and the validity of the sentence.

The conclusion is that, by the sentence of divorce pronounced in Feb. 1830, the marriage between Hull and his wife was effectually dissolved. Having then no wife, but having lawful children of his own living, Hull, in August, 1840, devised and bequeathed a portion of his estate to his paramour, and to an illegitimate child. It seems to the Court entirely free from doubt that the bounty to the illegitimate child, so far as it exceeds one fourth of his estate, is null and void, by the express terms of the Act. The bequest to the mother presents a question of more difficulty. The language of the Act is as follows: "If any person who is an inhabitant of this State, or who hath any estate therein, shall have already begotten, or shall hereafter beget any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give or settle or convey, either in trust or by direct conveyance, by deed of gift, legacy, devise, or by any other ways or means, whatsoever, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion," &c.

The Act does not purport to impose any penalty on the offence, but invalidates the gift. At the date of Hull's will, and at the period of his death, he had no wife of his own living. He was not living in adultery. However offensive his mode of life may have been to morals or decency, the marriage bed was not violated. Can a widower, having children, make provision for his mistress to the extent of more than one fourth of his estate? It may have been the object of the Act to place such person on the same footing with an adulterer whose lawful wife is still living. But the Act has not said so. Adultery is defined to be "the sin of incontinence between two married persons. So, if but one of the persons be married, it is nevertheless

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adultery."³ I cannot venture to apply this term to the character of the intercourse between Hull and the defendant in 1840, for the purpose of rendering the bequest to her obnoxious to the provisions of the Act of 1795. In determining on the validity of the gift, the inquiry must necessarily be confined to the condition of the parties at the time the gift was made. It is this which gives character to the gift, and it can neither be prejudiced nor improved by their condition at any other time.

So far as it is sought to impeach the devise and bequest to the defendant, Ann Hull, the

³ 1 JAC. L. D. 50.

bill must, in the judgment of the Court, be dismissed. An inquiry must be made as to the value of the estate of the testator, and the proportionate value of the bounty to the defendant, Mrs. Bryan. So far as the same exceeds one fourth of the value of the said estate, the same is hereby declared null and void, and the complainants are exclusively entitled to the said excess, as well as to the whole residue of the estate, if any, of which their father may have died intestate, according to the first and eighth canons of the Statute of Distributions of this State.

It is ordered and decreed that the Commissioner take an account of the estate of the testator and of the value thereof in 1840, as also of the transactions of the defendant, Ann Hull, in the management of the same; that he also take an account of the value at that date of the devise and bequest in trust for the defendant, Mrs. Bryan, called in the will "my daughter Zulina," and that the Commissioner have leave to report any special matter. Each party to pay their own costs up to this stage of the proceedings.

The Commissioner reported in conformity with this order, and upon hearing the report and exceptions, in June, 1847, his Honor Chancellor Johnston delivered the following decree:

Johnston, Ch. This case is fully stated in the decree of Chancellor Dunkin, who, after deciding some general principles, referred the accounts to the Commissioner with special directions. The Commissioner's report comes before me with exceptions taken to it by the several parties.

The bill is brought by the legitimate children of Gideon H. Hull, to avoid certain devises and bequests made by him, (and which took effect upon his death, the 11th of November, 1840,) to his natural daughter and her mother, so far as the same exceeded the fourth part of his estate.

My brother Dunkin decided that the devises and bequests to the natural daughter were void, so far as they exceeded the 4th of this estate, to be valued at his death, but that those to the mother were not vitiated by the Act of 1795, inasmuch as he had been divorced from his lawful wife in 1830, and therefore his testamentary gifts to this person were not made to "a woman with whom he lived in adultery."

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*The order of reference was "that the Commissioner take an account of the estate of the testator, and of the value thereof in 1840, as also of the transactions of the defendant, Ann Hull, (the administratrix of the will and mother of the natural child) in the management of the same. That he also take an account of the value at that date of the devise and bequest in trust for the defendant, Mrs. Bryan, called in the will 'my daughter Zu-

lina,' and that the Commissioner have leave to report any special matter."

The Commissioner reports that:

The value of the testator's estate at his death, in 1840, was.....	\$8,230 27
Comprising	
That given to the mother.....	\$1,541 36
" " to the daughter.....	4,537 50
Intestate	2,151 41
	<hr/>
	\$8,230 27
That the debts paid, and to be paid amounted to	5,280 29
To which was to be applied the intestate property	2,151 41
	<hr/>
Leaving a balance of debts.....	3,128 80
To be paid out of the mother's and daughter's legacies, in the following proportions:	
Out of the mother's	\$ 793 44
" " the daughter's	2,335 44
	<hr/>
	\$3,128 88
The value of the daughter's share being..	\$4,537 50
And her proportionate share of debts.....	2,335 44
	<hr/>
	\$2,202 06
The Commissioner sets down the nett value of her devises and bequests, at.....	2,202 06
Which the Commissioner, considering it as a life estate of 7 years, sets down at....	1,079 00
And deducts from it $\frac{1}{4}$ th of the whole estate, after deducting debts, say \$8,230 27, less \$5,280 29, leaves \$2,949 98, one fourth of which is.....	737 49
And makes her excess over $\frac{1}{4}$ th.....	341 51
The Commissioner charges the mother for rent received by her \$2,546 85	
And Bryan, the daughter's husband	2,130 50
	<hr/>
	\$4,677 35
Credited by repairs and improvements	1,374 00
	<hr/>
Balance of rents.....	\$3,303 35

And he charges the mother, as administratrix with the will annexed, with this balance, \$944.54, with interest on \$927.29, from Jan. 1, 1847.

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*But he has omitted to report the sum to which the plaintiffs, respectively, are entitled as the result of this account.

The different exceptions are now to be considered.

The plaintiff's first exception is "that the defendant, Zulina Bryan, (the natural daughter,) took an estate in fee, in the property given her by the will of Gideon H. Hull, and the Commissioner, therefore, erred in valuing her interest therein as an estate only for the term of her natural life."

The 3d clause of the will is as follows: "I give and bequeath to my friend, Charles Lamar, in trust and for the benefit, use and behoof of my daughter, Zulina, the following property, to wit: 3 houses and lots, situate, &c., in the town of Hamburg, and known in the plan of said town, &c. Also 3 negroes, viz: Toney, Charles and Mary. Also one tract of land, containing 20 acres, adjoining, &c. It is understood, however,

(and I hereby declare it is my will) that the said Charles Lamar hold the aforesaid property in trust, for the said Zulina during her natural life, and, upon her death, then the said property is to go to the heirs of her body, if any, or should she die without issue, but having a husband, then one-half of the said property to go to such husband, and the other half to be appropriated, by my executor, to the erection of a public school in the town of Hamburg. But should my said daughter, Zulina, die without leaving issue or husband, then the rents and profits, arising from said property, to be appropriated towards the erection and promotion of a public school in the town of Hamburg, as aforesaid." The interest conferred upon the daughter, by the will, is, in express terms, limited to her natural life. Then upon her demise, the property is given over to the heirs of her body, or issue, if any. If no issue (at her demise) it is to go by way of alternative disposition to her husband and to the erection of a school, a moiety to each. But if neither issue nor husband at her demise, the whole is to go to the school. I cannot doubt that the whole of these ulterior dispositions are, as alternatives, limited to take effect at the death of the daughter, and are good limitations, and that the heirs of the body take as purchasers. This exception is overruled.

The plaintiff's second exception is, "That if it be intended by the report, to limit the recovery of the plaintiffs to the sum of \$341.51, then it is respectfully submitted that the same is erroneous, because the plaintiffs are entitled to have a partition made between them and the defendant, Zulina, of the specific property given to her by the will of Gideon H. Hull, as also to be reimbursed the excess paid by the income and profit of the said property, over and above the just proportion of the debts of the estate, chargeable upon the same. And, in any event, are entitled to interest on the said sum of \$341.51, from the 1st of Jan. 1841.

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*This exception appears to have been hurriedly put in. It is only upon the contingency that the Commissioner intends, by his report, to limit the recovery of the plaintiffs to the sum of \$341.51, that actual partition is insisted on. But I am of opinion that the right of actual partition is doubtful under the Statute in virtue of which this bill is filed, and at all events, is excluded by the decree, and cannot be insisted on without reversing that decree.

The Statute of 1795 enacts "That if any person who is an inhabitant of this State, or who hath an estate therein, shall have already begotten, or shall hereafter beget, any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own, living, and shall give, or settle, or convey, either in

trust, or by direct conveyance, by deed of gift, legacy, devise, or by any other way or means whatever, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after payment of his debts, than one fourth part thereof, such deed of gift, conveyance, legacy or, devise, made or hereafter to be made, shall be, and is hereby declared to be, null and void, for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate."

The wrong done to the lawful wife and children consists in taking property from them and bestowing it upon the illegitimate family, and the measure of the wrong is the amount and value of the property thus given away. The law does not compel the husband and father to give his property to his lawful family. It does not take from him his right of free alienation, arising from the very fact of his ownership of the property. It is only when he gives an undue portion of it to those who have perverted his affections from those naturally entitled to them, that the law vindicates their wrong by declaring them entitled to a certain portion of the amount and value of the property thus improperly bestowed. The Statute intends to compensate them for the wrong.

True, the Statute declares the gift null and void for any excess over the fourth, but this is defined to be his estate clear of debt, showing that it is the value of the thing given away, and not the abstraction of the thing itself, that forms the ground of inhibition. The wrong consists in giving an excessive "proportion of the real clear value" of the estate, and the redress intended is to compel a restitution of the amount or value thus improperly abstracted.

This interpretation of the terms of the Statute, may be doubtful. But the innumerable difficulties arising from a construction requiring partition in all cases practically forbid such, (this latter) construction

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from being exclusively adopted. *I apprehend the proper reading of the Statute is that which advances the remedy, and that partition or compensation should be allowed according to the condition of the estate.

But, as I have said, I consider this part of the exception to be excluded by the decree. The residue of the exception will be made the ground of further directions to the Commissioner. He should cast his account in such way as to show the sums to be decreed to the plaintiffs respectively, and report that result specifically, and I think that after having ascertained the excess for which Mrs. Bryan is chargeable, interest should be given by the report from the death of Hull, or from the period usually allowed for distribution.

On these points the report is recommitted.

The plaintiff's 3d exception raises a question, which cannot arise under my construction of the Statute, nor under the decree of Chancellor Dunkin. The plaintiffs are not entitled to the property specifically, nor its income; but only to the excess over one fourth of its value, with interest. The exception is therefore overruled.

Mr. Bauskett has filed three exceptions on behalf of the defendant, and although they do not specify which defendant was meant, they were argued for Mrs. Hull.

The first of them raises the question whether the property in question belonged to Hull or to this defendant. There was some pretty strong general proof before the Commissioner, which will appear in his report, that Hull had nothing when he began to cohabit with her, and was not very industrious in accumulating afterwards, and that this defendant had something at the beginning, and was both active and frugal, after Hull came to live with her. But the means of accumulation on the part of Hull were not so limited as contended for. The answer of Mrs. Hull to the case of Smith given in evidence conflicts very seriously with her present position, and she cut herself off very much from contesting Hull's right to the property, by administering on it as his, and by her returns to the Ordinary.

This exception is overruled.

Mrs. Hull's 2d and 3d exceptions were sustained by the Commissioner, without appeal, and the fourth was not insisted on.

Bryan and wife (the natural daughter,) put in several exceptions.

The first insists on matters without the report, and is overruled.

Do. as to the second.

The third contends that the Commissioner did not put a proper estimate on the value of a particular Lot (No. 124.) The Commissioner does not appear to have mistaken the testimony. The exception is overruled.

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*The report does not show that the allowances contended for in the 4th exception were claimed before him, and the exception is overruled.

The 5th has already been disposed of.

The report is recommitted.

The plaintiffs moved the Court of Appeals to modify the circuit decrees, upon the grounds:

1. That the provision made by the will of Gideon H. Hull for the defendant Ann Hull, so far as it exceeds the one fourth part of the clear value of his estate, is within the inhibition of the Statute of 1795; and submitted that the decree of His Honor Chancellor Dunkin ruling otherwise, however it may consist with the letter of the Statute, was at war with its spirit and intention.

2. That under the will of Gideon H. Hull,

the defendant, Mrs. Bryan, took an estate in fee in the property thereby given to her; that even if she be held to have taken but for life with remainder to her issue, the provision for such issue is, within the meaning of the Statute of 1795, "a gift, settlement or conveyance" for her "use and benefit;" and that in either aspect the property devised and bequeathed to her should have been valued as an estate in fee.

3. That under the Act of 1795, the plaintiffs are entitled to have partition and distribution made between them and the defendants Ann Hull and Mrs. Bryan, of the specific property given to them by the will of Gideon H. Hull, as also to an account of the income and profits of the same accrued since his death.

4. That even if the plaintiffs have no right to partition or distribution of the specific property given to the defendants Ann Hull and Mrs. Bryan, they are at least entitled to such a proportion of the income and profits thereof accrued since the death of Gideon Hull, as the excess of the provision for Mrs. Bryan and Ann Hull above one fourth of the value of his whole estate, bears to the whole value of such provision, in lieu of interest upon the sum at which such excess is estimated.

The defendants appealed, on the ground that the complainants not being legally or equitably entitled to have any amount reported in their favor, the bill should have been dismissed. And they submitted that in the payment of the debts of the estate, the intestate fund should be first applied and exhausted: and then that the balance of the debts should be paid out of the property ineffectually devised and bequeathed to Zulina, without exacting contribution from the bequests to Ann Hull, until after the whole excess of one-fourth, or ineffectual bequest, is exhausted.

[For subsequent opinion, see 3 Rich. Eq. 65.]

Carroll, for the complainants.

Gray, for the defendants.

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*Bauskett, also for defendants. The plaintiff's first ground of appeal insists that the defendant Ann Hull, is within the inhibition of the Act of 1795, and this depends upon the technical definition of Adultery, and the effect of the sentence of divorce.

As to Adultery. *Republica v. Roberts*, 2 Dallas, 124; *Commonwealth v. Putnam*, 1 Pick. 136; *Commonwealth v. Call*, 21 Pick. 511.

As to the effect of the Divorce. *Constitution U. S. Art. 4, sec. 1*; *Act of Congress*, 1790, 1 Vol. 115; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234.

Gideon H. Hull was a party to the proceedings in Connecticut, and the cases of *Rose v. Himely*, 4 Cranch, 268, and *Miller v. Miller*, 1 Bail. 242, do not apply. As to Domi-

oil, see Story's Conflict of Laws, 46, and as to the effect of a foreign judgment of Divorce, Story's Conflict of Laws, 168, 191, and 492.⁴

Second ground of appeal raises the question, what estate or quantity of interest Mrs. Bryan took in the property devised to her.

The words of the will show an intention to restrict her interest to a life estate. But in the devise over, after her death, it is said that the words used as descriptive of the persons who were to take ("heirs of her body,") serve to enlarge her estate to a fee, and the rule in Shelley's case is relied on. But not so.

It is clear from the whole will, that the testator intended that she should take but a life estate; and a plain and manifest intention, when ascertained from the will itself, is paramount to all technical rules of construction. These rules are resorted to and applied only when it is equivocal what is meant. The words "heirs of the body," are here used as synonymous with "issue," for the will says, upon her demise, then the said property is to go to the heirs of her body, if any, or should she die without issue, but leaving a husband, then one-half, &c. But the rule in Shelley's case does not apply.

1. The estates are not of the same quality; the devise to Zulina is equitable. Charles Lamar is trustee; but to the heirs of her body, or her heirs, or her issue, after her demise, is a legal estate.⁵

2. The context of the will shows that the words "heirs of her body" were not used in their technical sense, and therefore brings the construction within the 3d exception to the rule in Shelley's case.⁶

But if Zulina cannot take beyond one-fourth, and it be an estate either in fee or for life, what becomes of the residue. Is it intestate? The limitations to the husband and school in Hamburg are not too remote.⁷

A devise of a particular estate to one who cannot take, with remainder over, the remainder-man takes immediately. Shelford on Mortmain, Wright v. Row, Kennell v. Abbott, Baker v. Hall, 12 Ves. 500, Jackson v. Hurbek, Ambler 487, Breithaupt v. Bauskett, 1 Rich. Eq. 471. Durour v. Motteaux, Tinney v. Tinney, MS. Book B, p. 291, (Col.

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*The plaintiff's 3d ground claims partition of the specific property and an account for profits since the death of the testator. But not so. The Act of 1795 declares in substance that if any person, &c. shall give any larger or greater proportion of the real clear value of his estate than one-fourth, such gift shall be void for so much of the amount or value thereof as shall or may ex-

ceed such fourth part of his real and personal estate. It is the amount or value of the excess over one-fourth that is declared void, and if the bastard will pay up that excess in value, he is entitled to the devise of the whole estate.

The legatee in throwing off property to reduce his legacy, has a right to select what he will keep, and may retain the whole, if he will pay in value or amount the whole excess. So ruled in Gardner v. Atkinson, MS. Decisions Book B. p. 340, Columbia.

The property is to be valued in reference to the period of testator's death, and the capacity of a subsequent enlargement of the estate is not to be estimated in making up the one fourth part. Tinney v. Tinney.

The defendant's ground of appeal rests on the principle that in marshalling assets for the payment of debts, intestate property should be first exhausted before a demand can be made on property bequeathed; "descended estates are liable before devised estates." The rule is well settled. Vide 2 Jarman on Wills, 546, note, 4 Kent, 420, Warley v. Warley, 1 Bail. Eq. 397.

Assuming that the bequest to Ann Hull is good, why should she be called on to contribute to pay debts until the whole of the excess of one-fourth bequeathed to Zulina is exhausted? The plaintiffs claim, as next of kin or distributees under the Act of 1791, the excess of one-fourth, as intestate property. If this rule be not adopted, a specific legatee will have to contribute rateably with a distributee of intestate property.

The case is submitted.

JOHNSTON, Ch., delivered the opinion of the Court.

This Court concurs in so much of the decree as is brought before us by the first ground of appeal.

Adultery is familiarly known, in law, as the illicit intercourse of two persons, one of whom, at least, is married; and we must understand the word to have been employed in this sense in the Statute of 1795, unless there is something in the context to shew that it was used with a different significance.⁸

Where the words of a Statute, in their primary meaning, do not expressly embrace the case before the Court, and there is nothing in the context to attach a different meaning to them, capable of expressly embracing it; the Court cannot extend the Statute, by construction, to that case, unless it falls so clearly within the reasons of the en-

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actment as to warrant *the assumption that it was not specifically enumerated among those described by the Legislature, only because it may have been deemed unnecessary to do so.

Where the general intention of the Stat-

⁴ Vattel, Book 2, chap. 7, sec. 85.

⁵ Vide 1 Coke, 266.

⁶ Vide also 4 Kent, Com. 215.

⁷ 5 Pick. 537, 36 vol. Law Lib. 158. 1 Brown C. C. 61. 4 Ves. 810.

⁸ 5 Coop. 271.

ute embraces the specific case, though it be not enumerated, the Statute may, nevertheless, be applied to it by an equitable construction, in promotion of the evident design of the Legislature. But where this is done, it is always presupposed that such a case was within their general contemplation, or purview, when the Statute was enacted by them: for if the case be omitted in the Statute because not foreseen or contemplated, it is a *casus omissus*, and the Court, having no legislative power, cannot supply the defects of the enactment.

Nothing in the context of the Statute of 1795 has struck us as indicating that the word adultery was not employed in its primary legal signification; and the case before us is a *casus omissus*, unless it can be brought within the reasons of the Statute.

In considering the Act, with reference to its general intention, it must be remembered that there are few rights more valued by the citizen, or more uniformly respected by the Legislature, (of which we have abundant evidence in this very Statute) than the *jus disponendi*: and no construction in abridgment of this right, can be conformable to the spirit and intent of the Act, except where the abridgment arises necessarily from the application of the Act to the cases which it describes, or becomes necessary in carrying its provisions into effect, as provisions of a remedial Statute.

The general scope and intention of this Act are very evident. Its provisions were intended, (so far as the Legislature could safely interpose for that purpose) to prevent a man who had forgotten his domestic duties, from squandering his property upon the object of his perverted affections, to the wrong and injury of his family; and by depriving him of the means of rewarding the associates of his vitiated appetites, or providing for their progeny, to discourage both him and them from entering into such immoral and pernicious connexions.

The persons upon whom his bounties were to be squandered were his mistress and his bastard children. The latter he could not legitimate, and therefore there was no difficulty in framing an enactment to meet their case. The mistress presented a very different case, requiring the utmost attention in constructing provisions not likely to be eluded. If we duly consider the difficulties to be encountered and overcome, we shall probably perceive why it was that the Legislature confined its enactment to the case of adultery. It was because it could not have effectually legislated for any other case of a kept mistress, without exercising a degree

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of rigor for which it was not prepared; and which, if exercised, would, probably, have resulted in evils fully as intolerable as those which it sought to suppress, if not far more intolerable.

If the man had a wife, or the mistress a husband, this presented a case of adultery, for which provision could be made, incapable of being evaded. There was no possibility of legitimating the connexion, while either the wife of the one or the husband of the other lived; and while these relations existed, the objectionable gift could not be made.

But in the case of a widower, living with a single woman, (the case before us, and to which it is contended the Statute applies,) no effectual prohibition could well be enacted, and, therefore, probably none was intended, although the Legislature may have felt the strongest disposition to protect the children of the former from improvident gifts made by their father to his mistress, at their expense. It may have occurred to the Legislature that a woman who has such control over a man as to induce him to bring his motherless children to beggary, by giving his whole estate to her, has, in all human probability, sufficient influence to induce him to make her his wife, as a means of giving efficacy to the gift. What legislation could have prevented this, short of declaring that no man having children, shall bring to a second marriage more than one-fourth of his property? or, that he shall not give to, or settle upon a second wife more than that proportion? or that if he marry a woman with whom he has had illicit connexion, such inhibition shall exist? But from what appears in the Statute, no intention to interfere with the *jus disponendi*, to the extent required by the two first cases supposed, can reasonably be ascribed to the Legislature; nor would such interference be required either by public policy or morality. The third alternative could not have been adopted without subjecting the parties to every second marriage, to investigations of most scandalous and immoral tendency, at the instance of the husband's children. Such consequences could not be tolerated, and may have induced the Legislature to confine themselves to cases of adultery, by producing a conviction that they could not safely provide for any other.

2. The second question raised by the appeal, is what is the quantity of estate conferred by the will of Hull on his natural daughter Mrs. Bryan?

In the judgment of the Court, she took a fee-conditional in the real estate, and a life estate in the personalty.

The property is given "in trust for the said Zulina, during her natural life, and upon her demise, then, the said property is to go to the heirs of her body, if any." "Should she die without issue, but having a husband, then to the husband," &c. But should she "die without leaving issue or husband," then over to a public school.

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*By the rule in *Shelley's* case, these words give Zulina a fee-conditional in the real

estate devised to her. This rule is that where an estate of freehold, legal or equitable, is limited to a person, and the same instrument contains a limitation of the same legal or equitable character, either mediate or immediate, to his heirs, or the heirs of his body, the word heirs is a word of limitation, i. e. the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee-conditional; if to his heirs general, a fee simple.⁹

It is not necessary in this case to observe, that when the limitation is of an equitable nature, or in trust, the rule does not operate, if the trust be executory, as where the trustee has some act to perform in regard to the tenant for life, or where the objects take not immediately under the trust, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested.¹⁰

The trust in this case is what is denominated an executed trust; and the rule applies in such case, equally as if the interests were purely legal.

The rule is a rule of property, and not of construction: that is, if the terms of the instrument make a case which falls within its operation, it will operate notwithstanding a persuasion may exist that such was not the intention of the grantor or testator. The general intention of the law must prevail over his particular intention. If the remainder-men can take as heirs, they shall not take as purchasers but as heirs: and the inheritance shall be annexed to the interest of the first taker. And "so strong is the rule that words, however positive, expressly negating the continuance of the ancestor's estate beyond the period of its primary express limitation, will not exclude it."¹¹

These doctrines are undoubted; and it only remains to apply them to this case; and we need go no further than our own case of *Whitworth v. Stuckey*, 1 Rich. Eq. 404, for a precedent. The devise in that case was of lands to a son, for life, and, at his death, to the lawful issue of his body. And it was held that the limitation to the issue served only to enlarge the son's estate to a fee-conditional.

In that case there was a limitation over, in case of the son's dying without lawful issue living at the time of his death; but it was held that this did not restrict the son to a life estate, nor enable the issue to take as purchasers: and very properly; because, as we have seen, if it had been the positive and express intention of the testator that the son should take a life estate, and no more, the issue would still have taken as

heirs, and the law would have annexed their estate to his.¹²

If, therefore, the limitation over, in the case before us, were good, as to real estate, it could have no influence in excluding the rule in *Shelley's case*.

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"Indeed, it would be extraordinary if an intention to limit over upon a contingency, at the expiration of the life estate, should have an effect to change the character of that estate and the ensuing limitation to the heirs; when, according to the authorities, the direct and express interpolation of an intermediate estate between them, would have had no such effect.

"If A., by will or otherwise," says an elementary writer, "has an estate of freehold limited to him, and the same instrument contains a subsequent limitation to his right heirs, or to the heirs of his body, after some other estate for life, or in tail, interposed between such limitation of the first estate to him, and such subsequent limitation to his heirs, or heirs in tail, this remainder to the heirs, or heirs of the body of A., vests in A. as a remainder; and is transmitted through him, by descent, as from ancestor to heir. The general rule is this; that whenever the ancestor takes an estate of freehold, whether it be, or not, such as may determine in his lifetime, and there is afterwards, in the same conveyance, an unconditional limitation to his right heirs in tail, (either immediately, and without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of such mean estate,) there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency, or abeyance; with this distinction: that where such subsequent limitation is immediate, it then becomes executed in the ancestor, forming, by its union with his particular freehold, one estate of inheritance in possession; but when such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession, till the determination of the preceding mean estates. As, if there be an estate to A. for his life," "remainder to the heirs of the body of A.: this is an estate tail, executed in possession in A.: but if there be an estate to A. for his life," "remainder to B. for life, remainder to the heirs of the body of A., this is only a present freehold in A. with a vested remainder to him in tail, to take effect in possession, after the determination of B.'s estate."¹³

The same author also states the effect, when the intermediate estate is suspended upon a contingency: and refers to *Bowles' case*, 11 Rep. 80. "The two limitations" says

⁹ Vide 4 Kent, 214. 2 Jarman on Wills, 241, ch. 36.

¹⁰ 2 Jarm. 244, 201, 253.

¹¹ *Ib.* 246.

¹² *Ib.* 411.

¹³ 1 Rob. Wills 463, note.

he, "are united and executed in the ancestor until such time as the intervening limitations become vested; and then open and become separated, in order to let in such intervening limitations as they arise."¹⁴

I have said that if the limitation over were good, it could not prevent the application of the rule.

But the limitation over, in this case, is

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clearly void, as to *the real estate, according to the case of *Mazyck v. Vanderhorst*, 1 Bail. Eq. 48, following the case of *Forth v. Chapman*, 1 P. Ws. 665. In the former case, where real and personal property were devised, in the same clause, to A. and the heirs of her body, forever, but if she should die leaving no lawful heir or heirs of her body, then over; it was held that the limitation over was good as to the personality, but too remote, and therefore void, as to the real estate. Upon the principle of that case, the limitation over, in the case before us, is deprived, by remoteness, of any possible influence to convert the direct gift to the issue into an estate by purchase.

The effect is different, however, as to the personality. The case just referred to shews that the word leaving makes the limitation over, in respect to this species of property, valid: and then, the cases determined in this State upon Bell's will, have laid down the rule, that when, as in this case, there is a direct limitation to issue, or heirs of the body, and then a valid limitation over in default of issue, the issue take as purchasers.

The consequence of these doctrines is that Zulina takes a fee-conditional in the real estate given to her by the will of the testator, and a life estate in the personality, with remainder to her issue.

With respect to the real estate, the decision in *Adams v. Chaplin*, 1 Hill. Eq. 265, is that the fee vested in her from the time the will took effect. According to that case there was no estate appreciable in law left in the testator. Her estate was not, as had been supposed in *Tinny v. Tinny*, MS. Book, B. 291, a life estate, to be enlarged to a fee upon the birth of issue, but a fee, defeasible in the event of her dying without performing the condition annexed to it.

A question is raised whether the remainder given to the issue of Zulina in the personality is not to be regarded as a personal benefit conferred on her by her father, falling within the inhibitions of the Statute of 1795. In *Bradley v. Lowry*, 1 Speers Eq. 1, [39 Am. Dec. 142,] where a father gave a slave and a tract of land to the husband of his natural daughter, it was held to be a benefit conferred upon the daughter, within the meaning of this Act, because the evident design was to confer a benefit on her, through her husband, in evasion of the Statute. In that case the benefit was direct, because of the unity of

the husband and wife. Nothing could be given to the one without the enjoyment of the other. We feel great difficulty, however, in following that decision here. The argument is that by providing for Zulina's children, her father exonerated her, to the extent of that provision, from the duty and burden of providing for them. But, if we should take into consideration bounties of this remote description, we should entangle ourselves in inextricable difficulties in the application of the Statute, and we deem it safer to hold that the interests of the chil-

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dren of *Zulina, who take as purchasers, distinctly from their mother, and not through her, or in connexion with her, shall not be regarded as a gift to her.

We come now to the most subtle question in the case. Ann Hull, the mistress, whose legacies have been supported, contends that after applying and exhausting the intestate property in the payment of the testator's debts, "the balance of the debts should be paid out of the property ineffectually devised and bequeathed to Zulina," and that the bequests to Ann Hull should not be required to contribute to the payment of debts "until the whole excess beyond one-fourth, or ineffectual gift to Zulina, shall have been exhausted."

It is contended that the Act of 1795 is to be applied to the property given to Zulina, in the first instance, and that her legacies are to be vacated to the extent that they exceed in value one fourth of the whole estate after deducting the debts in gross: and that this excess is then to be regarded as intestate property, and applied to the debts, in exoneration of Ann Hull's legacies, which, in respect to intestate property, is only secondarily liable. But we are of opinion that this would invert the proper order of proceeding. It was long ago determined, in *Owens v. Owens*, MS., that the will of a testator, in favor of his bastards or mistress, was a good and valid will as to all the world except his lawful wife and children: and so far has this doctrine been carried that, in *Breithaupt v. Bauskett*, 1 Rich. Eq. 465, it was held by Chancellor Harper, that the election to avoid it was so completely personal to these parties, that the privilege expired with the life of the wife, and could not be exercised by her executor.

The instrument is not void but voidable; and as to all persons taking by the will, the estate is to be administered under the will, as if there were no such thing as the Statute of 1795. The rule for the payment of debts, as laid down in *Warley v. Warley*, 1 Bail. Eq. 397, is to be applied until the clear value of the legacies and devises is established; and then the Act of 1795 is to be applied, at the instance, and for the benefit, of the lawful wife and children, for the vacation of so much as has resulted in legacies to

¹⁴ 1b. 464.

the mistress or bastards, beyond one fourth of the clear value of the whole estate. There can be no difference in principle, whether parties entitled to take advantage of the Act of 1795, make their application for that purpose before or after the debts are paid and the legatees put in possession of their legacies, nor should the results be different. If the lawful wife or children should be ignorant of the facts until the administration is closed, and should then discover that the spurious family, one or more, are in possession of a clear estate, exceeding one fourth of the clear estate of the ancestor, they have a right to make their case against them, without calling in the executor or other legatees.

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They *have nothing to do with the administration in such a case, nor can the administration affect their rights, one way or another. Nor can their obtaining a decree for the excess to which they are entitled, authorise any legatee, specific or other, whose legacies have been partially or wholly applied to debts of the testator, to call upon them for contribution out of their recovery, as intestate property; and thus subject the estate to a second administration. Their reply to such an application would be that what they had recovered was recovered from a legatee who, from the relations subsisting among those claiming under the will, was entitled to it as against every other legatee: that they recovered it by a superior right, from a party holding by a better right than the party now demanding it from them; that their recovery had not rendered their acquisition intestate property; on the contrary, they had recovered it from one in whose hands it was testate, and because it was given to him as testate; and that although they had avoided his legacy, the property was in their hands, as it was in his, testate property as to every party taking under the will.

If the lawful wife and children come into Court while the administration is still pending, they must make the executor a party to the suit: but this is not to change the course of administration, the purpose being to conduct the administration to the proper conclusions under the will, and to ascertain the property resulting under the will to that party against whom their claim is really to be made.

The question might be very properly put to Mrs. Ann Hull, why her rights under this will are to be increased in consequence of the claim made by the lawful children upon her daughter. If they had never made their claim, she would have had no right to contribution out of the property indicated by her ground of appeal. As their claim does not prejudice her, it is not perceived why she should take any benefit from it.

If her ground were sustained, the adjudication would present this strange absurdity,

that she would take from the plaintiffs what they obtain by a superior right from Zulina, and then in her hands it would be reclaimable by Zulina by a better right than hers: and thus the adjudication must proceed continually in a circle.

The last question is whether the excess to be recovered by the plaintiffs is to be set off to them by partition, or to be accounted for *ex debito*, and this is a question of no little difficulty.

In *Bradley v. Lowry*, 1 Speer's Eq. 1, [39 Am. Dec. 142,] this question was reserved. In that case I inclined to the opinion that the excess should not be accounted for, but taken off by the process of partition; because, as I then read the Statute, it made the

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title of the *donee good for a part and void for the residue; which seemed to infer that there was a community of title in the donee and the lawful family of the donor, according to their respective interests. I have carefully reviewed the statute, and I now doubt that opinion. Insurmountable difficulties would arise from holding that in all cases there was an absolute right to claim partition. In many cases it would be impracticable. Suppose, for example, specific gifts were made to each of 20 bastard children, with cross remainders among them. Other examples might be given, little less embarrassing, but this will suffice.

On the other hand, as I have said in my circuit decree in this case, the terms of the statute do, in a great measure, point to compensation for the excess, and I very much doubt whether if the whole of an estate were bequeathed to a bastard on condition that he account to the lawful family for three fourths of its clear value, such a will must not be specifically executed by the Court, as conforming to the Statute.

But even under the construction that the statute requires nothing but a restoration of the excess in value, when this can conveniently be done by partition, that process might be adopted.

Our conclusion is that nothing can be definitely ordered on this point until the property in the hands of Zulina is ascertained, and how much it exceeds in clear value one fourth of the estate.

It is ordered that the decrees be modified in conformity to this opinion; and that the Commissioner do ascertain and report,

1st. The gross value of the estate.

2d. The aggregate amount of the debts.

3d. The value and description of the different devises and bequests.

4th. The sums chargeable to the same in a due course of administration.

5th. The nett value of the different devises and bequests to Zulina.

6th. The excess received by her over one fourth of the testator's estate, clear of debts.

7th. The rents and profits; and
 8th. Any special matter; including a statement of what the plaintiffs are entitled to.
 The defendants to pay the costs not heretofore provided for.

DUNKIN, Ch., and DARGAN, Ch., concurred.

Decrees modified.

2 Strob. Eq. *196

*B. M. ENICKS & Wife et al. v. J. S. P. POWELL, Adm'r, et al.

(Columbia. May Term, 1848.)

[*Executors and Administrators* ⚡120, 531.]

Where administration has been revoked, and the distinct office of administrator de bonis non conferred on the same person, the funds in his hands, as administrator, are transferred to his hands as administrator de bonis non—the sureties of the administration are fully discharged, and a corresponding liability substituted in the sureties of the administrator de bonis non.

[Ed. Note.—Cited in *Whitmire v. Langston*, 11 S. C. 389; *Todd v. Davenport*, 22 S. C. 150; *Chick v. Farr*, 31 S. C. 470, 10 S. E. 176, 390; *Hall v. Hall*, 45 S. C. 179, 22 S. E. 818; *State ex rel. Causey v. Causey*, 93 S. C. 304, 76 S. E. 707.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 485, 2407; Dec. Dig. ⚡120, 531.]

[*Executors and Administrators* ⚡527.]

The sureties to the first bond, and the different sureties to a new or additional bond, given by an administrator for the performance of his trust, are all to be regarded as parties to a common undertaking; to the distributees of the estate, they are responsible to the extent of, and, as among themselves, in proportion to, the obligations executed by them respectively.

[Ed. Note.—Cited in *Bobo v. Vaiden*, 20 S. C. 277.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2368; Dec. Dig. ⚡527.]

Before Dargan, Ch., at Barnwell, February Sittings, 1848.

Dargan, Ch. The following facts were proved or admitted in this cause:

Letters of administration, with the will annexed, of the estate of Elijah Gillett, were committed to the defendant, J. S. P. Powell, on the 14th October, 1831, at which time Powell executed a bond to the Ordinary, in the penal sum of \$20,000, with L. Hext, W. Enicks, John Holly, S. Bonsell, and D. Tobin sureties thereto; and by virtue of said letters, Powell, with the permission of the Ordinary, sold the whole of the testator's personal estate for a large sum of money.—On the 21st June, 1833, the said letters of administration were revoked by the Ordinary, at the instance of the said L. Hext, W. Enicks, and John Holly, and other letters were granted to Powell, on his entering into a second bond to the Ordinary, in the penal sum of \$22,000, with Wm. R. Erwin and U. M. Robert sureties thereto. On the 11th March, 1834, Powell,

at the instance of U. M. Robert, was cited or notified by the Ordinary to appear in his office, and enter into a new or additional bond for the performance of the trust; and he accordingly did, on the 1st April, 1834, give such new or additional bond, in the penal sum of \$15,000, with the said W. R. Erwin, and S. R. Cannon and Robert Goode, sureties thereto. On the 8th May, 1840, the last mentioned letters of administration were revoked, at the instance of the said Robert Goode; and Powell seems afterwards to have taken no further steps in the administration of the estate.

Powell sold, on the 23d January, 1832, the whole personal estate, for \$16,945.50.

On the 19th July, 1839, Powell executed and delivered to Wm. R. Erwin and U. M. Robert, the two mortgage deeds recited in the pleadings, to indemnify them against any loss they might sustain in their capacity of sureties to his second bond aforesaid.

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*By a decree of this Court, made on the 15th May, 1844, in the cause of Aaron Gillett and others v. J. S. P. Powell and others, it was ordered that Powell do pay to the complainants (in said cause) the sum of \$5,801, with the interest thereon from the 1st May, 1841; the said sum having been ascertained to be due by Powell, as administrator, to the estate of Elijah Gillett.

On the 10th February, 1845, eighteen of the slaves included in one of the mortgage deeds aforesaid, (given to Erwin and Robert as indemnities,) were sold by the sheriff, as the agent of the mortgagees, for \$5,211.60, and the proceeds were applied to the part payment of the said sum of \$5,801.82, to the complainants in this cause.

On the 23d January, 1832, Powell, as administrator, and at his administrator's sale, sold to Wm. R. Erwin the following slaves of the estate: Jacob, Flora, Mungo, Mahaly, Sandy, Sue, Ben, Rachel, July, and Sally. To Samuel B. Colding, Amey, Bess, and Jim. To Virgil Bobo, Aleck and Cornelia; and took their respective bonds for the purchase money.

In the same year (1832) and but a short time after the said sale, Powell took the above named negroes off the hands of the said purchasers, Colding, Erwin, and Bobo, and gave them up the bonds which they had given him for them at the sale of the 23d January, 1832. Each of the said purchasers, (viz: Colding, Erwin, and Bobo,) at the same time gave to Powell a written acknowledgment, that he had "received from J. S. P. Powell, as administrator of the estate of Dr. E. Gillett, for Mrs. Lavinia Powell," (the wife of the said J. S. P. Powell,) "late Lavinia Gillett," a certain sum of money, at a certain time, in full for the said negroes—that is to say: S. B. Colding, on the 4th August,

1832, \$750: Wm. R. Erwin, on the 1st October, 1832, \$3,290: Virgil Bobo, on the 3d November, 1832, \$550, amounting in all to \$4,590.

The defendant J. S. P. Powell's share of the estate of Dr. E. Gillett on the 1st May, 1841, was \$3,193.28.

On the 10th January, 1845, the sheriff sold the following negroes under the aforesaid mortgage to Erwin and Robert, given for their indemnification, to wit: Amey for one hundred and ten dollars, Jacob for one hundred dollars, Mingo for three hundred dollars, July for five hundred dollars, Sandy for three hundred and sixty dollars, Sue for two hundred and thirty-three dollars and thirty-four cents, Ben for four hundred and seventy-five dollars, Rachel for four hundred and fifty-five dollars, Sally for three hundred and five dollars, Aleck for five hundred and ten dollars, Cornelia for two hundred and seventy-five dollars, Jeff for two hundred and thirty-three dollars, Lucy for two hundred and thirty-three dollars and thirty-two cents,

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Reuben for two hundred and *seventy-five dollars, (the three last were issue and increase of the other,) Isaac for four hundred and ninety-five dollars and twenty-five cents, Lovey for twenty-five dollars, Dinah for one hundred and ninety-five dollars, Leah for three hundred and eighty dollars, making the gross amount of the sale by the sheriff, \$5,460. Deduct the expenses of sales, &c., \$248.40, and the nett proceeds of sale amount to \$5,211.60.

The negroes Bess, Jim, Flora, and Mahaly are not included in the above list of sheriff's sales; although they are included in the list of negroes which Powell took off the hands of Colding, Erwin and Bobo. In no way have they been accounted for.

Powell, in his return to the Ordinary, charges the estate with a balance due him on the 8th of January, 1833, of \$599.25. On the 4th February, 1834, he charges himself with a balance due the estate of \$332.71. On the 16th May, 1835, he charges the estate with a balance due him of \$1,484.17. And on the 17th May, 1837, he charges the estate with a balance due him of \$2,782.55.

Jacob S. P. Powell was sworn as a witness. He was introduced to show that he received more moneys of the estate than appeared in his returns to the Ordinary. It was objected that he was incompetent to prove facts contradicting his own returns which were sworn to. The objection was overruled. He testified that during the first year of his administration, he appropriated to his own use \$8,000 of the proceeds of his sale of the effects of the estate, believing that he was entitled to that much in right of his wife. Of this, on the 3d of November, 1832, he received \$4,590, the amounts due by Erwin, Bobo, and Colding, \$300 from Ed. Harrison, \$100 from Goode, \$1,200 from J. G. Brown, and a fur-

ther sum of \$500 from Bobo, all of whom were purchasers at his sale.—Also other sums not particularly recollected; he received sufficient to make up the \$8,000 to which he believed himself entitled. Most of the foregoing debts, which he speaks of as having been collected by him to realize his supposed moiety of eight thousand dollars, appear in his second return, as having been received by him in the year 1833, and previous to the revocation of the first letters, yet on the 24th February, 1834, the day on which the balance on said return was struck, there appeared to be due by that return to the estate, only the sum of three hundred and thirty-two dollars and seventy-one and three quarter cents. In the next year's account, when the amount received by him, according to his statement to the Ordinary, was two thousand and twenty-seven dollars and twenty-four cents, he strikes a balance in his favor of one thousand four hundred and eighty-four dollars seventeen cents. In the subsequent and only other return which he made, he charges nothing as

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received, and *strikes a balance in his own favor of two thousand nine hundred and eighty-two dollars fifty-six and a quarter cents.—Yet on the 15th May, 1844, in the case of the Adm'r of Gillett and others v. Jacob Powell, [Speers, Eq. 142,] there was a decree against him for five thousand eight hundred and one dollars, on account of the very funds of which he professed to give an account in the returns alluded to. The returns therefore are strikingly falsified, as well by the evidence of Powell himself, as by the decree which was rendered against him.

On this state of facts, the first question which arises is, whether the sureties to the first administration are liable at all, for the defalcations of Powell, and if so liable, to what extent. On their behalf it was contended, that a sale by an administrator, in pursuance of a decree of a Court of competent jurisdiction, is not a devastavit, and to make them liable, the waste must be committed before the revocation of the administration, for the faithful performance of which they are bound. Such a sale, I readily admit, would not be a devastavit, until a misapplication of the funds arising therefrom. Neither would the receipt of money be such, until its misapplication. But in the one instance his power over the fund commences at the receipt of the money, and in the other, at the time of the sale, and of his receiving the securities for the effects sold. In both cases the sureties would be bound for the legitimacy of the ulterior results in the exercise of a power which their confidence conferred and enabled him to abuse. They engaged themselves to be responsible for the faithful exercise of the power which he then acquired over the funds of the estate, and are liable, if he has not paid them over to the proper parties when required by law.

In this view of the case and in reference to this question, it is of no importance when Powell collected the money on the securities taken at his sale. A portion of the proceeds he has never paid over, and there is a decree against him for the same. And though it were conceded that he did not collect the money now due, during the term of the first administration, yet his abuse of the trust had its incipency in that period, and grew out of it as a natural consequence.—And the sureties on the first bond must be accordingly liable. It seems to me that an illustration will place this question beyond controversy. Suppose that Powell after obtaining letters of administration had made a sale on a credit, and taken the proper securities for the proceeds, but had actually made no collections before a revocation of his letters of administration. Suppose also, that there had been no subsequent administration granted to any one; and that Powell, after the revocation of his letters, instead of accounting for the securities taken at his sale to the proper parties, collects and applies them to his own use. Can it be doubted

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that the sureties on his administration bond would be liable? As regards the distributees of the estate, the giving a second bond on a new administration, does not discharge the sureties on the first from any liability that they may have incurred during the period for which they engaged to be responsible.

It is difficult in this case to ascertain when all the collections were made. Powell's returns have been falsified by his own evidence and the decree of the Court, as has been stated. The account taken by the Commissioner on which the decree was rendered, does not throw any light upon this part of the investigation. On account of the obscurity of the facts, and for facility of computation, he was charged with the whole amount of the sales, without reference to the time of the collection of the different items. It is certain, however, that a very large proportion was at once collected and appropriated. And in regard to the time of collecting the balance, in the absence of all proof, it would be legitimate to presume its collection when it became due; which would be within the period of the first administration. Aided by this last presumption, we have evidence that not only did Powell's control over the fund now due, commence during the period of his first administration, but that the money came into his hands and the devastavit was consummated during that term.

If, at the time of the revocation of his letters of administration, Powell was not in arrears to the estate, on a fair adjustment of his accounts, then clearly the sureties to the first bond could not be liable. Neither would they be liable beyond the lowest amount to which the administrator had, at any subsequent period, reduced his indebtedness to

the estate, on a proper accounting and taking into consideration all his liabilities. But even if the periods of his receiving the funds of the estate in money instead of the time when he acquired the power and control over those funds, were necessary to be inquired into and considered, there is sufficient evidence before me to warrant the conclusion that he had, during the first administration, converted to his own use an amount sufficient, with the subsequently accumulated interest, to equal the amount of the final decree against him, and that at no period posterior to the revocation of his letters, until after that decree, had his indebtedness been reduced below the amount of this decree. This view of the case would seem to satisfy the doctrine to be deduced from *Vaughan v. Evans*, 1 Hill Eq. Rep. 414, in which it was held that a Commissioner giving new sureties on receiving a new appointment, must be held to have paid to himself, unless an actual default were shown. In the case of *Field v. Pelot*, McMullan's Eq. R. 385, the Chancellor expresses himself dissatisfied with the principle laid down in *Vaughan v. Evans*, though he had himself written the

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opinion of the Court in the latter case, and he gives a most decided preference to the doctrine of *Trimmer v. Trail*, 2 Bailey, 480, that with respect to funds in an administrator's hands, at the time of his giving new security, the security should be regarded as cumulative, and the former sureties only discharged from future liabilities. And this seems to be the principle that prevailed in *Field v. Pelot*.

I am therefore of the opinion, and so decree, that all the administration bonds of Jacob Powell, as administrator of the estate of Elijah Gillett, were cumulative securities for the faithful performance of the duties of his trust, to the full amount of the final indebtedness, found against him by the decree of the Court of Equity; that each one of the sureties in the said three several bonds, is liable directly to the complainants for the balance remaining due upon the decree against their principal, the said Jacob Powell. And it is the further judgment and decree of the Court that the complainants are not bound to look to or exhaust any counter securities, which some of the sureties have taken from Powell for their own indemnification, but are entitled to make the balance of the said decree remaining due out of the estate of each and every of the said sureties, without reference to the equities that may subsist among themselves.

It may be as well to remark, that no question was made as to the third and last bond being cumulative, there having in that case been no revocation of the letters, but simply an order that Powell should give another bond with additional sureties.

L. Hext, W. Enicks, John Holly, S. Bonsall

and D. Tobin are the sureties to the first bond. I have held them equally liable with the sureties on the other two bonds to the distributees of Elijah Gillett, for the existing defalcation of their principal. Their rights, as among themselves, present a very different question. All the sureties may be divided into two classes with distinctive rights. The sureties on the first bond constitute one class, and the sureties on the two last bonds constitute another class. The sureties of the second class are ultimately liable to those of the first, as the first indorser of a bill or note is liable to the subsequent indorsers, though all are liable to the payee of the bill or note. By a legislative provision,¹ the sureties of an administrator are entitled, if they become dissatisfied, to petition the Ordinary for relief, and that officer is authorized "to make such order or decree as shall be sufficient to give relief to the petitioner." The sureties to the first bond did petition the Ordinary for relief, and he granted them relief by revoking Powell's letters of administration. Who can doubt but that they desired, and the Ordinary intended to give them all the relief that it was in his power

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to afford, consistently *with the rights of the distributees of the estate? But when the administration is recommitted to the same hands by virtue of a new bond, with other sureties, the old sureties would have but an inadequate relief, and not such as is desired or was intended by the Act, if, as between the two sets of sureties, the last were not to be ultimately responsible. The liabilities of the old sureties could not, in justice to the rights of the parties interested in the estate, be entirely discharged. But as between the sureties themselves, it would be perfectly competent so to regulate their respective liabilities, that the new sureties should assume all the ultimate responsibility.—Nothing short of this would afford the adequate relief which the Act intended to give. And this seems to be in accordance with the view of the Court in *Field v. Pelot*.

It is, therefore, the judgment of the Court in this case, that if the money due to the distributees of Elijah Gillett should be made out of the estates of the sureties to the first administration bond, or any of them, the said sureties to the first bond are entitled to reimbursement from all and either of the sureties on the two last administration bonds.

And now another question presents itself. Two of the sureties, to wit: Wm. R. Erwin and U. M. Robert, who were alone with Powell on the second bond, having apprehensions as to his solvency, obtained from him in their own name counter securities. On the 19th July, 1839, Powell executed and delivered to them two mortgage deeds, (which are recited in their answers) to save them harmless against their liability as his sureties on this

second administration bond. On the 10th January, 1845, at the instance of the mortgagees, and for the purpose of foreclosing the mortgages quo ad, the sheriff sold the 18 negroes already mentioned, and the nett proceeds (\$5,211.60) have been applied in satisfaction pro tanto of the complainants' claim, leaving the balance still due, about which this controversy has arisen. And the defendants, Wm. R. Erwin and U. M. Robert, claim as between themselves and the other sureties, the exclusive benefit of that payment, as arising from the counter security taken in their own name and for their own individual benefit. And that they, having already paid more than their proportion of the defalcation out of their counter securities, are not liable as among themselves and their co-sureties to contribute.

The position assumed in behalf of Robert and Erwin is not tenable. The money that has been applied on the joint liability of all the sureties, has been paid out of the means, not of Erwin and Robert, but of Powell. It is not equitable that Powell should secure the life-boat to two of his sureties, and leave the others to sink without a chance in the wreck which his own misconduct has produced.—Equity will not permit such gross and glaring

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ing injustice. They are held in *this decree to be the co-sureties of Powell, and bound to make good his defalcations, and they must stand up together and breast the common peril which they have voluntarily taken upon themselves.

The fact that there were several bonds, makes no difference in the application of this well settled principle of equity jurisprudence. In the case of *Deering v. the Earl of Winchelsea*, 2 Bos. and Pul. 270, it was held that the rule applied whether the sureties were bound on the same or a separate bond, and that the right to contribution, and to an equal participation in the burthens, existed alike in both cases. It is true, as was settled in *Craythorne v. Swinburne*, 11 Vesey, 160, that sureties, on entering into their common engagement, may, by contract, "define their position," among themselves. They may waive the equity of contribution if they choose, or may agree that a counter security taken by one should operate for his exclusive benefit. And this, as in *Craythorne v. Swinburne*, may even be proved by parol, which is generally admissible to rebut a mere equity. But in that case the Lord Chancellor referred to *Deering v. Winchelsea* with approbation. It has also, in *Field v. Pelot*, been held to be a sound rule, and the doctrine enforced. I have no difficulty in applying it in this case. It is, therefore, ordered and decreed, that as far as the relief extends, which has been had from the sale of the negroes mortgaged by Powell to Erwin and Robert, it must operate for the equal relief of all the sureties, and in discharge of the

¹ 15 Stat. 111.

common burthen. And the remainder of the liability must be equally shared. And if any portion of the remainder of the mortgaged property can be had, it must be sold and applied for the common benefit of all the sureties.

It is also ordered and decreed, that Jacob Powell deliver up forthwith to the Commissioner of this Court, all the mortgaged property mentioned in the said mortgage deeds, not already disposed of in satisfaction of said deeds, and yet in his power to produce; and that the commissioner do sell the same on a credit of one year, with interest from the day of sale, and personal security; and that the fund arising from the sale, be applied for the relief of the sureties in the way of reimbursement, and according to the principles of this decree. It is also ordered that each party pay his own costs.

Grounds of Appeal.

On the Part of the Defendant Mark Goode, Administrator of Robert Goode, deceased.

1. Because, while it is conceded on the part of this defendant, that the different sets of sureties are severally liable to the legatees of Gillett, it is respectfully submitted, that as between themselves, they are

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not jointly or equally liable; that the sureties to the first bond are primarily liable for the value of the assets which came to the hands of their principal on the credit or responsibility of their bond, while the sureties to the third bond are primarily liable for all the assets which came to the hands of the administrator on the credit of their bond, and are, as to assets previously received, only guarantors of the first and second bonds.

2. Because the sureties to the first bond were, at the time of the revocation of the letters of administration, which had issued on the faith or responsibility of that bond, liable for the assets which had come to the hands of the administrator in virtue of the said letters, and it was not the intention of the Act of Assembly,² nor within the power of the Ordinary, to shift that liability, or any part of it, on the sureties to the subsequent bonds.

3. Because the relief intended to be afforded by the Act to sureties to administration bonds, extends to future liabilities only, and not to liabilities already incurred.

4. Because, as to assets which came to the hands of the administrator on the faith or responsibility of the sureties to the first and second bond, the third bond is only a security for the sufficiency of the first and second bonds, or in other words, a subsidiary or collateral security.

5. Because, if assets had come to the hands of the administrator, after the execution of the third bond, and before the revocation

of the second letters of administration, the sureties to that bond (perhaps in common with the sureties to the second) would have been exclusively liable for the same; and it is therefore contrary to the principles of equity, to subject them to the whole or any part of the liability incurred by the sureties to the first bond, by implication.

6. Because J. S. P. Powell having converted the whole of his testator's estate before the execution of the third bond, and no assets having come to his hands afterwards, the sureties to that bond are primarily liable for no part of the debt due to the legatees of Elijah Gillett, the testator.

Patterson, for the appellant.

Appeal by 1st Set of Sureties.

The defendants John Holly, Daniel Tobin and William R. Enicks, give notice that at the next sitting of the Court of Appeals in Columbia, a motion will be made to modify the decree in the above stated cause, on the following ground.

Because his Honor the Chancellor has decreed that the sureties in the first administration bond of Jacob S. P. Powell, on the estate of Elijah Gillett, are liable to the distributees of the said Elijah Gillett, for the amount due by the said Jacob S. P. Powell to the said distributees; whereas, it is respectfully submitted that his Honor should

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have decreed that the sureties to the first administration bond were entirely discharged from liability—at all events, not liable until the remedies against the sureties on the 2d and 3d administration bonds were entirely exhausted.

Bellinger and Hutson, Defendants' Solicitors.

Wm. R. Erwin's Appeal.

The defendant, Wm. R. Erwin, gives notice that at the next sitting of the Court of Appeals in Columbia, a motion will be made to modify the decree of the Chancellor, on the following ground.

Because his Honor the Chancellor has decreed that the sureties on the second and third administration bonds of J. S. P. Powell, on the estate of Elijah Gillett, are liable to the distributees of the said Elijah Gillett, for the amount due by the said J. S. P. Powell to the said distributees, and also that they are liable over to the sureties on the first administration bond of the said J. S. P. Powell on the said estate, if the money should be made of said first sureties.

Whereas it is respectfully submitted, that his Honor should have decreed that the said sureties to the second and third administration bonds, are not liable for the amount due by the said J. S. P. Powell to the said distributees, inasmuch as the decree determines that the said amount was due before the revocation of the first letters of admin-

² 5 Stat. 111.

istration, and was never afterwards reduced either by the said J. S. P. Powell or the said first sureties.

James T. Aldrich, Solicitor.

JOHNSTON, Ch., delivered the opinion of the Court.

We agree with the Chancellor, that the sureties to the second and third bonds are to be regarded as parties to a common undertaking. To the distributees of the estate they are responsible to the extent of, and as among themselves, in proportion to, the obligations executed by them respectively. This is the Chancellor's conclusion of fact, as to the intention of the parties; and it seems to be well warranted by the circumstances.

But we differ from him with respect to the sureties to the first bond.

Upon the petition of these sureties for relief, the question is, what power had the Ordinary to relieve them? It is conceded on all hands, that he could not grant them a direct discharge from the obligations of the contract into which they had entered. It has been supposed, however, that though an Ordinary cannot discharge the contract as to past transactions, he may do so with respect to the future. But it is not so. For instance if, upon the application of these sureties, the Ordinary had made a decree, in terms, that the bond given by them

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*should not be obligatory on them, in respect to the future conduct of the administrator, without more; such a decree would have been a mere nullity. While the administration exists, the contract in virtue of which it was granted, cannot be abrogated or impaired. If the letters of administration be revoked, this excludes the sureties from being made liable for the administrator's future conduct; though they remain subject to all responsibilities incurred at that time. The Ordinary has no power, either as to the past or the future, to decree relief, but "to make such order or decree as shall be sufficient to give relief;"³ and it depends altogether upon the operation of the decree which is made, and not upon its object or intention, whether or not the decree is really a relief to the sureties. In the case before us the Ordinary revoked the letters of administration; which restricted the liabilities of the sureties upon the bond to that point of time. They remained, however, subject to all existing liabilities; and if the administration de bonis non had been conferred upon a stranger they would have been liable to him, as such; and according to the case of *Villard v. Robert*, 1 Strob. Eq. 393, might have been compelled to account to him, and his release would have been a good discharge to them. And so when the administration de bonis non was conferred upon Powell, the former administrator, he

became entitled in his new capacity to an account of the past administration, and if the account had been formally rendered and the funds ceremonially transferred, no one will doubt that the sureties to the administration would have been fully discharged, and a corresponding liability substituted, in the sureties of the administrator de bonis non. As the administrator, and the administrator de bonis non, the debtor and the creditor, was the same person, and therefore incapable, by recognized legal process, of suing himself or obtaining this account and transfer, the only question is, whether the same results were not produced by operation of law, and we think upon authority they were. The bond was not abrogated, but it has been satisfied. It was not vacated, but has been paid.

There is nothing in *Field v. Pelot*, 1 McMul. Eq. 369, which destroys this doctrine. One of the Chancellors seems to question the case of *Vaughan v. Evans*, 1 Hill. Eq. 414, in which it has been applied. But he had not the concurrence of either of the three other Chancellors, two of whom, though uniting in his decree, did not apply it, because the case before them did not in their apprehension come under it. That case is an existing authority; and the present decree cannot be sustained without overruling it, for which we are not prepared.

It may be affirmed, that from the time of *Waukford v. Waukford*, 1 Salk. 299, there is no case where a debt and credit, a right to demand, and an obligation to pay, co-

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exist even for a moment in the same person, in which it has not been held that the debt was extinguished by presumption of its payment. A debtor becoming executor to his creditor, is held, at common law, to have paid his debt; and upon his death, his executor cannot be called upon by the representative of the creditor, to pay it. A husband is discharged by the marriage, from pre-existing debts to the wife, and whether solvent or not at the time of the marriage, and therefore whether capable or not to make actual payment, his representative is not liable to be sued by the wife, if she should survive him.

A case such as the present, where the administration has been revoked and the distinct office of administrator de bonis non conferred on the same person, is strictly almost the only case of administration in which a debt and a credit can co-exist in the same individual, in which he is at once both debtor and creditor. A case of continuing administration presents no such feature. But where the administration is revoked, a debt may exist, and when the administration de bonis non is conferred, a right to demand it arises to the new officer; and as perfectly where the appointment falls upon the former incumbent, as if it had been bestowed on a

³ 5 Stat. 111.

stranger. The new office is distinct from the old, and secured by a distinct bond; and must be attended by the same rights, in whose hands soever it may be placed. There is no difference in principle between such a case, and the cases where an administrator has been appointed guardian, in which cases it has been uniformly held that the funds in the hands of the administrator are transferred to his hands as guardian, to the discharge of his sureties to the former office.

In no case where there has been a new appointment of the same person to a distinct office, have his former sureties been held liable;* neither in *Trimmier v. Trail*, 2 Bail. R. 480, *The Ordinary v. Bigham*, 2 Hill R. 512, *Simkins v. Cobb* [2 Bailey, 60,] *Joyner v. Cooper*, [2 Bailey, 199,] nor any other. And although in some of the cases the decision turned on other points, and dicta are to be found relating to the different degrees of direct power possessed by the Ordinary over the contract in cases of past as contradistinguished from future liabilities, (altogether inaccurate, I apprehend) the doctrine for which I now contend would have applied to them all and have led to the same results.

It is adjudged and decreed that the sureties to the first bond are discharged; and that the decree on that point be reversed. In all other respects it is affirmed, and the appeal dismissed.

The point in relation to the mortgages taken by the sureties, is not embraced in the appeal, and cannot be considered.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

Decree modified.

* Vide 1 McM. Eq. 400—1.

2 Strob. Eq. *208

*THOMAS M. FINLEY, Administrator, et al.
v. ALEXANDER HUNTER, Ex-
ecutor, et al.

(Columbia. May Term, 1848.)

[Wills ⚡658.]

Testator bequeathed to his wife a life estate in certain slaves, with remainder over to his son, on condition that, at certain periods specified in the will, he should emancipate, or send them into a free State—*held*, that the emancipation, or removal, was a condition subsequent.

[Ed. Note.—Cited in *Thomas v. Kelly*, 3 S. C. 213, 16 Am. Rep. 716.]

For other cases, see Wills, Cent. Dig. § 1553; Dec. Dig. ⚡658.]

[Executors and Administrators ⚡291.]

An executor's assent to the legacy to a tenant for life, ipso facto enures to vest the estate in remainder.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1155; Dec. Dig. ⚡291.]

[Wills ⚡855.]

The Act of 1841, rendering void any bequest, &c. of slaves to be removed without the

State, with a view to their emancipation—*held* not to destroy the legal title of a legatee, vested in slaves previous to its passage; but only to render void the condition of the bequest, that he should remove them into a free State at a period subsequent to its passage.

[Ed. Note.—Cited in *McLeish v. Burch*, 3 Strob. Eq. 244; *Johnson v. Clarkson*, 3 Rich. Eq. 316; *Willis v. Jolliffe*, 11 Rich. Eq. 513; *Calhoun v. Calhoun*, 2 S. C. 306; *Thomas v. Kelly*, 3 S. C. 213, 16 Am. Rep. 716; *Rumph v. Hiott*, 35 S. C. 455, 15 S. E. 235.]

For other cases, see Wills, Cent. Dig. § 2171; Dec. Dig. ⚡855.]

[Wills ⚡865.]

Whenever the testator has not expressed his intention in favor of the legatee, it must be presumed to have been reserved for the benefit of the next of kin.

[Ed. Note.—Cited in *Johnson v. Clarkson*, 3 Rich. Eq. 317.]

For other cases, see Wills, Cent. Dig. § 2188; Dec. Dig. ⚡865.]

[Slaves ⚡22.]

[The statute of 1841, prohibiting the emancipation of slaves, only invalidates that portion of an instrument which provides for such emancipation. Other provisions connected with it, even forming a part of the same clause, are valid.]

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 92; Dec. Dig. ⚡22.]

Before Johnston, Ch., at Abbeville, July Sittings, 1847.

Johnston, Ch. Thomas Finley departed this life the 3d of Dec. 1831, in Abbeville District, where he had long resided, leaving a widow, Jane, but no lawful issue. He left a natural son Reuben Finley, whom he had begotten in his youth, in Virginia, by one Catherine Kinder, and who, at the death of his said father, resided in Overton county, Tennessee, where he was married and had a family of children, and where he followed the trade of a wheelwright.

Thomas Finley left, in full force, at his death, a last will and testament, executed by him the ——— day of ———, 1823, in the following words:

"1. I give and bequeath to my dearly beloved wife Jane Finley, the following part of my estate, namely: negroes Finder, Tom, Jude, William, Caroline, Milly and Rose, and all my beds and bed-clothes, with my mahogany table cupboard and cupboard-furniture, and kitchen furniture—to her and her heirs and assigns forever. That she may have a comfortable support and maintenance, I give her the tract of land on which I now live, containing 250 acres, situate on Sawney's creek, in 'the District and State aforesaid; together with all my other negroes and property of every kind, whatsoever, that I may die possessed of, for her use during her natural life. And I hereby declare the bequest and provision hereby and herein-before made to my said wife, Jane, if accepted, is to be taken and received by her in bar and in lieu of dower in my estate.

"2. After the death of my said wife, Jane.

and after payment of the several legacies hereinafter mentioned, I give and bequeath to Reuben Finley, of the State of Tennessee,

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*wheelwright, whose mother's maiden name was Catherine Kinder, the aforesaid tract of land, together with all the negroes, and all the property belonging to my estate, of what kind soever, real and personal, at the death of my said wife, Jane, to him and his heirs forever, on the following condition, viz: that he emancipate all the female children of my two negro women, Nancy and Jinny, or cause them to be sent to the State of Indiana or Ohio, where the laws of the State will liberate them. The said female children are to be set free as they respectively arrive at the age of 25 years, and all their children with them, should they have any; as it is my wish and desire to put a stop to the slavery of the race of negroes belonging to me in future. I also request that said Reuben Finley have marble head-stones put at the head of my and my wife Jane's graves, with our names," &c., "respectively engraven on them: also, to enclose our graves with a stone wall," &c.

3 and 4. The testator then bequeaths a negro boy, Franklin, and a negro girl, Peggy, to his niece, Ann Finley; Franklin absolutely, but to be well treated and not sold or bartered out of her family; and Peggy with her children to be emancipated, or sent to Indiana or Ohio for emancipation, at the age of 25.

He also bequeaths a negro boy, Robert, to Thomas Finley Mitchell, absolutely.

Lastly he appoints the defendant, Alexander Hunter, together with one John Clarke, (now deceased,) executors. Hunter alone qualified and acted under the appointment.

All the property of the testator passed into the possession of his widow, who lived on the premises.

On the 9th of August, 1837, Reuben Finley, the testator's natural son, died at his residence in Tennessee, in the life time of the testator's widow; and, of course, without having obtained possession of his legacies. He died intestate, leaving a widow and children, (all parties, as plaintiffs or defendants, to this suit;) one of which children, the plaintiff, Thomas M. Finley, has obtained letters of administration, both in this State and in the State of said intestate's domicile.

On the 29th of Nov., 1845, Jane, the widow of the testator, Thomas Finley, died, leaving a will, of which the defendant, Hunter, the executor of her husband, is also executor.

The bill is filed by Thomas M. Finley, the administrator of the said Reuben Finley, and by two other of the children of the said Reuben, against their co-distributees, and against Hunter, the executor of Thomas and Jane Finley, respectively. From the fact that the next of kin of Thomas Finley were represented by counsel at the hearing, I infer

that they are, also, defendants to this suit; but the copy of the bill furnished me being

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abbreviated at the conclusion, instead of *being a full copy,¹ leaves me uncertain upon this point. I shall treat the case as if they were parties.

The bill prays that twelve slaves (named in the bill,) alleged to have been in the possession of the widow, (Jane Finley,) at her death, and claimed as belonging, under the will of Thomas Finley, in remainder, to the estate of Reuben, may be delivered up, to be partitioned or sold, and the proceeds partitioned among the distributees of the said Reuben. That the lands devised in said will be partitioned among the same parties. That the defendant, Hunter, account to them for the hire of said slaves and the rent of said land, alleged to have been received by him after the death of Jane, the widow. And that he give an account, generally, of his administration, &c.

At the hearing it was proved conclusively, by the depositions of several witnesses, examined by commission, that Reuben Finley, the intestate of the plaintiff, Thomas M. Finley, was a putative child of Thomas Finley, and was the person referred to in his will: and that the parties presenting themselves as his representative and distributees, were really such. This evidence was given to satisfy the defendant, Hunter, who in his answer required the proof to be made.

In addition to this, the only evidence offered at the hearing was that of Alexander Scott; who testified that Jane, the widow of the testator, had the possession of all his estate, during her widowhood, and used it as her own. He heard her say that Reuben was once in this State "and had the favorance of her husband," and that "from his resemblance to the latter, she thought she would have known him." That she was willing to give him up the negroes, if he would give up the land. That he lived in Tennessee, and was the illegitimate son of old Finley.

I could have desired to know from the papers before me whether the slaves claimed by this bill are not, some of them at least, those (or the descendants of those) given to the widow Jane, absolutely, by the first section of the first clause of old Finley's will. If so, it deserves to be more seriously considered than it was at the hearing, (for it appears the point was not made,) whether the second clause, bequeathing to Reuben in remainder, by a just construction, applies to them. If it necessarily takes in all the

¹ I take occasion to repeat, what I have often stated: That by a full copy, I mean not only a full transcript of the bill or answer, with all its endorsements, but one including a copy of every exhibit. If counsel could witness or realize the perplexity (and the hazard of their client's rights, too,) occasioned by the irregularities and omissions referred to, I am sure they would cease to occur.

slaves covered by the first section of the first clause, it must prevail over it, and will recall the absolute gift made to Jane; for being a latter clause of a will, it repeals any prior clause, to the extent of any conflict there may be between them.

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"I shall not raise the question; which the better knowledge of the counsel in relation to the component parts of the estate may have satisfied them was not necessarily involved in the case. But I may be permitted to remark, that it is not so clear to my mind, that the testator did not, by the terms employed by him, "all the negroes," &c. "belonging to my estate" "at the death of my wife," intend to refer, exclusively, to the property covered by the second section of the first clause, which he had thereby set apart or given to his wife "for her use;" and in order to secure her beyond all reasonable doubt "a comfortable support and maintenance" "during her natural life;" and which property he may have considered as reverting and again "belonging to his estate" "at the death of his wife." That he was mistaken in the latter opinion, as a legal proposition, is a circumstance that might not, necessarily, shut out the interpretation I am suggesting: the enquiry being, not what is the precise legal effect of the second section, aforesaid, but to what body of property did the testator intend to refer, as the subject of the second clause.

It certainly is difficult to believe that he intended to revoke the absolute gift which he had taken unusual pains, by the employment of formal words, to create in the first section. Nothing but an invincible necessity should lead us to adopt such a construction of his will; and I am not sure that effect may not legally be given to the whole will, without resorting to it.

But I do not feel at liberty to raise this question of myself.

Another question was very properly omitted in the discussion of the case:—whether the legacies to Reuben, the natural son, were not avoided by the Act of 1795, so far as they exceeded one-fourth of the clear value of the testator's estate. As long ago as the case of *Owens v. Owens*, 2 Faust, 76, it was determined, upon the construction of that Statute, that it was not competent for collaterals, but only for the wife and children of the donor, to avoid the gift in such cases. The wife of old Finley in the case before us, did not avail herself of her personal privilege; but on the contrary, according to the testimony of Scott, recognized the bastard's right.

The executor and next of kin took their stand upon the Statute of 1841.²

The 1st section of this Statute provides "that any bequest, deed of trust, or conveyance, intended to take effect after the death

of the owner, whereby the removal of any slave or slaves without the limits of this State, with a view to the emancipation of such slave or slaves, shall be utterly void, and of no effect, to the extent of such provision; and every such slave, so bequeathed, or otherwise settled or conveyed, shall become assets in the hands of any executor or administrator, and be subject to the pay-

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ment of debts, or to *distribution amongst the distributees, or next of kin, or to escheat, as though no such will or other conveyance had been made."

There are no other provisions of this Statute directly applicable to the case before us, nor insisted on in argument; though there are others showing, in a very clear manner, how very strong was the repugnance of the legislature to emancipation, in any form, or under any device, secret or open; and to the conferring upon slaves any rights or privileges, whatever, inconsistent with the status of strict bondage.

It is argued that the Statute will be violated here, if the representative of Reuben Finley be allowed to recover the slaves claimed by him under old Finley's will; which expressly provides for the emancipation of portions of them either in this State or beyond its limits. But if we confine ourselves to the impediment created by the Statute,—without mingling other objections with the one we are now considering,—it presents no obstacle to the recovery of any of the slaves, except those specifically directed to be set free. The will operates as to all the rest; and is only nullified by the Statute "to the extent of such provision,"—evidently meaning, so far as the property directed to be emancipated is involved: and I apprehend that slaves not directed to be set free, as well as any other species of property, may be as validly given in other parts of the will, or even in the emancipating clause, as if they were conveyed by a separate and distinct instrument, altogether free from imputation.

This objection, therefore, goes only to a part of the plaintiff's right.

Then, the objection is varied; but presented in such a form, that though it is, indeed, a different objection, it still depends for its validity upon the same Statute of 1841.

It is argued that the whole of the property given to Reuben is given together, and is coupled with a condition, the non performance of which forfeits the whole; that this condition is the emancipation of portions of the slaves: and that the Act of 1841 frustrates the performance of the condition, and thereby defeats the legatee's right to any part of his legacy, extending even to the devise of the land.

Now, if the duty imposed upon Reuben Finley by the will, and which the will denominated a condition, be indeed a condition in law, it is very material to inquire whether it be

² Acts of 1841, p. 154.

a condition precedent or subsequent. Conditions precedent are such as are, from the nature of the case, or by express requirement, to be performed before the right to which they are annexed can attach or vest. Until they are performed the right does not vest. Conditions subsequent, are such as are to be performed after the right vests or attaches in law; and the general rule is that the right which has already vested is terminated or divested by a failure to perform them.

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*A failure to perform a precedent condition stands upon a different ground in some respects from a similar failure in respect to a condition subsequent. As the right cannot vest until the precedent condition is performed, it is deferred until it is actually performed; and no excuse that the performance was originally or has become impossible or forbidden by law, nor any other reason whatever for the non-performance of the condition, can entitle the party to the dependant right, so long as he has not fulfilled the condition. But it is different with respect to conditions subsequent. If the performance of them becomes illegal or impossible, after the correlative right has vested, the right is not thereby divested.

Then, was the condition required by Thomas Finley's will, a condition precedent or subsequent? Was it a condition to be performed before the right to the property could vest, or after it had vested?

A good many cases were quoted for the purpose of showing the peculiar characteristics of these different kinds of conditions. The definitions of elementary writers were referred to and insisted upon. But the distinction between these two classes of conditions does not depend so much upon the form of expression employed to create them, as upon the nature of the act to be done, and the relation in which the agent stands to the other party to the contract, and to the subject matter of the contract. The things given here are slaves; the act to be done by the recipient, is the emancipating of them. The donor does not, himself, emancipate. He gives the property to another, and requires him to do it.—What is emancipation? It is the relinquishment, by the owner of slaves, of his right of property in them. And can it be disputed that Reuben Finley could legally perform the act required of him only after the legal title had vested in him? Besides, a portion of the slaves were to be held by him, for his own benefit, until they arrived at 25 years of age; and he was not required to set them free until they arrived at that age. Could the emancipation of these be a prerequisite to his title to them? Did the testator, while expressly giving him a right to their services for the period indicated by the will, intend to require that he

should relinquish in advance the only title by which he could exact those services?

Before we proceed further, in this connexion, it is proper to observe that the remainder given to Reuben is what the law denominates a vested, in contradistinction from a contingent, remainder. Upon the death of the testator, the right of Jane, the life tenant, vested in her; and eo instanti the right to the remainder vested in Reuben. It was not to spring up, in future, upon any contingency; but arose upon the testator's death, and abided from that time in Reuben,

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and in no other person; his enjoyment of the property only awaiting the death of the life tenant, whose possession in the mean time was his possession, as against all third persons, and who held in trust for him.

When the executor of Thomas Finley assented to the legacy of the life estate, this was an assent to the remainder. The assent passed the legal title; which was thenceforward vested, in the proportions of life estate and remainder, in the parties respectively entitled to them under the will. Up to the time of the executor's assent, these were equitable interests, but thenceforward they became and were legal interests or titles to the property.

We are now prepared to examine how far the Act of 1841 can control the right thus vested in Reuben Finley.

It will be remembered that the will was executed in 1823, and came to operate in 1831. At that time, as appears by the case of *Frazier v. Frazier*, [2 Hill, Eq. 304,] (by which I am bound, however much I doubt its correctness,) such bequests as were made in this will were lawful and would be carried into execution by the decree of the Court.

Upon the back of this the executor assented; and it was not until 1841, ten years after the legal title was vested in the remainderman, that the Legislature declared such wills void, and forbade the executor to carry them into effect.

My opinion is, that the right of property was well vested in Reuben Finley before the enactment of the Statute, and that the Statute does not divest him of it: its only effect being to render illegal the condition of emancipating the slaves, which he was subsequently to perform; and thus to create a valid excuse on his behalf for not performing it.

But the case of *Gordon v. Blackman*, 1 Rich. Eq. 61, 2 Id. 43, [44 Am. Dec. 241,] is appealed to for the position that the Act of 1841 will be enforced retroactively, so as to control wills operating before its passage.

It is true that the Statute is retrospective as well as prospective in its terms.

Chancellor Kent says "a Statute, when duly made, takes effect from its date, when no time is fixed: and this is now the settled rule." "A retro-active Statute would partake in its character of the mischiefs of an ex

post facto law, as to all cases of crimes and penalties: and in every other case, relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a Statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of *Dash v. Vankleek*, 7 Johns. a. 477, and shown to be founded not only in English law, but on the principles of general jurisprudence.—A retrospective Statute, affecting and changing vested rights, is generally considered, in this country, as founded on unconstitutional principles, and, consequently, inoper-

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ative and void. *But this doctrine is not understood to apply to remedial Statutes; which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights," &c.³

If in *Blackman v. Gordon* a retro-active operation was given to the Statute of 1841, it was, in no sense, to take from a citizen his vested rights. The slaves in that case had not been emancipated as directed by the will, but were still in the hands of the executor, who held them upon trust. The bill was by the next of kin, to prevent their emancipation. It was decided that it was unlawful, after the Statute, for the executor to emancipate; and the trustee having no beneficiary interest in the slaves, to entitle him to hold them, was directed to deliver them up to the next of kin. Whose vested right was taken away by the decision? Not that of the executor, for he had no beneficial interest. Not that of the slaves. "The law," says Chancellor Harper, "declares them to be mere chattels. They had no status in Court; and could not have come into Court to enforce the execution of the trust."

What the Court did in that case is far short of—very different from—what it is requested to do in this. In that case the will was still unexecuted, and its provisions remained merely directory. The Court said, the law has intervened to prevent the directions from being carried into effect. "The act of emancipation," says the Chancellor "was to be in future, and the Act of the Legislature has intervened to forbid that future action. How can it be regarded as retrospective, any more than if the testator, himself, had expressed an intention of liberating his slaves, and before his execution of that intention, an Act of the Legislature had forbidden it? The executor only stands in the place of the testator."

No vested right was taken away by the decision; and, in truth, no retro-active operation was given to the Statute.

What we are requested to do here is to carry back the terms of the Statute to 1831, and take away a legal titled vested in Reuben Finley ten years before its passage; upon no better ground than that a condition

then incumbent upon him, and (according to solemn decisions) lawful for him at that time to perform, cannot now be fulfilled by him without the breach of a posterior law. I cannot do it.

But after all, I am of opinion that what has been called a condition, is to be regarded in this Court as a trust. The testator gives certain of the slaves to his son, out and out.—Others, he gives to him, in the confidence that he will emancipate them forthwith. A third class is given until they arrive at a certain age, at which time they and their issue are to be liberated. As to the first class, there is no trust. A beneficial interest, unaffected by any duty to be

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performed, *was intended. The second class was given entirely upon trust, without any intent to confer a benefit on the trustee.—In the third class, there was a compound intention:—to give a beneficial interest up to the time of emancipation, and to impose a trust or obligation to emancipate afterwards.

Ever since *Morrice v. The Bishop of Durham* the rule has been that where no beneficial interest is intended, but a trust duty is attempted to be imposed, if the trust designed to be established, fails from any cause, the trustee shall not hold for his own benefit; but a trust results to the grantor or his next of kin.

To apply this doctrine here, the representative and distributees of Reuben Finley are entitled to a decree for all the slaves not intended to be emancipated. They are not entitled to those forthwith directed to be set free; for the performance of that direction is now prohibited by Statute, and, as trust, results to the next of kin of the testator. They are entitled to the services of those directed to be set free at the ages prescribed in the will, together with those of their children until that time; but they are not entitled to the services of either beyond that time, for the reason given in relation to the class just preceding.

And it is referred to the Commissioner to ascertain and report the slaves falling under these three classes, respectively, that the Court may be enabled to frame its decree according to the foregoing principles. In relation to the slaves directed to be liberated, the Commissioner will in his report affix the time assigned by the will for their emancipation to their names respectively.

I suppose there can be no objection to a sale of the slaves; and that the fund be distributed, by allotting to the distributees of Reuben Finley, (or to his representative, for them,) the proceeds of those given by the will without a direction to emancipate; and to the next of kin of the testator the proceeds of those directed to be liberated forthwith: and that interest on the proceeds of the others be allotted to the administra-

³ 1 Com. 454, part 3, sec. 20.

tor or distributees of Reuben, up to the time prescribed for the emancipation, and that the capital or proceeds themselves, be thereupon paid over to testator's next of kin.—Counsel, however, may suggest any other form of decree when the report comes in; or before, if they can agree.

It is referred also to the Commissioner to state an account of the hire, according to the principles above announced: awarding it to the different parties according to their interest in the slaves during the time for which the hire accrued.

It is decreed that the distributees of Reuben Finley are entitled to partition of the tract of land described in the will of Thomas Finley.

If counsel agree they may obtain an order

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for sale or parti*tion, upon proposing it: if they do not agree, let a writ issue for the partition of it.

The rent of said land is referred as a subject of account.

There is a report with exceptions; which report includes some things that I have here referred. It will answer no good purpose, but rather tend to confusion, to take it up separately, or in advance, and it is recommended, with the exceptions.

The account of Hunter's administration, and the account against the estate of Jane Finley for property of Thomas's estate, received by her but not forthcoming, or determined at her death, will, of course, be understood as included in the order of reference hereby made. But the Court does not wish to be understood as deciding upon the liabilities of the parties called to account. It has not the facts before it, and cannot learn them from the report: which is a report of results only.

The distributees of Reuben Finley and the next of kin of Thomas Finley, respectively, to pay their own costs up to this stage of the proceedings: and those of Hunter and Thomas M. Finley, as representatives of Jane and Thomas Finley and Reuben Finley respectively, to be allowed them out of the estates represented by them.

The complainants appealed, and moved the Court of Appeals to modify the circuit decree of his Honor the Chancellor, on the grounds that his Honor held—

1. That the bequest to Reuben Finley was coupled with a trust for the benefit of the testator's next of kin, instead of being subject only to a condition subsequent, the performance of which was rendered illegal by Act of Assembly.

2. Because no trust could result to the testator's next of kin, as by the will Reuben Finley was the general and residuary legatee, as well as the devisee and legatee of particular portions of the testator's estate.

3. Because the females, if held in trust, should have been declared a fund subject

to payment of testator's debts as well as to distribution among his next of kin.

4. Because his Honor should have declared all the property, real and personal, embraced in the second clause of testator's will, vested in the heirs and representative of Reuben Finley, free from condition or trust.

The defendants next of kin of Thomas Finley, the testator, also appealed, on the following grounds:

1. That the legacy to R. Finley, being in terms contingent and conditional, never vested, and that the next of kin of testator, at the death of the tenant for life, were entitled to the property real and personal.

2. That the legacy to R. Finley, being upon a condition precedent and illegal, is void.

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*3. That the emancipation of the female slaves, or their removal for emancipation, was a condition precedent, to be performed by Reuben Finley, before the vesting of the legacy, and the condition never having been performed the legacy never vested.

4. That the legacy to R. Finley and his heirs, according to the terms of the will, could not vest till the death of the tenant for life, Jane Finley—and then, if not before, by force of the Statute of '41 it became illegal and void.

5. That as to the personalty, there was no assent by the executor to the legacy to R. Finley, and the real estate, till condition performed, descended to the heirs at law of testator.

6. That the female slaves directed to be emancipated, are not given or attempted to be given, by the will, to R. Finley, and that the other property, real and personal, is only intended to be given him, in the event that he liberate the said female slaves.

7. If the legacy to R. Finley were vested, and the direction to emancipate, a condition, not precedent, but subsequent, still the legacy was subject to be, and has been, divested, by a failure to perform the condition.

8. That the bequest as to the female slaves, directing their emancipation, was, at the time of making the will, and now is, illegal, and wholly void; and that the next of kin of testator were entitled to said slaves, immediately upon the death of the tenant for life.

Thomas Thompson, for the complainants.
Perrin and Wilson, for the defendants.

CALDWELL, Ch., delivered the opinion of the Court.

This Court concurs with the circuit Chancellor in his construction of the will of Thomas Finley. The circumstance of a life estate in the slaves having been bequeathed to Jane Finley, and after her death to Reuben Finley, who was directed at specific periods designated in the will to send the female children of the two negro women, Nancy and Jinny, to the State of Indiana or

Ohio, or to set them free, make it manifest that the condition could not from its nature be precedent but was necessarily subsequent.

It is very clear, both from principle and authority, that the executor's assent to the legacy to Jane Finley, the tenant for life, ipso facto enured to vest the estate in remainder in Reuben Finley. The particular estate and the remainder constitute in law but one estate, however numerous the tenants may be who are entitled to it, or however disintegrated the periods at which it is to be enjoyed.⁴

The only remaining question is what is the effect of the Act of 1841, 11 Stat. of So. Ca. 155; on the devise and bequest to Reuben Finley?

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*As far as the negroes in controversy are concerned it is apparent the testator had three objects in view; first, to provide a life estate for his wife; then an estate in remainder for Reuben Finley; and finally, to emancipate the children of the two negro women as they respectively arrived at the age of twenty-five years. The testator died in 1831, Reuben Finley in 1837, and Jane Finley in 1845; the limited estate in the slaves vested in Reuben Finley before the passage of the Act, although by the terms of the will he was not entitled to the possession of them until the life estate of Jane Finley expired. The Act of 1841 was not passed for the purpose of divesting legal rights; nor can it be construed so as to affect the vested rights of Reuben Finley. They are not forfeited because he has not complied with the condition of the will, which the Act has rendered illegal and void. The legal effect of the Act is, to leave the rights of Reuben Finley untouched, and to exonerate his legal representatives from the performance of the condition.

If the condition had been simply to emancipate the slaves, it would have been in derogation of the Act of 1820, which provided "that no slave shall hereafter be emancipated, but by Act of the Legislature," and would come within the rule laid down in *Lenoir v. Sylvester*, 1 Bail. R. 632, and the alternative, "or cause them to be sent to the State of Indiana or Ohio, where the laws of the State will liberate them," not having been consummated, brings the case within the express provisions of the Act of 1841,⁵ and the decision of this Court in the case of *Gordon v. Blackman*, executor, 1 Rich. E. R. 61. The slaves the testator intended to emancipate, are therefore in the same situation as if the testator, after having bequeathed to Reuben Finley the limited interest in the female children, (of the two negro women) until they respectively arrived at the age of twenty five years, had stopped short,

and left the ulterior estate in these slaves undisposed of.

The legatee cannot claim more than the testator has given him, as the Act clearly had no more intention to enlarge his estate, than to enable him to perform the condition; its object was to annihilate such impolitic means and modes of emancipation, whether by deed or by will.

The testator evidently intended to bestow a benefit upon the slaves, to which the interest in them, bequeathed to Reuben Finley, was subordinate. It is very clear that the testator did not design, in any event, that they should enure to him absolutely. His limited estate repels such a presumption; indeed such a construction would be making a new will for the testator.

The heirs and next of kin are persons highly favored by the law, and are never excluded from a resulting trust on mere conjecture; there must be clear and positive

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evidence of *benefit being intended by the testator to the legatee, and not merely negative evidence that no benefit was intended to them. The result of all the rules is, whenever the testator has not expressed his intention in favor of the legatee, it must be presumed to have been reserved for the benefit of the next of kin. This principle has been applied in England to numerous cases, where there is no express provision by Act of Parliament;⁶ but how much more strongly must it apply here, where the object of the Act of 1841⁷ was to defeat every effort to evade the Act of 1820;⁸ to destroy such conditions and trusts, and to cast the estate upon the distributees or next of kin of the person making such bequest, gift or conveyance.⁹

It has been supposed that the principle laid down in *King v. Dennison*, 1 Ves. and Beams 260, is applicable; but there are very material distinctions to be observed between that and this case; there the testatrix devised all her real estate to Mary Altham and Arabella Isaacson and their heirs and assigns forever, subject to and chargeable with certain annuities; but here the estate in remainder in these slaves is limited to Reuben Finley for a particular period, which indicates that the testator did not contemplate giving him more than he expressed; and before the legatee can perform the condition, the Act intercepts it, and does not leave the question to construction, but *ex vi termini*, casts the estate upon the next of kin. In that case the judgment of Lord Eldon stood upon the ground that if it was a devise for a particular purpose only, and the application did not exhaust the whole estate,

⁶ Before the late Stat. 1 Wm. 4 C. 40.

⁷ 11 Stat. of S. C. 155.

⁸ 7 Stat. of S. C. 442.

⁹ Hill on Trustees, 119.

⁴ Williams on Ex'rs. Coke's, Rep. Lampet's case.

⁵ 11 Stat. of S. C.

there was a trust for the heir, whether the testator said so or not, and the heir standing in this situation is entitled to what in Law or Equity is not given to another. But as the whole estate was devised to these two persons, the heirs could not claim the residue.¹⁰

The slaves constitute the third class intended to be benefited by the testator, but as they are considered by the law as chattels, beyond all doubt they cannot claim the performance of the condition, nor can any one prosecute their claims for them, as they have no civil rights. As this residuary interest in them was not efficiently disposed of by the testator it cannot now be carried into effect for their benefit but is cast upon the next of kin. The Act of 1841, therefore, merely affects the estate of the testator which he intended to emancipate, but does not touch the interests of the legatees. It is ordered and decreed that the appeal be dismissed and the circuit decree be affirmed.

JOHNSTON, Ch., DUNKIN, Ch., and DARGAN, Ch., concurred.

Decree affirmed.

¹⁰ Same rule applicable to personal property. *Southouse v. Bate*, 2 V. and B. 396. *Muller v. Bowman*, 1 Coll. N. C. C. 197.

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*CHARLES E. SIMS, Administrator, v. S. W. SHELTON.

(Columbia, May Term, 1848.)

[*Equity* ⇨44.]

Where an Act of the Legislature confers jurisdiction on the Court of Law, of cases that previously were within the jurisdiction of the Court of Equity, the former does not thereby obtain an exclusive, but a concurrent, jurisdiction.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 141-145; Dec. Dig. ⇨44.]

[*Executors and Administrators* ⇨413.]

The Court entertained jurisdiction of a bill filed by an administrator for the specific delivery of slaves belonging to the estate or his intestate, and for an account of their hire.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1626; Dec. Dig. ⇨413.]

[*Equity* ⇨17.]

When a bill is filed for the specific delivery of slaves, the presumption from the general statement, will be that they are of such peculiar value as to entitle the plaintiff to relief, unless the proof be sufficient to rebut it.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 41; Dec. Dig. ⇨17.]

[*Specific Performance* ⇨69.]

A bill for the specific delivery of slaves, will be supported, whenever the plaintiff's right to them and to their hire, cannot be as effectually prosecuted at Law.

[Ed. Note.—Cited in *Reese v. Holmes*, 5 Rich. Eq. 575.]

For other cases, see *Specific Performance*, Cent. Dig. §§ 200-202; Dec. Dig. ⇨69.]

Before Johnston, Ch., at Edgefield, June Sittings, 1847.

Abstract from Bill.

That Joseph S. Shelton, late of the District of Union, departed this life, intestate, on the day of August, 1845, being possessed at the time of his death, amongst other articles of property, of certain slaves, to wit:—Charles, Rufus, Jim, Charlotte and Mary Ann; that shortly after the death of the said intestate, the administration of his estate was duly granted to the complainant, Charles E. Sims, by the Ordinary of Union District; that the said intestate was at the time of his death, indebted greatly beyond the value of his whole estate; that in the interval which elapsed between the death of the said intestate, and the granting of the administration of his estate to the complainant, Samuel W. Shelton, the defendant, seized and took into his possession the above named slaves, and thereupon removed and carried away the same, and appropriated them to his own use, &c. Complainant further charges, that the entire assets of his intestate will not suffice to discharge the judgment debts of the said intestate at the time of his death, and the said defendant is himself largely indebted by judgments, far beyond his means and ability to pay; that the said slaves are now in the possession, power or control of the said defendant. The complainant, instead of a recovery of the value of the said slaves, is desirous that a specific delivery of them should be decreed to him; and under the circumstances of the case, prays that the said slaves and other chattels, may be specifically delivered up to him by the said defendant, and that he do account before the commissioner for hire, &c. Fair and Carroll, complainant's solicitors.

Abstract of Answer.

Defendant admits that Joseph S. Shelton departed this life intestate, at the time

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charged in the bill, and that the complainant is the administrator on his estate; that between the time of the death of the intestate, and the grant of letters of administration on his estate, the defendant took into his possession the said slaves; which act, he alleges, he committed in right of his minor children, Lewis L. Shelton and James B. Shelton, to whom the said intestate in his life time had made a bona fide gift to the said slaves, but retained the possession thereof, as their trustee; that he did not convert the said slaves to his own use, as charged in the said bill, but held and still holds the possession of them, as the natural guardian of his children; that at the time of the said gift of the said slaves as aforesaid, the intestate was in good and solvent circumstances, and abundantly able to pay his

debts, without in any wise effecting the said slaves; that an action of trover had been instituted against this defendant for the recovery of the said slaves in Newberry District, at the instance of the complainant, in 1844, by virtue of which, defendant was held to bail, and under which he was imprisoned for some considerable time, during which an agreement was entered into between the parties, to refer all matters in dispute between them to an arbitration, which this defendant attended twice, but was not met by the complainant, in consequence of which nothing was accomplished, excepting that this defendant was discharged from his imprisonment, and, as he thought, the whole matter in dispute abandoned by the complainant, and continued in that belief until the filing of the bill in this case; that one of the slaves, to wit: Rufus, departed this life whilst in the possession of this defendant. The defendant, from the facts contained in this case, respectfully submits to your Honors, that admitting the said complainant has a right of recovery to the said slaves, that he has mistaken his remedy—that he has a clear and adequate remedy at law, and consequently that the several matters contained in his said bill are not properly cognizable in this Honorable Court; therefore this defendant claims all benefit of advantage arising from the same, as fully and as effectually to all intents and purposes, as though a plea to the jurisdiction of this Court had been regularly filed, and that the bill be hence dismissed with costs.

M. Gray, defendant's solicitor.

After hearing the case, his Honor directed the following decree to be entered:

Johnston, Ch. On hearing the bill and answer, evidence of the insolvency of the complainant's intestate, and that the negroes Charles, Charlotte, Jim and Mary Ann, are in the possession of the defendant: On motion of Fair and Carroll, solicitors for complainant, and after argument, it is ordered and decreed, that the negroes, viz: Charles,

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Charlotte, Jim *and Mary Ann, as the property of Joseph S. Shelton deceased, at the time of his death, be delivered up by the said defendant, to the complainant, Charles E. Sims, as administrator of said deceased, immediately on being served with a copy of this order, and that the said defendant do account on reference, for the hire of said slaves, since they were taken into his possession.

The defendant appealed, and moved the Court of Appeals to reverse and set aside the decretal order of his Honor, requiring the defendant to deliver up the slaves mentioned therein, and account for the hire thereof, on the following grounds:

1st. Because the Court had not jurisdiction of the cause, inasmuch as the slaves ordered

to be delivered up, were charged to have been taken and converted by the defendant to his own use, and therefore if the complainant had any remedy, it was entirely of a legal character, and should have been prosecuted in a Court of Law, and not in a Court of Equity, where such matters are not properly cognizable.

2d. Because the decree is in other respects contrary to the principles of Equity.

Gray, for the motion.

CALDWELL, Ch., delivered the opinion of the Court.

The only question in this case is whether the Court has jurisdiction?

The bill was filed by the plaintiff, as administrator of Joseph S. Shelton, against the defendant, for the specific delivery of five slaves, and for an account of their hire while in his possession; it states that the intestate and defendant are insolvent, and the assets of the former will be insufficient to discharge the judgment debts against him at the time of his death; the answer does not controvert these facts, and defendant admits that he took into his possession the slaves in right of his minor children, Lewis S. Shelton and James B. Shelton, to whom the intestate in his life time had made a bona fide gift of the slaves, but retained the possession thereof as their trustee; that defendant did not convert the slaves to his own use, as charged in the bill, but held and still holds the possession of them, as the natural guardian of his children.

The object of the plaintiff is to obtain possession of the slaves, to dispose of them in the due course of administration, which will be to sell them, and to apply the proceeds to pay the debts of the intestate. The defendant insists that the plaintiff's bill cannot be sustained for their specific delivery, as he has plain and adequate remedy at law. Whatever doubts were entertained as to the allegations and proofs necessary to sustain a bill for the specific delivery of slaves before the decision of the Court of Errors in *Young v.*

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Burton, 1 McMul. E. R. 255, there *can be none now as to the two propositions established in that case.

"1st. That a bill well lies for the specific delivery of slaves generally, which are withheld from the possession of the rightful owner."

"2d. That it is sufficient to give jurisdiction to the Court to state that the slaves are the property of the complainant, and that their possession is withheld by the defendant."

In the previous cases in which the jurisdiction of this Court has been sustained, the bills uniformly stated the circumstances that constituted the peculiar value of the slaves to the plaintiff, who could not have been ade-

quately compensated by damages recoverable in an action at law; but it is now permanently settled that a bill will lie without alleging such circumstances, and that the presumption from the general statement will be that the slaves are of such peculiar value as to entitle the plaintiff to relief, unless the proof be sufficient to rebut it. If this case stood upon the single ground of an administrator filing a bill for the specific delivery of slaves that were to be sold to pay his intestate's debts, and there was no auxiliary circumstance to support the jurisdiction, the objection to it might be sustained; an administrator so situated would probably not occupy a stronger position than a mortgagee, who cannot recover a slave specifically in this Court.

In *Bryan and Richardson v. Robert*, 1 Strob. E. 334, decided at May Term, 1847, Chancellor Harper, in delivering the opinion of a majority of the Court, said "there is a material misconception in supposing this a case in which a bill will lie for the specific delivery of a slave. The general principle is, when an owner has had possession of a slave, and has been deprived of it by the act of another, the general presumption is, that there may be some qualities in the slave which would render him of more value to the owner than would be compensated by the price of such slave estimated at his mere marketable value. So where the party contracts for the purchase of specific slaves it is presumed that he may have made his contract with a view to some particular qualities in the slaves themselves, for which ordinary damages would not be a sufficient compensation. Or, as in *Horry v. Glover*, [2 Hill, Eq. 515,] where one is entitled to the gift or limitation of a friend, relation, or ancestor, there is a very sufficient reason why he should have the slaves themselves instead of any damages for their estimated value. A general expression is used in one of the cases, that where a party states a defendant to be in possession of his slave, he states a case entitling him *prima facie* to the interference of this Court. And so it is, but it must be taken with the qualifications which I have suggested from the context of the cases. An exception is

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made in the *cases, when it appears that, without any view to peculiar qualities, there is a contract for slaves, to be sold again as merchandise."

It cannot be presumed that an administrator, any more than a mortgagee, would have either personal attachment to the slaves, or a knowledge of their peculiar qualities, so as to enhance their value and make it available to the estate, and as his duty requires him to apply such assets to the payment of debts, and to distribution, there would seem, *ceteris paribus*, to be no special reason why he should be entitled to a higher remedy than a mortgagee; his proceeding for a specific delivery

is merely to obtain possession, that he may sell and receive the marketable price of the slaves, and this object can be attained as well, if not better, by a verdict in trover, or trespass at law.

But let us examine whether the plaintiff can, under the circumstances of this case, have the plain and adequate remedy at law that divests this Court of jurisdiction.

Before the Act of 1827, to which the case of *Norrell v. Corley* (although finally decided after its passage) gave rise, a judgment in trover created no specific lien on the property whose value had been recovered; the Act was adopted to remedy this defect of the common law, and in some degree to give the plaintiff the benefit of a proceeding in rem, but was certainly not intended to deprive this Court of its jurisdiction. It is a familiar principle that where an Act of the Legislature confers jurisdiction on that Court, of cases that previously were within the jurisdiction of this Court, the former does not thereby obtain an exclusive, but a concurrent jurisdiction. Proceedings in partition and dower are common illustrations; the same rule prevails where by the practice of the other Court issues are made up and questions are tried at law, that might be made the subject matter of a suit in Equity, such as setting aside a judgment at law for fraud.¹

By the terms of the Act of 1827² the Sheriff may be required by the plaintiff "to cause the defendants to enter into bond with sufficient security to the sheriff of the district in which such action shall be brought, for the production of the chattel sued for, to satisfy the plaintiff's judgment in case he should recover against the defendant or defendants; and such specific chattel shall be liable to satisfy the plaintiff's judgment, to the exclusion of other creditors." Although this was an improvement in the action of trover, it was not anticipated that it would provide an adequate remedy in every case; it would clearly be altogether inapplicable to a case where equitable rights subsisted between the parties, and in many other cases would be utterly inefficient: take the case of a defendant who is insolvent;³ suppose that he should contumaciously resist process or

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evade its effects by refusing to give *the bond and sureties, or is involuntarily unable to comply with the requisitions of the Act, the efficacy of the remedy would be much impaired; in the interim the property could not be seized or secured by any proceeding at law, although it may be in never so much peril, *pendente lite*. But let us transfer the case to this Court and draw the parallel be-

¹ *Seigling v. Mann*, 1 McMul. R. 252.

² 6 Stat. of S. C. 337.

³ This is a good ground to refuse to decree specific performance to grant a lease. *Neale v. McKensie*, 15 Eng. Ch. 473.

tween the jurisdictions; here there are the most ample powers to remove any of these impediments in the plaintiff's way, and to prevent the irreparable injury that might result from either its removal or destruction; and even its use and services may be so secured, that the plaintiff, if successful, may receive the benefit, independently of the defendant's insufficiency to pay the damages that might be recovered at law.

When it is argued that the plaintiff at law may imprison the defendant perpetually, even that is often a very unsubstantial satisfaction. None would prefer it from humanity, and few from interest, as a substitute for the property, or its value. From the different organizations of the Courts, not only the means, but the mode and measure of redress, in this Court are decidedly more ample and adequate than can be administered at law. When the account is taken for the hire of the slaves, it is not left to the hasty calculation of a Jury, who from their organization, number, and mode of hearing the case, have neither the means, time, or experience so necessary to adjust an account accurately; with them it frequently becomes a mere striking of averages rather than an exact estimate of hire; but in this Court there is an officer whose ability and experience often eminently qualify him to examine with care the evidence that may be offered, and after having subjected every item to the strictest scrutiny, he can call the parties and their counsel before him, submit his report, and consider their exceptions to it, so that if there be omission, inadvertence, error or mistake in adjusting the account, they may be remedied and corrected. After the judgment and execution have been obtained at law, the defendant may withhold or remove the property, and if he be insolvent the plaintiff is at an end of his remedy, unless he resorts either to a ca. sa. against his person, or to an action on the bond, which of course increases the delay and expense, that are no inconsiderable objects in every suit. No Court has such ample, expeditious or adequate means and measures of redress as that of Equity, where, by a single suit, not only the slaves and their hire can be secured, but any right, interest or estate in them, whether legal or equitable, may be brought forward and determined between all the parties interested. On the ground of the defendant's insolvency, this bill is clearly sustainable; if it had been framed merely as ancillary to an action at law to secure the slaves and their hire, it might probably have been supported, had such cir-

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cumstances been *stated as would show the property was in peril. In this case the defendant's answer in some degree strengthens the plaintiff's claim to redress; it denies the conversion while it admits that the defendant

took possession of the property as the natural guardian of his sons. No proof was offered of the alleged gift, and as the children were not made parties in this case, their rights cannot be considered; but the defendant certainly, from his own showing, has no legal or equitable right to the possession of the slaves. Whatever rights the intestate had at his death devolved upon his administrator, who is responsible for the administration of his assets, and as the statute of limitations would now be a bar to a suit at law, and the plaintiff is clearly entitled to the possession of the slaves and to the value of their hire, it might operate as an irreparable injury of the creditors of the estate if this bill be dismissed. The decision in this case does not impair the rights of the defendant's sons, but merely restores the property where it ought to be, in the possession of the legal representative of Joseph S. Shelton, who died in possession of it.

It is therefore ordered and decreed that the appeal be dismissed, and the circuit decree be affirmed.

JOHNSTON, Ch. and DARGAN, Ch., concurred.

DUNKIN, Ch., absent at the hearing.

Decree affirmed.

2 Strob. Eq. 227

THOMAS L. FRASER et al. v. HORATIO McCLENAGHAN.

(Columbia. May Term, 1848.)

[*Equity* ⚡40.]

When a bill is properly filed for the delivery of slaves, and the plaintiff establishes his right of property, the Court will decree compensation for such of the slaves as may have died pending the suit.

[Ed. Note.—Cited in *Watson v. Kennedy*, 3 Strob. Eq. 11.

For other cases, see *Equity*, Cent. Dig. § 115; Dec. Dig. ⚡40.]

This case was first brought up upon appeal by both parties from the decree of his Honor Chancellor Johnson, pronounced at Marion, February sittings, 1845.¹ The bill was filed for the specific delivery of slaves. The Chancellor decreed the delivery of the slaves alive at the hearing, but refused to allow compensation for those who had died subsequent to the filing of the bill. This Court sustained the judgment of the Circuit Court as to the delivery of the slaves then alive, but ordered the question of compensation for those who had died, to be reargued.

As this independent proposition was alone before the Court, any further statement of the facts of the case is unnecessary here.

¹ 2 Rich. Eq. 79.

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*The argument was heard at Columbia, May sittings, 1847.²

Munro, for complainants.
Harlee, for defendant.

JOHNSTON, Ch., delivered the opinion of the Court.

The question remaining for decision in this case, is the one which was reserved out of the judgment rendered on a former occasion,³ and it is this: When a bill is properly filed for the delivery of slaves, and the plaintiff establishes his right, should compensation be decreed for such of the slaves as may happen to die pending the suit?

The jurisdiction of the Court being now well established, to decree the delivery of specific slaves, and such suits being of common occurrence; it must often happen, when the bill is brought for a large number, or stock of family negroes, that some of them may die before the hearing. Indeed, it would be a rare case in which such a contingency did not take place. The question before us is, therefore, one of unusual practical importance, and deserving of serious consideration.

In *Horry v. Glover*, 2 Hill Ch. 528, which was a case of specific delivery, demanded by remainder-men, from volunteers under the deceased life tenant, compensation was decreed for slaves who had died pendente lite. The Court, in granting this remedy, proceeded upon the principle which obtains in like cases at law. "Certainly" says the Court "the general rule (meaning the rule at law) is as contended for on the part of the plaintiffs, and supported by the authorities referred to,—that if a bailee or pawnee, who is a trustee, wrongfully refuses to deliver the deposit or pledge, when demanded, he thenceforth keeps it at his own risk, and will be liable for the value, if it afterwards perish. (See *Story on Bailm.* 93, 231, and authorities there referred to.) The principle appears to apply to the present case: the tenant for life, or volunteers under him, being regarded as trustees. The value of these slaves must, therefore, be a subject of reference."

If the defendant in the case before us were a volunteer under the life tenant, this decision would be conclusive. But we are of opinion that though that circumstance be wanting, the judgment must still be the same.

Supposing a bill to be filed, in a proper case, against a defendant in possession of slaves, it constitutes a demand for their immediate delivery: and nothing remains for the plaintiff, but to establish his right of prop-

erty. If that is established, equity will decree the delivery. In this case the Court

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*has supported the plaintiff's right of property; and has ordered the slaves remaining alive at the hearing to be delivered up. The only question is whether compensation should be decreed for those who have died; who were equally demanded, and who equally belonged to the plaintiffs.

There is no doubt that, if these slaves had been sued for at law, the refusal to deliver them up would have amounted to a conversion; and that the verdict and judgment would have been for their full value, including hire up to their death. It would be very singular if this Court, undertaking to do more complete justice, should do less; and suffer an accident, occurring while its suitor is before it, to utterly defeat him of his right.

Where slaves die pending a suit for their delivery, the Court has but three alternatives:—to refuse compensation for them; or send the party to law for compensation;—or give the compensation by its own decree.

If it adopt the first alternative, and refuses compensation, its judgment is conclusive, and prevents the plaintiff from recovering it at law, as he otherwise might have done:—so that by assuming jurisdiction of the case made in the bill, it has, in effect, prejudiced the plaintiff, by taking from him an undoubted legal right.

If it dismisses the bill, without prejudice, as to the deceased slaves, and sends the claimant to law for their value, it increases the costs and delays of litigation; a course which cannot but be regarded as both oppressive and unnecessary, when it is considered that it has already heard the evidence and adjudicated the right of property, in that part of its decree which relates to the surviving negroes. Such a course would, also, be a plain violation of that acknowledged principle, which makes the prevention of circuity of action a general ground of equity jurisdiction.

The constant course of the Court, where it has obtained jurisdiction of a case, is to go on, and do complete justice to the parties in all matters incidentally connected with it.

An objection is made that, if the Court undertakes to give the value of the deceased slaves, it assumes to award damages; a matter beyond its jurisdiction. This objection is little better than verbal. The Court does not undertake to give damages for the trespass or conversion. Having a right to award the delivery of the slaves, as they stood at the inception of the suit, and being frustrated in this remedy by an accidental occurrence, it awards their value in lieu of the slaves themselves:—just as the Law Courts, in actions of detainee, give judgment for the property sued for, or its equivalent in money; which latter is not adjudged (in

² The Reporter must apologise to the profession for his seeming neglect in not having reported this case in his first Equity volume. He found, when too late, that, by some accident, he had not a brief—nor could he at the time procure 2 Rich. Eq., which contained the first report of the case.

³ See 2 Rich. E. 79.

detinue) as damages, but as a mere alternative for the property.

There is another view worthy of consideration.
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tion. Suppose *slaves decreed to be delivered up should die after the decree, or should have died before, and the fact was unknown; the literal performance of the decree for their delivery would thus be rendered impossible.

It would never do to say that the defendant was entirely exonerated from the obligations of the judgment against him. And suppose him to be attached for non-compliance with the decree;—upon what other terms should he be discharged, than upon coming as near to a compliance as possible, by paying the value of the property?

It is said, however, in the decree of the Chancellor, that the defendant, under the circumstances, should not be made to pay the value of these slaves. The Chancellor appears to refer to the doubtfulness of the evidence of title: which he supposes justified the defendant in retaining possession until the right should be adjudicated.

The doubtfulness of the evidence would have been no exoneration of the defendant in an action of trover at law, for the dead slaves; and in this Court it was no exoneration as to the living.

It is readily conceded that testimony may be so dubious and uncertain as not to amount to evidence; not serving to convince the mind. In such cases, the Court may refuse, and should refuse, to exercise its acknowledged functions. But if there is such evidence as authorizes it to interpose for one purpose, it may and should interpose for every purpose to which the evidence applies. In this case the Court has determined that the evidence of the plaintiff's title was sufficient to warrant a decree for the delivery of the living slaves: and the decree on that point was just and conscionable only because the negroes ordered to be delivered up were proved to be the plaintiff's property. The same evidence applied to the whole body of slaves, and proved that the dead, as well as the living, belonged to the plaintiffs. The former were converted by the defendant to his own use, equally with the latter, and died in his service: and why should he not account for their value?⁴

It is ordered that so much of the decree as refuses to award compensation for the slaves who died pendente lite, be reversed: and it is decreed that the defendant is accountable for the value of the same.

It is ordered, that the case be remanded to the Circuit Court and referred to the Commissioner, to take the account.

HARPER, Ch., DUNKIN, Ch., and CALDWELL, Ch., concurred.

Decree partially reversed.

⁴ Hinson & wife v. Pickett, MSS. G. 170, [1 Hill, Eq. 35.]

2 Strob. Eq. *231

*POLLY CALHOUN, by Her Next Friend, v.
JAMES J. CALHOUN et al.¹

(Columbia. May Term, 1848.)

[*Husband and Wife* ⚭185.]

The Court of Equity has no power either to make or confirm a sale of a married woman's separate estate, which by the deed creating it, is expressly prohibited from being sold.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 720; Dec. Dig. ⚭185.]

[*Husband and Wife* ⚭179.]

The Court will not sustain a sale of her separate property, made by a feme covert, although not restricted by the deed, unless it be her voluntary act, and for such necessary purposes as the Court, after her examination, would have ordered it to be made.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 711, 939; Dec. Dig. ⚭179.]

[*Husband and Wife* ⚭179, 182.]

A married woman, unless expressly authorized by the deed of settlement, can neither charge nor dispose of her separate estate; and when authorized, the mode prescribed must be strictly pursued.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 711, 715; Dec. Dig. ⚭179, 182.]

Before DeSaussure, Ch., at Barnwell, January Sittings, 1831.

DeSaussure, Ch. This case was originally heard by me on a single point, and I decided that the words of a certain deed distinctly gave a separate estate to Miss Polly McLewrath, (now Mrs. Polly Calhoun,) with all the qualities attached to separate estates, in two slaves, Dinah and Mary, with their future issue.

This case was afterwards heard by Chancellor Harper. The plea of the defendant, Dixon Thompson, was, that he was a purchaser from Calhoun and wife, for valuable consideration, without notice, of a slave which had been conveyed to a trustee, to the separate use of the wife. The Chancellor overruled the plea, and ordered that it be referred to the Commissioner, to inquire and report whether the sale of the slave in question, to the defendant, was the act of the complainant, without the control of her husband; whether the said sale of the said slave was necessary to the support of the complainant and her children, and whether the proceeds of the sale, or what part of them, were applied to such necessary support; reserving the equities which may arise on the coming in of such report.

The reference has been had, and the Commissioner reports, that he is inclined to think, from the evidence, that the complainant was in some measure influenced by her husband to sign the bill of sale (of the slave in question) to the defendant, Thompson,

¹ This case was decided in 1831, at which time the Court of Appeals consisted of the Hon. David Johnson, Hon. J. Belton O'Neill, and Hon. Wm. Harper.

though she was placed under no actual constraint. That the Commissioner is induced to think that the sale of the slave was necessary to the support of the complainant and her children, as it appears they managed badly, and she and her children must have

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suffered if they had not sold some of the property. The evidence was satisfactory that they had no other property which could have been sold without selling their provisions. And the evidence goes strongly (though not positively,) to prove that a considerable portion of the proceeds of the sale was applied to the payment of debts contracted for necessities; to wit: to Mr. Beck for 50 bushels of corn \$50; to Mr. Hewlett for fodder, and Mr. Peyton for sugar, coffee, shoes and a saddle, &c. the amount of which does not appear. Forty dollars were also borrowed by Polly Calhoun from Beck, but it does not appear how it was applied. It was proved that Mrs. Calhoun said she always intended that Mr. Canady should be paid.

To this report exceptions were filed by the counsel for the defendant;

1. Because it was proved that the sale of the slave in question was the act of the complainant, without the control of her husband, and that the Commissioner ought to have so reported.

2. Because although it was proved that James Calhoun, (the husband of complainant,) was, before and at the time, indebted to Hewlett, Beck, Peyton and Canady, yet the amounts do not distinctly appear, nor is there evidence that any part of the purchase money was paid.

These exceptions were overruled by the Commissioner, and now come up to be decided by the Court. Upon recurrence to the decree of Chancellor Harper, it appears that after overruling the plea of the defendant, Dixon Thompson, that he was a purchaser for valuable consideration without notice, on the ground that notice was proved by one witness supported by circumstances, he proceeds to state that though it has been decided by our Courts that a married woman cannot dispose of her separate estate by her own act, yet the Court will charge it with debts that have been necessarily incurred for the purposes of the trust, and the wife may charge and dispose of her separate estate for her necessary support. But that it must appear to have been her own act; to have been necessary; and the application of the money must be shewn. The Chancellor therefore directed the inquiry before the Commissioner above stated.

The first exception brings up the inquiry, whether the sale of the slave in question was the voluntary act of Polly Calhoun, the wife of James J. Calhoun. The bill of sale is dated the 29th Novr. 1827, and in consideration of \$275, conveys a negro girl, Jemimah, to Dixon Thompson. It was executed by

Mary Calhoun and James J. Calhoun, in the presence of a subscribing witness.

The presumption is, that a person who executes a deed or instrument of writing, does it willingly and deliberately, meaning to do what the deed purports. This presumption

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does not arise in the case of a feme covert, and if it did, is rebutted. That presumption is weakened in the case of a wife who is supposed (truly or not, as the case may be) to be under the control of her husband. The Commissioner in his report states, that he thinks the wife was in some measure influenced by her husband to sign the bill of sale to Thompson, of the slave in question, though she was placed under no actual constraint. This statement seems to negative the idea of control, which was the point of inquiry directed by the Chancellor.

The exercise of influence, whether founded on affection or on a deference to superior judgment, has never been considered such a constraint on the will of a party acting under it, as to vitiate his act, more especially when we perceive that there are other motives sufficiently powerful to produce the effect of the party acting as he did. Now in this case, the evidence stated and relied on by the Commissioner, shews a strong motive of voluntary action by the wife. The husband was of that miserable class of men who is described as worse than a heathen; he did not provide for his family by his honest industry. The Commissioner reports, (and this touches the very point of the second inquiry directed by the Chancellor,) that the sale of the slave was necessary to the support of the complainant and her children, who must have suffered if they had not sold some of the (trust) property; and they had no other property which could have been sold, without selling their provisions. It appears further by the report, that a considerable portion of the proceeds of the sale was applied to the payment of debts contracted for necessities, to wit, corn, fodder, sugar, coffee, a saddle, shoes, &c., all of the first necessity, and Mrs. Polly Calhoun herself received from Beck \$40; and it appears that the purchaser, Dixon Thompson, settled with the creditors, for they assign to him on the back of the bill of sale their interests—at least the intention is obvious, though clumsily arranged and expressed. It appears to me then that the inquiries directed by Chancellor Harper have been responded to, and shew satisfactorily that there was no such improper control on the part of the husband, under the circumstances, as ought to vitiate the bill of sale; and that there was a necessity for the sale, to support the family; and that the debts contracted for necessities have been satisfied by this arrangement. It is therefore ordered and decreed, that the bill of complaint of Polly Calhoun be dismissed; but without costs.

The above case was argued with great

learning and ability by Mr. Patterson, for the complainant, and Col. Butler, for the defendant. But not a word was said in argument in relation to the case of Hewlett & Co. v. James Calhoun and Polly his wife, which was on the docket, and was stated to

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*the Court to have some connexion with the above case. But as there was no evidence, and no argument, no decree can be made on that case.

Complainant Polly Calhoun appealed.

1. Because the complainant (Mrs. Calhoun) had no power to sell the slave in question.

2. Because the sale to Thompson was not the voluntary act of Mrs. Calhoun.

3. Because the sale of the slave was not necessary to the support of Mrs. C. and her children.

4. Because the proceeds of the sale was not applied to such necessary support.

5. Because the decree is contrary to evidence, law, equity, and good conscience.

Curia, per O'NEALL, J.—At common law a feme covert was regarded as legally incapable of making any contract, which would bind her. This disability was intended to be her protection. It was founded on the notion that her existence was legally merged in her husband. They were regarded in law as one person. She was supposed to have no will of her own, and hence was legally incapable of charging herself by contract. Neither could she have a personal estate which did not vest in the husband *jure mariti*. From her real estate, he was, during coverture, entitled to the receipt of the rents, issues and profits; and after her death, he was entitled, if there was issue of the marriage, born alive, to hold during his life, by the curtesy, the whole of her land of which he had actual possession during the coverture. In the progress of time, and out of the refinements, and perhaps the necessities, of society, it was permitted in equity that the wife should have both personal and real estate separate from her husband. Incidental to this right of property, it was held, with different modifications at different times, that she was as to it a feme sole, with power to charge or dispose of it. *Fettiplace v. Georges*, 1 Ves. J. 48. From the English cases it may be deduced as a general rule, that a feme covert, unless restrained by the deed of settlement, had the right to dispose of or charge her separate personal estate as a feme sole. For in *Pylins v. Smith*, 1 Ves. J. 193, Lord Chancellor Thurlow states the rule to be that "she (a feme covert) is sole, so far as she has a power of appointment; but with any limitations in the deed giving her that power." In *Jackson v. Hobhouse*, 2 Meriv. 482, where, by a settlement, the interest of a sum of money was to be received to the separate use of the wife, with a proviso against the wife assigning or otherwise dis-

posing of the interest in anticipation, the wife and her husband, in order to obtain an annuity, assigned the future interest, and the Lord Chancellor Eldon held that the clause

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against an assignment in *anticipation was good, and restricted the power of the wife over her separate estate. He says "it is now too late to contend against the validity of a clause in restraint of anticipation." In *Jaques v. The Methodist Episcopal Church*, the Court of Errors of the State of New York held that a feme covert, with respect to her separate property, was to be regarded in a Court of Equity as a feme sole, and might dispose of it without the assent and concurrence of her trustee, unless she was specially restricted by the instrument under which she acquired her separate estate. In the same case Chancellor Kent, after a full review and elaborate examination of all the cases, comes to the conclusion that a feme covert in Equity, as to her separate estate, is to be regarded as a feme sole, "sub modo. or to the extent of the power clearly given by the instrument." 17 J. R. 548; 3 J. C. R. 113. In *Ewing v. Smith*, 3 Desaus. Eq. Rep. 417, 462, [5 Am. Dec. 557,] a majority of the Court of Appeals in Equity, in this State, held that a married woman who has a separate estate cannot part with it or charge it in any way, without an examination; that as by marriage she loses all the powers of a feme sole, a separate estate does not confer all those powers on her, and that therefore the power of appointing such estate must be expressly given, and the mode prescribed be strictly pursued. Since this decision the rule has been considered settled as laid down in it; and if I was disposed to doubt its correctness, I should not feel at liberty to lay down another. But I concur fully in its wisdom. To permit any other would be to defeat every separate estate. For to the kindness, force, or a necessity created by the acts of an improvident husband, most women would at some period be compelled to yield up the property which the kind and prudent care of parents or friends had intended as a permanent provision for herself.—The rule laid down in *Ewing v. Smith* would dispose of this case. For the wife, in the deed from which her separate estate is derived, has no power of disposition: and her alienation has been without examination in the Court of Equity. If the deed had merely given her a separate estate without restriction, and she had voluntarily aliened, for the necessary support of herself and her children, her sale might have been sustained. For in that case, the Court of Equity would have permitted the sale to have been made if it had been applied to for that purpose, and acting upon the equity maxim, that it considers that as done which ought to have been done, the sale would have been confirmed. In the deed in this case there is, how-

ever, an express restriction upon the power of the wife: after conveying the property in trust for the complainant and the heirs of her body, the deed provides that it shall not be "subject to any alienation whatever in case of her marriage, and excluding forever every claim or pretence of claim by her hus-

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band to the said slaves." This, *according to the English cases, and the decision of the New York Court of Errors in the case of *Jaques v. The Methodist Episcopal Church*, is such a restraint upon the power of the wife over her separate property as would prevent her alienation from taking effect. If this restraint had been imposed on a donee not laboring under any legal disability, it would even then prevent an alienation. For unless contrary to some rule of law, a donor has the right to impose such limitations and restrictions on his gift as he may think proper.—In the case of a feme covert, who at common law is considered as incompetent to do any legal act of alienation, it cannot be that she would have greater powers than one who is under no legal disability. But it is said, that the sale was necessary to her support, and hence it ought to be sustained. The Court of Equity has no power either to make or confirm a sale of a separate estate, which, by the deed creating it, is expressly prohibited from being sold. On the facts, however, I should be disposed to think, (if this restriction in the deed did not exist,) that the sale could not be sustained. In such a case the sale must have been the voluntary act of the wife, and for such purposes as the Court, on her examination, would have ordered it to be made. In this instance, it appears that the wife, by the persuasion of the husband and the threats of the constable, Beck, did sign the bill of sale. It is true the Commissioner and Chancellor both conclude she was under no actual constraint; by which I understand there was no legal duress. This, however, was not necessary to be shown to avoid her acts. In law, she is always, in the presence of her husband, supposed to act by his compulsion, and her act is therefore considered as his. It was for those undertaking to sustain the sale, to show it to be

the result of her own will. If it arose from the persuasion of the husband, who has been pronounced by the Chancellor to be of that class "who are described as worse than an heathen," it was his sale and not hers: but when we add to this that the officer of the law was saying to her—if you do not sign the bill of sale, I will levy executions on your corn and horse, it would surely be asking a great deal, to require a Court to pronounce a sale so made by a feme covert to be her own voluntary act. The propriety of the sale, too, has not been made out. For all the debts, to pay which the slave was sold, were debts contracted by the husband. It is possible they were for supplies for his family, but the credit was given to him and not to his wife, and in such a case it would be in vain to ask an order for the sale of the wife's separate estate from the Court of Equity. The report of the Commissioner is no answer to the inquiries which Chancellor Harper directed him to make. It was his business to examine as to the points submitted to him, and

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give the Chancellor the benefit of his *judgment upon them. If his report can be regarded as deciding anything, it must, instead of being against the complainant, be considered in her favor: 1st. In deciding that the bill of sale was executed unwillingly by her; 2d. That the proceeds of the sale were applied to the payment of debts contracted by the husband before the sale; and 3d. That a part of those debts were not necessary to the support of the complainant.

In every point of view I think the sale by James J. Calhoun and wife, of the slave *Jemima*, to *Dixon Thompson*, the defendant, cannot be sustained.

It is therefore ordered and decreed that the decree of Chancellor DeSaussure be reversed, that the defendant, *Dixon Thompson*, do deliver up the slave *Jemima* and her child or children (if any) and account for her hire, to such trustee as may be appointed by the Court of Equity for *Barnwell District*, for the complainant, and that the said *Dixon Thompson* do pay the costs of this suit.

The whole Court concurred.

Decree reversed.

CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—NOVEMBER AND
DECEMBER TERM, 1848.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
“ B. F. DUNKIN,
“ J. J. CALDWELL,
“ G. W. DARGAN.

2 Strob. Eq. *239

*T. J. DYSON v. A. G. LEEK et al.

(Columbia. Nov. and Dec. Term, 1848.)

[*Equity* ⇐122.]

Where the plaintiff had taken a Sheriff's deed, with an imperfect description of the land conveyed thereby, and, in an action of trespass to try titles, had it in his power to supply that defect, and failed to avail himself of it, a litigation of the same matter in this Court was not allowed.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 295; Dec. Dig. ⇐122.]

[*Equity* ⇐43; *Judgment* ⇐405.]

If it was perfectly competent for the plaintiff to have established at law, all that he can prove here, and he omitted or neglected to adduce the testimony necessary, it furnishes no ground for the interference of this Court.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 122; Dec. Dig. ⇐43; *Judgment*, Cent. Dig. § 767; Dec. Dig. ⇐405.]

Before Caldwell, Ch., at Edgefield, June Sittings, 1848.

After hearing the case on bill and answer, his Honor delivered the following decree.

Caldwell, Ch. The bill and answer and their exhibits are not necessary to be recapitulated to understand the questions involved in this case, and I shall therefore only refer to such parts of them as are material.

This controversy has arisen from a case of trespass to try titles, in which Dyson was the plaintiff and Leek the defendant, in the Court of Common Pleas. The case is report-

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ed in *2 Richardson's Law Reports, 543. It appears the defendant Leek, was deeply indebted, that several judgments had been obtained against him, and executions had been

issued on them; among others, the plaintiff had obtained a judgment against him for \$8,000, with interest from 3 October 1842, and costs for \$37.08; the execution was lodged on the 4 October, 1842; that the defendant was desirous of selling his lands (a part of which is the subject of dispute) to the plaintiff, and together with the wife, made an agreement under seal, with Dyson, on the 30 October, 1843, wherein Leek and his wife covenanted, before the first day of December following, "to make out a complete title in fee simple to and by such sufficient deed or deeds of conveyance as such shall be approved by the said T. J. Dyson or his counsel, &c., free from all manner of encumbrances, all the following tracts or parcels of land, viz: one tract containing seven hundred and fifty acres, more or less, it being the same land which I heretofore purchased from the said Thomas J. Dyson, known as a part of the Anderson Mill tract, lying in Edgefield district, on Big Saluda River and Wilson's Creek, in the State aforesaid, bounded East by Saluda River, South by R. Williamson's land, West by the Owens tract, North by Thomas J. Dyson's land, on Wilson's Creek, and hath such marks and boundaries, as will appear by the annexed plat to be laid out by the said Thomas J. Dyson. One other tract or parcel of land, known as the Owens tract, lying in the State and district aforesaid, containing two hundred and twenty-two acres, bounded S. by S. Hargrove and F. W. Pickens, W. by William Mays land, N. by D. Proctor, and a portion of the above mentioned Anderson tract, E. by the Anderson tract. The said Thomas J. Dyson

to have possession of the field lying between Wilson's Creek and Dyson's ferry road, near the old Mill place, containing about 80 acres, the first of January next, and to have possession of all the above mentioned tracts the first of January, 1845, and have right to clear or cut away the timber on the said tracts of land, any time from the date" &c. It is very apparent, from the amount of judgments against the defendant, and the value of the property he owned, that he had not the means of paying them, and performing his contract with the plaintiff, and the only mode by which the latter could be effected, was by a sale of the defendant's lands by the Sheriff to the plaintiff, to perfect his title; to consummate this, it was necessary that Owens (who, at the date of the agreement, had not conveyed the tract of land called the Owens tract, to the defendant, although he had purchased it and resided on it) should convey the Owens tract, of two hundred and twenty two acres, to Leek. This was advised by counsel, and accordingly, a few days before the Sheriff's sale, Owens did make a deed conveying this tract

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*to Leek, in the presence of three persons, Stalnaker, Gibbs and sheriff Christie, and afterwards on the 5th of February 1844, the sheriff, (Christie) sold one thousand acres of land to the plaintiff, which he described in his sale book as "a tract of land containing 1000 acres, more or less, adjoining lands of F. W. Pickens and Daniel Proctor, sold for \$6,500," and afterwards, in the absence of the plaintiff, made a deed to him of the land describing it as "one thousand acres, more or less, adjoining lands of F. W. Pickens, Proctor and others," (A. Hunter's testimony.) It appeared at the hearing that the advertisement described the land as one thousand acres of land, where the defendant lives, &c. Leek lived on the Owens tract. The question made in the Court of Law, was whether two hundred and eighteen acres, called the Owens land, were included within the deed from the sheriff to the plaintiff. Pickens' and Proctor's land would be the adjoining tract, whether the Owens land was excluded or included, so that this boundary alone did not show what land was intended to be conveyed. "The only remaining description," (says Justice Evans, delivering the opinion of the Court) "is the quantity. If the land can be otherwise located, quantity is in general immaterial, but when it is resorted to as one of the evidences of intention, it then becomes a material part of the description. The Anderson land is said, by the surveyor, to contain 1007 acres. It is said in the surveyor's explanation of his plat, that 150 acres of this had been sold, as he was informed by the plaintiff, by the defendant to Mr. Roe; taking this off there are nine hundred and ninety-two acres left, approximating very nearly to the quantity

mentioned in the deed; but if we add to this the Owens land, 218 acres, then the number of acres exceeds what is called for in the deed, by more than 200. We do not, therefore, perceive that the verdict of the Jury withholds from the plaintiff any thing included in his deed. The verdict gives him a tract of land, adjoining F. W. Pickens, Proctor and others, and containing within 8 acres of the quantity mentioned in his deed. It was said in the argument in this Court, that a part of the Anderson land, on the South side, had been sold off to Pickens; there was some evidence that Pickens' land, which was called for as a boundary, lay on that side, and that something was said by the witnesses to that effect, but its location and number of acres was not found on the trial, nor does the plat shed any light on the subject. I think it likely that both parties understood the Owens land to have been included in what the sheriff sold; but if the plaintiff took a deed with a description which in the opinion of the Jury does not include it, he cannot complain. When a plaintiff comes into Court, demanding that which is in the defendant's possession, he must show that he is

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the legal owner, before he can expect *to recover it by law; this the plaintiff in this case has failed to do, and his motion for a new trial is dismissed."

The case made at the hearing was different from what it was in the Court of law. The agreement under seal of the 30 of October, 1843, was offered in evidence, and its execution testified to by J. W. Coleman, one of the subscribing witnesses; there was no proof that this contract was ever rescinded or abandoned by the parties, but many circumstances stated by the witnesses, shew that plaintiff, defendant and his wife, considered it subsisting, and that they had a right to enforce its execution. The acts and admissions of the defendant leave no doubt upon this subject. Leek and wife and others filed a bill against Dyson and sheriff Christie, in which it is admitted that the Owens land had been sold by the sheriff, and Leek claimed that Dyson should be compelled to perfect his agreement (of 30 October 1843,) by accounting for \$7,100, instead of \$6,500, which he had bid at sheriff's sale for the land; this bill was dismissed at June Term, 1845, for want of prosecution, and the plaintiff ordered to pay the costs. On the 4 November, 1843, Mrs. Leek, the wife of the defendant, gave the plaintiff a receipt for \$100, in part of the Owens and Anderson tracts of land. There was no evidence that Leek was present when it was given or that he had expressly authorized his wife to receive the money, but there was testimony that established the fact that she often attended to his business for him, settled cases (brought against him) with a magistrate, and in sheriff's office, and one of the witnesses said she

assumed the control of his business; and indeed there appears to have been some reason for it, as his intemperate habits often rendered him incompetent to manage his business.

The evidence clearly establishes that Dyson and Leek did, a short time before the first Monday in February, 1844, agree that the lands contained in the Anderson and Owens tracts, should be sold at sheriff's sale, that the former might obtain a perfect title to them, but the testimony does not show what price Dyson was to give for the lands; he bid \$6500, for them, and they were knocked down to him, and his bid was entered in the sheriff's sale book, for that amount. Leek was present at the sale, but made no objection to the amount bid, or to the sale. If this agreement was isolated, on parol proof there might be some difficulty in enforcing it, unless the terms had been certain, the consideration adequate, but it has their covenant of the 30th of October, 1843, to support it, and it appears to be but a small, if not an immaterial modification of the written agreement. The embarrassed circumstances of Leek and his utter inability to discharge the liens upon his lands, rendered it necessary to resort to a sheriff's sale to make the plaintiff a good title. In this way only

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could *Dyson pay the purchase money with safety, or Leek specially perform his covenant.

There are many circumstances which go to show this was the intention and understanding of the parties. When they made the original agreement, they estimated the part of the Anderson tract at 770 acres, and the Owens tract at 222 acres, making an aggregate of 992 acres; and it is not improbable, as this amount was so nearly one thousand acres, that they spoke about it as one thousand acres, and that the levy, advertisement, sale and deed of the sheriff were all made in conformity to this general estimate. On a resurvey it appears to have been ascertained that some of these estimates were erroneous, but not to the extent that was supposed on the trial at law. The testimony of the surveyor, Mr. Able, pretty well settles the question of quantity. When he surveyed the land he had no plat of the Anderson tract, and had not only to take the whole of it, but the 15 acres on Wilson's creek, (sold to Rowe,) parts of the tract, 93 acres, and 74 acres had been sold off to Col. Pickens, who reconveyed them to Dyson on the 11th July, 1844; and when these parcels are deducted from the whole of the Anderson tract, 1007 acres, they leave 825 acres, which only exceed the estimate of the parties 75 acres. The re-survey of the Owens tract made the quantity 218 acres; according to this view, there were 1043 acres of the Anderson and Owens' tracts liable to the judgment against Leek at the sheriff's sale to Dyson. But

whatever may have been the exact number of acres, the agreement was certain and specific as to the Anderson and Owens tracts of land, and as these were well known by the parties, a misapprehension or mistake as to the precise number of acres would be no sufficient ground, when the land could be identified and the boundaries were known by the parties, to invalidate their contract.

A deed made by Leek to certain trustees, for the purpose of paying his debts, &c., on the 2 March, 1843, describes the land as one tract, "containing 1000 acres, more or less, &c., the same being composed of two adjoining tracts, one of which I bought of James Owens and the other of T. J. Dyson." From all the circumstances, it is not very probable that they were far mistaken as to the quantity, and it is now certainly established that there is not an excess of 200 acres, as appeared from the evidence on the trial at law. An agreement to make a good title by a sheriff's sale is as legal and obligatory as if the party warranted to make it by his own deed: the making the bid at an adequate price and the payment of the purchase money on the part of the purchaser is a consummation of the contract, and the other party must be bound to perform his part. Here the agreement of the 30th October, 1843, was the basis of the second agreement which they made a short time before

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*the Sheriff's sale, and the former certainly constituted sufficient consideration for the latter, which was a mere modification of it, rendered peculiarly proper and expedient from the embarrassments of Leek, and it would now be a fraud upon the plaintiff, after he has performed his part of the agreement, and accepted a defective deed from the Sheriff, under the misapprehension that it was sufficient to convey the title to the whole tract, containing the Owens as well as the Anderson lands, to permit the defendant to retain the possession, and to enjoy the rents and profits of the former, while his covenant and agreement bound him to make a good title to plaintiff, of the whole lands specified. The plaintiff is entitled to a specific performance of the defendant's agreement, notwithstanding the verdict in the Court of Law, as the sheriff's deed was defective and did not conform to the agreement of the parties; it was evidently made under a mistaken view of what is technically conveyed, and it would be a reflection upon a Court of Equity, if such palpable errors and mistakes were not rectified, when the proof is so clear that now there is no reasonable doubt of the intention and understanding of the parties. The case is peculiarly within equitable jurisdiction, and it would have been error in the Court of Law to have assumed jurisdiction of such a question, that could not have been made either by the pleadings or the evidence; it has therefore been properly brought before this Court.

The next question is, shall the plaintiff be held accountable to Leek, for his bid, \$6,500, or the amount specified in the agreement, \$7,100. There is a deficiency in the evidence on this point that is sufficient to raise a strong doubt as to the specific amount that Dyson agreed with Leek to give at the sheriff's sale. There are some circumstances that would seem to weigh in favor of the lesser sum. As soon as the land was put up, Dyson bid \$6,500, and it was knocked off to him without Leek making any objection, and the bid charged to Dyson. But this might have been the case, if Dyson had bid \$5,000, instead of \$6,500; the evidence does not establish what Dyson was to bid for the lands, but the agreement very distinctly specifies the sum of \$7,100 was to be given for them; if they intended to modify the contract in this respect, they ought to have done so in a legal way, by an instrument of equal solemnity; and upon the general principles of the admission of parol proof, it would be unsafe to rely on the frailty of memory to contradict and change what was set forth in writing with such clearness and certainty; the adequacy of the price bid is not sufficient to raise the presumption that the parties agreed to substitute the \$6,500, for the \$7,100, which Dyson stipulated to pay Leek for the lands.

The amount that Dyson bid is very conclusive proof that he thought he was pur-

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chasing both tracts, as it was said he *had sold the Anderson tract to Leek for \$5,500, and it would have been an extraordinary thing to have given \$1,000 more for the same land at a sheriff's sale; such a supposition would also imply the absurdity of estimating the Owens tract at \$600, which is certainly not more than half of the value at which it had been rated and was worth. As there is no sufficient proof that the second agreement, which was in parol, made an alteration of the amount to be paid by Dyson on his obtaining a perfect title to the lands by the sheriff's sale, I think the written agreement of the parties ought to be adhered to and carried into effect, and that Dyson should account for the amount therein stipulated. As Leek is insolvent, and has in violation of his contracts retained possession of parts of the land since Dyson's purchase at sheriff's sale, he must account for the rents to the plaintiff from that time, and their amount must be set off against the difference between the amount, sixty-five hundred dollars, that Dyson bid for the lands and paid to the sheriff, and the sum of seventy-one hundred dollars, which Dyson stipulated to pay Leek on his making him a good title.

It is therefore ordered and decreed, that Simeon Christie, sheriff of Edgefield District, a successor in office of Simeon Christie, late sheriff, do make and deliver to the plaintiff, T. J. Dyson, a deed of conveyance in fee of all the right, title, interest, and estate of

A. G. Leek, in and to the said lands bought by the plaintiff under the executions in the sheriff's office, on the 5th day of February, 1844, with such description of the same as to include both the Anderson and Owens tracts of land; and that the defendant A. G. Leek do forthwith deliver to the plaintiff the possession of said lands, and account to him before the Commissioner for the rents and profits of such parts thereof as have been in the possession or under the control of the said A. G. Leek since the date of said sale; and that the said T. J. Dyson do account for six hundred dollars, the difference of his bid at sheriff's sale, (which he has paid,) and the amount specified in his agreement with the said A. G. Leek and wife; and that the said rents and profits be set off, when ascertained, against the same; that the Commissioner make a report on the accounts between the parties to this Court; and that defendant A. G. Leek, pay the costs.

The defendant appealed and moved the Court of Appeals to reverse the Circuit decree of his Honor the Chancellor, on the following grounds:

1st. Because it is submitted that there was no competent evidence on the hearing of the cause, that it formed any part of the agreement or understanding of the parties at the time of entering into the said covenant, that in order to make good titles to the land in question, the same should be sold at sher-

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iff's sale. But that the fact is established otherwise, by the plaintiff's bill, his answer to a former bill and the covenant itself. It is therefore submitted that the decree is erroneous in assuming the fact that such sheriff's sale formed a part of the understanding of the parties at the time of making said covenant.

2d. Because there was no competent evidence of an agreement between the parties subsequent to the date of the covenant, that the land was to be sold by the sheriff for the purpose of making titles to the complainant; and that whatever evidence was heard upon the subject, being parol declarations, was insufficient and incompetent to establish an agreement affecting the title to lands.

3d. Because the receipt given by Martha Leek, the defendant's wife, for one hundred dollars in part payment for said lands, being unauthorized by the defendant, was incompetent evidence, and the Court erred in admitting that receipt in evidence on the hearing of the cause.

4th. Because the decree sets up and decrees the specific performance of the said covenant of 30th October, 1843, which, the defendant submits, is erroneous. 1st. Because the execution of said covenant was obtained by the misrepresentation, by the complainant, of its contents. 2d. Because the complainant does not offer or tender in his

bill to perform his part of the agreement as set forth in said covenant. 3d. Because the complainant does not in said bill ask or seek the aid of this Court to set up or decree the performance of said covenant, and the same is not prayed for in his bill; and 4th. Because to the bill heretofore filed in this Court by the defendant Leek and others, against said Dyson, praying, among other matters, that said covenant should be performed by said Dyson, he the said Dyson in his answer, rejected and abandoned said covenant, and insisted that he was entitled to the whole of said land under his purchase for the price bid at the Sheriff's sale, and denied the jurisdiction of the Court in the premises. It is therefore submitted that the said complainant is barred and estopped from having the performance of said covenant decreed for his benefit in the present cause.

5th. Because the complainant's right to the said tract of land, called the Owens tract, has been decided and adjudged in the Court of Common Pleas, in the action of trespass to try titles, brought by the complainant against the defendant for the same land, as is stated in the defendant's answer, and was proved on the hearing—therefore the complainant is barred and estopped from litigating the same matter again in this Court.

6th. Because the decree is in other respects contrary to the law and evidence of the cause.

The complainant also appealed, on the

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ground that the *Chancellor erred in requiring him to account to the defendant for more than \$6,500.

Griffin, complainant's solicitor.

Bauskett, defendant's solicitor.

DUNKIN, Ch., delivered the opinion of the Court.

At the Sheriff's sales for Edgefield, in February, 1844, the complainant purchased certain real estate of the defendant, Leek, for sum of sixty-five hundred dollars. In April following Leek filed his bill in this Court, alleging that, in October, 1843, being considerably indebted in the Sheriff's office, he agreed to sell to the complainant the tract of land described in the pleadings for seven thousand one hundred dollars, which sum the complainant was to pay in the Sheriff's office to satisfy his own and other executions; that the land was to be sold by the Sheriff, and bid off by the complainant, in order to give him a clear title—that the complainant had accordingly attended the sale and bid off the land for sixty-five hundred dollars, and now insisted on keeping it at that price. The answer of the defendant to that bill positively denied that he had entered into any agreement upon the terms set forth; but admitted that he had agreed to purchase the land for \$7,100, upon receiving an unincumbered title prior to 1st December, 1843—that

he held executions and other demands to a large amount against the defendant, Leek, and, after discounting what was due to him, he was to pay him \$500 on the 1st May, 1844, and the balance on 1st January, 1845—but he averred that Leek was entirely unable to comply with his contract of executing to him a complete and unincumbered title,—and that, afterwards, the land was fairly sold by the sheriff, was purchased by the defendant at a fair price, and the proceeds of the sale fairly applied to the satisfaction of Leek's debts. That the defendant (Dyson) is at a loss to perceive the ground upon which he (Leek) can support any claim against him; he pleads to the jurisdiction, and insists that Leek has plain and adequate remedy at law. At June Term, 1845, the Court of Equity decreed that Leek's bill should be dismissed, for want of prosecution, and that he should pay the costs.

The defendant, Leek, declining to surrender the premises, an action of trespass to try titles was instituted against him by the complainant, in the Court of Common Pleas, for Edgefield District. At the call of the case, Spring Term, 1846, the defendant endeavored to postpone the trial, but the motion was successfully resisted by the complainant. The only question on the trial was as to the identity of the land purchased by the complainant at the Sheriff's sales, in February, 1844. The land claimed by the plaintiff consisted of two tracts, viz: the Anderson

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tract and the Owens tract. *The evidence offered at the trial is reported by the presiding Judge. It appeared that Leek lived on the Owens tract, and cultivated on both tracts, both before and after the Sheriff's sale. The terms of the description, in the Sheriff's deed, might be satisfied by including the Anderson tract alone, or by including both tracts. The Jury found for the plaintiff only the Anderson tract, and, on the hearing in the Appeal Court, the motion for a new trial was dismissed. 2 Rich. R. 543.

This bill was thereupon filed by the complainant, in which he alleges, among other things, that the advertisement of the Sheriff described the land to be sold as that on which the defendant lived, and that this was in accordance with the levy—and that Leek lived on the Owens tract. The prayer of the bill is that the Sheriff's deed may be reformed so as to describe with more precision "the Owens as well as the Anderson land," or "that a specific performance may be decreed of the contract, by which the Owens tract of land was sold to the complainant at said Sheriff's sale, and that Leek may be ordered and directed to deliver the said Owens tract to the complainant." No other relief is sought by the bill, nor is a case made for any other relief. The complainant in his answer to Leek's bill had denied any obligation under the contract of October, 1843,

and insisted on his purchase from the Sheriff and the bill was thereupon dismissed. He insists now on that purchase alone, and denies his liability for any other sum than that agreed to be paid to the Sheriff, and insists that, on that contract, he was entitled to the Owens as well as the Anderson tract of land. The defence is that the complainant has a plain and adequate remedy at law, and moreover, that the matter has been already adjudicated against the complainant by a tribunal of his own selection.

Standing upon his purchase from the Sheriff, it seems sufficiently clear that the complainant occupies the same position—is entitled to the same rights, as any other purchaser, and no more. He is entitled to all that the Sheriff proposed to sell, and did actually sell. At the hearing on the circuit, as reported by the Chancellor, it appeared that the Sheriff's advertisement described the land as one thousand acres where the defendant lives, &c. On the trial at law, as well as in this Court, it was shown that Leek lived on the Owens tract. The only inquiry is whether it was not perfectly competent for the complainant to have established at law all that he has proved in this Court—to have offered in evidence the Sheriff's advertisement in order to show what was meant by the description in his deed. If it was competent, and the complainant omitted or neglected to adduce the testimony, it furnishes no ground for the interference of this Court.

The principle on which parol and extrinsic evidence is sometimes admitted, to aid in

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the construction of written instruments, is very well established, although difficulty is experienced in its application. The judgment of the Court is simply declaratory of what is in the instrument. The question in the construction of written instruments is not what was the intention of the parties, but what is the meaning of the words they have used. In conformity with this principle, parol evidence has been held admissible to determine the person or thing intended, where the description in the instrument was insufficient for that purpose. In a devise of the manor of Dale, where the testator had two manors of that name, North Dale and South Dale, parol evidence was admissible as to which was meant.¹

In the Sheriff's deed to the complainant the land was described as one thousand acres, more or less, adjoining lands of F. W. Pickens, Proctor and others. This description would be equally applicable, according to the report of the presiding Judge, whether only the Anderson tract, or both the Anderson and Owens tracts, were sold by the Sheriff. On general principles, therefore, it would seem competent for the plaintiff to remove,

¹ 5 Bar. & Adol. 664; Wigram on Wills, 5, 9.

or explain, this latent ambiguity, by proving, from the Sheriff's advertisement, that the land exposed to sale was that on which the defendant lived, and that he lived on the Owens tract. But, in *Elfe v. Gadsden*, 2 Rich. R. 373, it was expressly adjudicated that the Sheriff's advertisement of the property for sale may be given in evidence to explain a latent ambiguity. That case was determined by the Court of Appeals prior to the hearing of this case at law. It cannot, therefore, be doubted that the Sheriff's advertisement was admissible in evidence on the trial at law. Prior to that hearing the complainant would have required no aid from this Court in order to maintain his legal right, both to the Owens and Anderson tracts of land, under the purchase from the Sheriff. The Law Court of Appeals held that the plaintiff had himself to blame for taking a deed with an imperfect description. But if he has had it in his power to supply that defect in the Court of Law, and has failed to avail himself of it, it would be of evil precedent and against well settled adjudications to permit the same matter to be litigated in this tribunal.

It is ordered and decreed that the decree of the Circuit Court be reversed, and that the bill be dismissed.

JOHNSTON, Ch., concurred.

Decree reversed.

2 Strob. Eq. *250

*E. L. FRASER and Wife v. L. P. HEXT,
Administrator, et al.

(Columbia. Nov. and Dec. Term, 1848.)

[*Compromise and Settlement* ⇨19.]

It is not the policy of the law to disturb settlements made with deliberation and with tolerable fairness, more particularly where they have been acquiesced in for any length of time afterwards.

[Ed. Note.—Cited in *Clarke v. Jenkins*, 3 Rich. Eq. 340; *McDow v. Brown*, 2 S. C. 111.

For other cases, see *Compromise and Settlement*, Cent. Dig. § 74; Dec. Dig. ⇨19.]

[*Account* ⇨25.]

No settled account ought to be opened upon the mere suggestion of a bill in Equity, especially where the truth of such suggestion is fully and substantially denied by the answer.

[Ed. Note.—For other cases, see *Account*, Cent. Dig. § 145; Dec. Dig. ⇨25.]

[*Equity* ⇨141; *Executors and Administrators* ⇨516.]

Where an attempt is made to open a settlement, on the ground of fraud or mistake in stating the accounts, it is incumbent on the complainant to set out in his bill the particular fraud or mistake, that the defendant may be prepared to answer it.

[Ed. Note.—Cited in *McDow v. Brown*, 2 S. C. 113.

For other cases, see *Equity*, Cent. Dig. §§ 325, 326; Dec. Dig. ⇨141; *Executors and Administrators*, Cent. Dig. § 2226; Dec. Dig. ⇨516.]

[*Executors and Administrators* ⚭303.]

Though a settlement is *prima facie* conclusive as to the amount due, a note given on the settlement is not payment or satisfaction, unless it is so agreed upon or understood by the parties: unless so understood, it is rather to be regarded as a memorandum or acknowledgment of the amount ascertained to be due, to be held by the creditor.

[Ed. Note.—Cited in *Thomas v. Kelly*, 3 S. C. 214, 16 Am. Rep. 716; *Adger & Co. v. Pringle*, 11 S. C. 547; *National Bank of Chester v. Gunhouse & Co.*, 17 S. C. 499.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1234; Dec. Dig. ⚭303.]

[*Executors and Administrators* ⚭516.]

[Where a distributee has settled with the administrator by taking his note, for which that of another person was substituted, and, not being collected, some time afterwards returned, and the first taken again, and, upon a bill to open the account on a suggestion of fraud, without any specific charge or proof, which was denied by the answer, a reference was had to a commissioner, who reported a balance in favor of the distributee less than the amount of the note, the court refused to disturb the settlement.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2232; Dec. Dig. ⚭516.]

Before Dargan, Ch., at Barnwell, February Sittings, 1848.

This case was heard on the Circuit, on exceptions taken to the Commissioner's report, made under a previous order of reference.

His Honor's decree sufficiently explains the facts connected with the points decided by the Court of Appeals.

Dargan, Ch. The complainants, Elias L. Fraser and Maria Louisa, his wife, filed their bill of revivor against L. P. Hext, executor of the last will and testament of Richard C. Ashe, and the other defendants, who were his devisees and legatees, for an account and settlement of the testator's estate. The testator, by his will, gave each of his children 100 dollars, to be paid at the convenience of his wife; all the residue of his estate, real and personal, to his said wife, Margaret Ashe, to be distributed among his children at her death, as she might think proper. The testator's wife died before him, and in 1837 the testator died, leaving his will unrevoked, and the following children, to wit: Richard C. Ashe, jr., Eliza Ann, who had intermarried with L. P. Hext, Mary D. who had intermarried with Edward K. Garvin, and Maria Louisa, who first intermarried with Medicus Powell, and after his decease, with the complainant, Elias L. Fraser. On the 11th October, 1837, L. P. Hext proved the will, and obtained letters of administration, with the will annexed; on the 20th November, in pursuance of an order of the Court of Ordinary, he sold all the goods and chattels of the testator, but does not appear to have filed any return of the sales. The personal estate, by an appraisement which preceded the sale, was valued at 3,717

dollars. The defendant never made any return of his accounts as administrator.

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*The complainants charge, that the complainant, Maria L. Fraser, then Maria L. Powell, after the decease of her husband, Medicus Powell, being desirous of removing to Chester district, to live near her deceased husband's relations, applied with some importunity to L. P. Hext, the administrator, for payment of her share of her father's estate. That after some delay and evasion, he made a statement of the affairs of the estate, and gave her, as her full portion thereof, a note of her brother, Richard C. Ashe, for about 450 dollars; for which she executed to him a receipt in full for her share of the testator's personal estate; he assuring her that he would thereafter satisfy her, that the amount thus received, was all that she was entitled to receive. They further charge, that Richard C. Ashe refused to pay her the note, alleging that on a settlement with Hext, it would be found that he owed him nothing. That she offered to return the note of Richard C. Ashe to L. P. Hext, and claimed her share and portion of the estate. That the said L. P. Hext refusing, she exhibited her bill against the said L. P. Hext, administrator as aforesaid, and the other legatees and devisees of Richard C. Ashe, deceased, charging the facts above stated; that the settlement and receipt above mentioned, "was fraudulent, false, partial and erroneous," and that it was "fraudulent and contrary to equity and good conscience," and prayed that he might be ordered to produce his statement of accounts, and that she might be allowed to surcharge and falsify it. And stating that there had been no partition of the real estate, she prayed a partition thereof, and for process, &c.

The complainant, Maria L. having intermarried with the complainant, Elias L. Fraser, and Edward K. Garvin having died, leaving his wife surviving him, and entitled to her distributive share of the estate of the testator; the complainants, on the 3d April, 1845, exhibited their bill of revivor against the said L. P. Hext, administrator as aforesaid, and the legatees and distributees of Richard C. Ashe, deceased, stating the marriage of the complainants and the death of Garvin, in which bill of revivor the same facts and charges were re-iterated, and the same prayer for relief.

The defendant, Hext, not denying the will, administration, and the proceedings thereon, says to the claim set up on the part of the complainants, that there was a settlement between Maria L. Fraser and himself, which was in full of her share of the testator's estate; that the said settlement was fair, full, complete and bona fide, and that it was intended to be final and conclusive; and that he agreed to give his individual note for the

amount which was found due on a settlement, which the said Maria L. agreed to take, and which was accordingly done, whereupon she executed to him her receipt and discharge in full of her claim; and he files a copy as an exhibit to his answer.

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*The defendant denies all the allegations of fraud, and that he ever promised to come to any other or further settlement. And he pleads and sets up the settlement and receipt in bar to any further account.

There was an order of reference to the Commissioner, and that he report upon the accounts and any special matter, with a reservation of the equities of all the parties. The Commissioner having held his reference, and examined the accounts, at this term submitted his report. To this report, exceptions were taken on both sides, only four of which, from the view I take of the case, will be necessary to be considered.

The 5th exception of the defendant, L. P. Hext, is as follows: "because the Commissioner has reported a balance in favor of Mrs. Fraser, in the accounts of the estate, whereas it is contended, that the defendant having submitted a receipt in full, no balance should have been reported against him."

The complainants do not charge in their bill, any specific fraud, error or mistake. But the allegation is of fraud and mistake generally, all of which the defendant positively denies, and there is no other proof on this point. The receipt which he sets up in bar, is in the following words:

"Received, 29 Novr. 1841, of Lawrence P. Hext, administrator of Richard C. Ashe, sen'r. four hundred and fifty dollars, in full of balance due me as my proportion of said estate.

Test, Adeline Hext.

(Signed.) Maria L. Powell."

The defendant, for the amount expressed in this receipt gave his promissory note, of which the following is a copy.

"\$450.00. On or before the first day of January next, I promise to pay Maria L. Powell or bearer, four hundred and fifty dollars, for value received, this 27th Nov. 1841,

(Signed,) Law. P. Hext."

Indorsed as follows.

"I obligate to put in place of this note, one upon Richard C. Ashe for a similar amount, including interest."

It would seem that the note of Richard C. Ashe was afterwards substituted, and for the reasons before stated, was returned, and this note resumed by the complainant, and is still in the power and control of her and her present husband.

The Commissioner, without regard to the receipts, which it was not his province to decide upon, proceeded to state an account between the parties, and after considering several rather nice questions of law and of fact, arising on the matters before him, found a

balance due by the defendant to the complainants; which balance, thus found by an intelligent Commissioner and a good accountant, is, (be it remembered) actually some two hundred dollars less than the sum accorded by the defendant to be due to the complain-

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ant, on the settlement between them. That is to say, this is the difference in the result, when the accruing interest is added to the principal of the note from its date. From which fact, I cannot be otherwise than impressed, that in the settlement, there was no fraud, unfairness or overreaching; and if there was error, it was not considerable in amount. And whether there was error of any kind or not, would depend upon the determination of those questions made in the exceptions of the complainants to the Commissioner's report, which the Commissioner has decided against them, and which, from the view I have taken of the case, it is unnecessary for me to consider.

In the settlement which was made, the complainant acquiesced from the 29th Nov. 1841, to the 24th day of July, 1844, when she filed her original bill. And in the mean time, the note of Richard C. Ashe, junr. was given to the complainant in lieu of the defendant's own note, according to the agreement indorsed thereon. Some efforts were made to collect Ashe's note, which proving fruitless, this note was returned, and Hext's note again delivered to the complainant. And this may be considered an affirmation of the settlement at that date, after the complainant had time for reflection and opportunity for consultation with her friends. Under these circumstances, I am of the opinion that the account thus settled between the parties should not be opened. In that settlement, they have approximated nearer to what the complainants consider the justice of the case, than an intelligent Commissioner, with all the aid of his experience and skill in the adjustment of accounts, assisted as he was by the Solicitors of the parties. It is not the policy of the law to disturb settlements made with deliberation, and with tolerable fairness, (to say the least,)—more particularly where they have been acquiesced in for two or three years.

In Porter & wife v. Cain, McMullan's Eq. S1, the settlement was made between the complainant and the defendant, who was the guardian of the complainant's wife, (who was still an infant,) and in a very short time after the complainant himself was 21 years of age. There was no fraud, but manifest errors in the statement of the accounts on which the settlement was made; there being no interest cast upon the annual balances, according to the usual mode of adjusting guardian's accounts. The complainant gave a receipt in full, and afterwards filed his bill for an account. The defendant set up his receipt in full in bar of the claim for an ac-

count, which was sustained by the Court, and the bill was dismissed. The Court also held, that if there had been fraud or mistake in stating the accounts, it was incumbent on the complainant to have set out in his bill the fraud or mistake, that the defendant might have come prepared to answer it. The

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Court even refused to allow the *complainant to amend his bill by setting out the fraud or mistake, as the bill was considered without any foundation.

The complainant's bill in the case before me, contained no specific charge of fraud or mistake, and if one exists and had been proved, the case as presented in the bill does not come up to the requirement of the rule as above laid down.

In the case of *Pratt v. Weyman*, 1 McC's. Eq. Rep. 161, it was said by Colcock, J. "the Court will not open a settled account where it has been signed, or a security taken on the footing of it, unless for fraud or errors distinctly specified in the bill, and proved as specified. We collect indeed from the highest authority, that no settled account ought to be opened upon the mere suggestion of a bill in Equity, especially where the truth of such suggestion is fully and substantially denied by the answer." See the cases cited in the decree of the Court and in the argument. In the case of *Slee v. Bloom*, 20 John. Reports, where the defendant sought to open an account stated, it was held that he was not entitled to do so, unless there was a sufficient foundation laid in the answer. See also *Dial v. Rogers*, 4 DeS. 175.

For these reasons and on these authorities, I decide that the receipt on settlement is a bar to the complainant's bill, and I should order it to be dismissed, but that I deem it proper to retain it for the purpose of adjudicating the rights of the defendants among themselves.

The fourth exception of the defendant Hext is as follows: "that the Commissioner has reported a balance in favor of Mrs. Garvin, when it is submitted that the defendant having exhibited the receipt of Edw'd. K. Garvin, no balance ought to be reported against him."

The defendant exhibited a receipt of Edward K. Garvin for one dollar, in full of all his wife's interest in the personal estate. The date of this receipt I do not remember, nor its precise terms, a copy not having been furnished me. To show that the consideration was not one dollar only, the defendant exhibited a judgment of Garvin to his testator for \$2040, with interest thereon from 4th April, 1836, besides costs. This judgment is said to have been designed as a fraud upon creditors, but whether it was so or bona fide, I apprehend that it was binding between the parties and their privies. Lawrence Hext, at or about the date of the aforesaid receipt, executed a receipt to Garvin for his share

of this case. The receipt is as follows: "Rec'd 1st (or thereabout) of January, 1843, from defendant my proportion of this judgment," &c. There may, and likely there were other dealings between the parties. It is obvious that he did not relinquish his wife's share for one dollar.

The reasoning and the authorities in reference to Mrs. Fraser's receipt, apply with equal force to the receipt of Garvin. He had a right to receive his wife's share of the per-

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*sonalty, if he could do so without a resort to Equity, and if he did so, his marital rights attached.

Mrs. Garvin did not answer the bill. She makes no question before the Court by the pleadings, but insists upon her share by parol. If she wishes the receipt to be set aside, she must file her bill for that purpose, or at all events, make the question in the pleadings.

The 2d and 3d exceptions of the defendant to the report of the Commissioner are overruled, and the report in that respect confirmed, for the reasons therein stated. It is also confirmed in respect to the amount found to be due to Richard C. Ashe. It is ordered and decreed that the defendant, L. P. Hext, pay to the said Richard C. Ashe, the sum of one thousand and fifty-two dollars 66-100, with interest from 20th January, 1847. It is also the judgment and decree of the Court, that the receipts of Mrs. Fraser and E. K. Garvin constitute a bar to the claim for an account set up in their behalf. It is further ordered and decreed that each party pay his, her, or their own costs.

Grounds of Appeal.

On the part of the complainants, and Mary D. Garvin, one of the defendants:

1. Because the receipt of the complainant, Maria Louisa, is not a bar to the relief prayed for by the complainants in this cause, nor conclusive evidence of payment.

2. Because the promissory note of the defendant, L. P. Hext, by which it is supposed the right of the complainants is extinguished, being unpaid and worthless, is not payment in fact or in law, and the complainants are remitted to their original cause of action against the said defendant.

3. Because the failure of the said L. P. Hext to exhibit the accounts by which he pretended to ascertain the amount due to the complainant, Maria Louisa, although at the time he gave the said promissory note he promised, and is required by the bill so to do, is of itself a fraud, by which it is rendered impossible for the complainants, who are entirely ignorant of the matters contained in the said accounts, to specify any of the items or particulars thereof.

4. Because the following exceptions, taken by the complainants to the report of the Com-

missioner, to the matters of account in this cause, ought to have been sustained, viz:

1. For that in and by the said report the complainants are charged with \$175 and interest thereon, as the balance due on the slave Mary, sold by Margaret Ashe, a feme covert, her husband, the testator, being then living, to Dr. Powell, the late husband of the complainant, Maria Louisa; whereas such sale was void and of no effect, and if valid,

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was not *made on the credit of the interest of the said complainant under the last will and testament of her father, who was then alive.

2. For that the complainants are charged in and by the said report with \$500 and interest thereon, as the value of the slave Hamlet; whereas the said slave, on the 9th August, 1837, and in the life time of the testator, was conveyed by Margaret Ashe, a feme covert, to Medicus Powell, the late husband of the complainant, Maria Louisa, in consideration of the love and affection which the said Margaret Ashe bore to the said Medicus Powell; and therefore the value of the said slave ought not to be deducted from the interest of the said complainant in her father's estate.

3. For that the complainants are not chargeable with the value of Hamlet, even supposing, what they do not admit, that the said slave had been given to the complainant, his daughter, as an advancement.

4. For that the gift of the slave Hamlet cannot, according to the evidence, be regarded as satisfaction pro tanto of the interest of the complainants under the last will and testament of the testator.

5. Because the receipt of Edward K. Garvin is not a bar to the right of the defendant, Mary D. Garvin, to her portion of her father's estate in the hands of her co-defendant, L. P. Hext; which receipt is in the following words: "Received, 31st December, 1842, from Lawrence P. Hext, administrator of Richard C. Ashe, Sen'r., deceased, one dollar (\$1.00) in full of all demands which I have or may have had, or have in right, title, claim, interest, or otherwise, in and to the said estate. E. K. Garvin."

Patterson, pro appellants.

Defendant's Grounds of Appeal.

The defendant gives notice, that at the next sitting of the Court of Appeals in Columbia, a motion will be made to modify the decree of his Honor the Chancellor, in the above stated causes, on the following ground:

Because his Honor the Chancellor, in and by his said decree, has overruled the 1st, 2d and 3d exceptions of the defendant to the report of the Commissioner; whereas, it is respectfully submitted that the said exceptions should have been sustained.

Bellinger & Hutson, defendant's solicitors.

Defendant's Exceptions.

The defendant, L. P. Hext, excepts to the report of the Commissioner made in these causes, in the following particulars, and upon the following grounds:

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*1. Because the Commissioner, in and by his said report, has not taken into the account the purchases made by Medicus Powell, the former husband of Maria Powell, the complainant, at the estate sale of the said intestate; whereas, it is submitted that said purchases should have been taken into the account and charged against the said Maria Fraser, the same having been made by her husband representing her in capacity of distributee.

2. Because the Commissioner has not debited the said R. C. Ashe with the amount due by him on two notes to the defendant, viz: one for four hundred dollars, due 1st January, 1841, with interest from the 30th January, 1840, credited with \$200, 3d March, 1843; and another for four hundred dollars, due 1st January, 1842, with interest from 30th January, 1840. Whereas, it is submitted that the said R. C. Ashe should have been charged with the amount due upon said notes, more especially since these are the very notes suit upon which has been enjoined by an order taken under the bill filed by the said R. C. Ashe, with a view to the settlement of the estate.

3. Because the Commissioner, in his said report, has omitted to take into the account the advancements made in the life time of the said R. C. Ashe to his children; whereas it is submitted, that said advancements should have been taken into the account, under all the circumstances of this case.

4. Because the Commissioner has reported a balance upon the accounts of the said estate in favor of Mrs. Garvin; whereas it is submitted, that the defendant having exhibited the receipt in full of Edward K. Garvin, the husband of the said Mrs. Garvin, no balance should have been reported in her favor.

5. Because the Commissioner has reported a balance in favor of Mrs. Fraser, on the accounts of the said estate; whereas it is submitted, that the defendant having exhibited her receipt in full, no balance should have been reported in her favor.

Bellinger & Hutson, defendant's solicitors.

DARGAN, Ch., delivered the opinion of the Court.

As to the effect of a settlement, and of a receipt in full, as prima facie discharging the party indebted from any further liability to account, this Court fully concurs in the views expressed in the circuit decree. To the authorities there cited may be added the case of Murrel v. Murrel, ante, p. 148, [49 Am. Dec. 664,] adjudged since the trial of this

case, (May Term, 1848.) It is to be hoped that this question may now be considered at rest.

There is one point, however, on which the circuit decree has not done full justice to the complainants. The parties were so intent on

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opening the settlement, that the question *was not discussed, or even brought to my notice, on the circuit trial. It is admitted that the note of L. P. Hext, executed on the settlement, and for which the receipt was taken, has not been paid. And the decree adjudging that Hext is discharged from further liability to account, awards nothing to the complainants, but leaves them to their legal remedy upon the note. Though a settlement is prima facie conclusive as to the amount due (as explained in the decree) a note given on the settlement is not payment or satisfaction, unless it is so agreed upon or understood by the parties. And unless such be the understanding, it is rather to be regarded as a memorandum or acknowledgment of the amount ascertained to be due: to be held by the creditor. In this case, it appears that it was understood by the parties, that the note of Hext to Mrs. Fraser was not satisfaction, for it was expressly stipulated that Mrs. Fraser was to have payment in other securities, to wit: the note of R. C. Ashe. If Ashe's note had been given in pursuance of the agreement, it would have been satisfaction.

The note of L. P. Hext, given to Mrs. Fraser for the amount found to be due on the settlement, is, then, not a satisfaction of the acknowledged indebtedness, and she is entitled to be remitted back to her original claim and remedy, which it does not appear that she has either expressly or impliedly waived. The judgment of this Court is, that the circuit decree be so modified, that the said L. P. Hext, as administrator, be ordered and decreed to pay to the complainants the sum of four hundred and fifty dollars, with interest from the 1st day of January, 1842. In all other respects the circuit decree is affirmed, and on all other points the appeals are dismissed.

The whole Court concurred.

Decree modified.

2 Strob. Eq. 258

NATHANIEL DURHAM v. ANN B. WADLINGTON et al.

(Columbia. Nov. and Dec. Term, 1848.)

[*Compromise and Settlement* ⚡8.]

Where a compromise of a doubtful right is fairly made between the parties, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally bind-

ing, and cannot be affected by any subsequent investigation and result.

[Ed. Note.—Cited in *McDow v. Brown*, 2 S. C. 109, 111; *Lost Bonds Case*, 15 S. C. 231, 233; *White v. Hewitt*, 86 S. C. 584, 68 S. E. 823.

For other cases, see *Compromise and Settlement*, Cent. Dig. § 28; Dec. Dig. ⚡8.]

Before Dunkin, Ch., at Newberry, July Sittings, 1848.

Dunkin, Ch. John C. Durham died on the 28th October, 1843. After his decease, on the same day, three witnesses appeared before a Magistrate, and made oath that they

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heard *the deceased, being then weak in body, but of sound mind and memory, make the following disposition of his property, viz: That he wished all his just debts to be paid, and all that was left to be equally divided between Thomas B. Wadlington and Caroline J. Wadlington. An additional affidavit was made, which it is not necessary to notice particularly. Not long after the death of John C. Durham, Ann B. Wadlington, the mother of Thomas and Caroline, (the other defendants,) obtained letters of administration on the estate of John C. Durham.

The deceased had never been married. The complainant was his brother, and resided in North Carolina. The deceased had two sisters, Sarah Pitts and Martha Sturman, who had removed to the West, and of whom tidings had not been received for some years. Complainant came to South Carolina, some six weeks after the death of his brother, for the purpose of looking after his interest in his estate. He took the advice of Henry Summer, Esq., who gave it as his opinion that the nuncupative will could not be sustained. They then spoke about the sisters in Indiana. It was not known, says complainant's witness, whether they were alive or dead. An interview afterwards took place between complainant and the witness, and Thomas B. Wadlington. They valued the estate, real and personal, at something over eight thousand dollars. It was finally settled down that T. B. Wadlington should give to complainant one-fifth of this sum, which was \$1,600, to wit: \$800 in cash, and \$800 in twelve months, for which a note was given. The agreement was accordingly executed in presence of Ann B. Wadlington and complainant's witness, Spencer B. Durham. The agreement bears date 5th December, 1843—is formally drawn, and in consideration of sixteen hundred dollars, bargains, sells, relinquishes and releases, to Thomas B. Wadlington, all the complainant's interest, right, title and claim, to the estate of John Durham deceased, in the district and State aforesaid, and describes the situation or location of the estate. On the 8th January, 1845, complainant returned to this state, received from defendant, Thomas B. Wadlington, eight hundred and fifty-six dollars,

being the credit part of the purchase money with interest, and signed a receipt in the following terms: "Received of Thomas B. Wadlington, sixteen hundred and fifty dollars, in full of my share of the real and personal estate of John Durham, deceased."

"January 8, 1845.

(Signed) Nathaniel Durham."

On the 1st. May following, this bill was filed, alleging that at the time of the sale, the complainant was "under the impression and belief, that the estate of John C. Dur-

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ham, deceased, was distributable between himself and Sarah Pitts and Martha Sturman, his sisters; both of whom were supposed to be living, their deaths not having been heard of or known to the complainant, or to the said Thomas B. Wadlington, and the said Ann B. Wadlington, at the time the said settlement or sale took place, and he expressly charges that it was so understood by the said Thomas B. Wadlington and Ann B. Wadlington, his mother, to wit: That complainant sold only one-third of the estate," &c.

The answer of Thomas B. Wadlington is very full and minute, and cannot well be abbreviated. He sets forth, however, the circumstances connected with the nuncupative will, by which the bulk of the property of the deceased was bequeathed to the defendant and his sister. That he was about to institute proceedings in the Court of Ordinary, for the establishment of the will; in consequence of uncertainty in the proof as to a particular formality, made a compromise with the complainant, and purchased from him for sixteen hundred dollars, "all his interest in, and his right, title and claim to said estate." He denies explicitly, that there was any agreement or understanding, at the time of said purchase, that defendant was purchasing only one-third part of the estate of John Durham, deceased. He states that "he did not then know whether the complainant was the sole heir and distributee of the estate or not; he had heard that the deceased had two sisters, Mrs. Sturman and Mrs. Pitts, but they had not been heard from by their relatives in this district, within thirteen years, and it was unknown to the defendant whether they, or either of them, were living or dead, at the time of the death of the said John Durham, and if dead, whether they had left issue then living or not." That the agreement was, as is expressed in the deed, that he was purchasing all the right, title and interest, of the complainant in the whole estate, real and personal, of John Durham; whether that interest should turn out to be one-third or one-half, or the whole; and that the defendant thought it not improbable at the time of purchase, that he would thereby acquire the whole estate. That the circumstances which induced complainant to accept his proposal, were,

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as he supposes, the strong moral claims of this defendant and his sister, and the chance that they would establish the nuncupative will.

Sometime after the defendant had purchased complainant's interest, to wit: in February, 1844, he and his sister filed a petition in the Court of Ordinary, praying the examination of the witnesses as to the nuncupative will, &c. That the complainants, Mrs. Sturman and Mrs. Pitts, were made parties by publication, and they were required to answer in June following. In July, 1844, the defendant purchased from

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*Henry Summer, Esq., the Attorney of the heirs of Mrs. Pitts, their share of the estate, for three thousand dollars.

The principle of law applicable to this case is comprised in § 131, 1 Story, and it is, among other things, there said, "where a compromise of a doubtful right is fairly made between the parties, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result."

The answer of the defendant is conclusive that the complainant knew as much of the facts as the defendant knew. The evidence on the part of the complainant proves not less clearly that he was at least as well informed as the defendant as to the probability of establishing the nuncupative will. But how does it now appear that the defendant did not pay to the complainant for his right just sixteen hundred dollars more than it was worth?

The defendant's rights can be in no manner affected by the initiative proceedings before the Ordinary. Although he had purchased the complainant's right, he did not know what might be the rights of the sisters, and as to them, it was important to him, if possible, to establish the will.

The Court cannot say the opinion of counsel was erroneous which recommended the complainant should be made a formal party, although his rights were in the defendant. Then probably, in July, 1844, the defendant had ascertained that the heirs of Mrs. Pitts were his only competitors, and he preferred to purchase his peace, even at an extravagant price, rather than encounter the hazards of litigation.

The Court is of opinion that the bill must be dismissed; and it is so ordered and decreed.

Copy of Agreement, under seal, between Nathaniel Durham and Thomas

B. Wadlington.

State of South Carolina,

Newberry District.

Know all men by these presents that I, Nathaniel Durham, of the State of North Carolina, Chatham County, do grant bargain, sell, release and relinquish unto Thom-

as B. Wadlington, of the State and district aforesaid, all my interest, right, title and claim to the estate of John Durham, deceased, of State and district aforesaid. The said estate is situate on waters of second creek, and on the creek itself. In consideration of which he pays to me the full and legal sum of sixteen hundred dollars; my right, title, interest and claim to said John Durham's estate, both real and personal, I do bind myself, heirs, executors, administrators and assigns forever.

Given under my hand and seal this the

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fifth day of De*cember, in the year of our Lord one thousand eight hundred and forty-three.

(Signed) Nathaniel Durham, (L. S.)

Witness:

Ann B. Wadlington.

S. B. Durham.

The plaintiff appealed from the decree of his Honor Chancellor Dunkin. and moved to reverse the same, on the following grounds, viz:

1. Because it was proved that plaintiff sold to the defendant, Thomas B. Wadlington, only one-third of the estate of John Durham.

2. Because the *res gestæ* of the whole transaction show that it was understood between the parties, that only one-third of the estate of John Durham was sold by plaintiff to T. B. Wadlington, defendant.

3. Because, according to the principles of Equity, the Chancellor should have decreed that one-half of one-third of the estate of John Durham should be accounted for, to the plaintiff, by T. B. Wadlington.

4. Because the defendant, T. B. Wadlington, told plaintiff that the receipt would make no difference, worded as it was, as he only wanted it to return to the Ordinary.

5. Because the decree is contrary to the equity of the case.

H. Summer, plaintiff's solicitor.

JOHNSTON, Ch., delivered the opinion of the Court.

We concur in the decree, which is hereby affirmed, and the appeal dismissed.

The whole Court concurred.

Decree affirmed.

2 Strob. Eq. 262

T. Y. NEELY v. JOEL L. ANDERSON.

(Columbia. Nov. and Dec. Term, 1848.)

[*Equity* ⇐94.]

The general rule in this Court, as to parties, is that all persons interested in the subject matter of the litigation, should be made parties, either complainant or defendant.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 252; Dec. Dig. ⇐94.]

[*Parties* ⇐76.]

The proper way to take advantage of the want of proper parties to a bill, is by demurrer, if the omission appears on the face of the pleadings, and by a plea, if it does not so appear.

[Ed. Note.—Cited in *Clark v. Tompkins*, 1 S. C. 124.

For other cases, see *Parties*, Cent. Dig. §§ 117-121; Dec. Dig. ⇐76.]

[*Equity* ⇐117.]

It is the duty of the defendant, who objects to the complainant's bill for the want of proper parties, to inform him, by pleading, who are the proper parties; or in law phrase, "to give him a better writ." But this rule is within the discretion of the Court. And when it is perceived that the parties, who are directly interested, are not before the Court; that they will not be bound by its decrees, but be entitled to another hearing in a suit to be instituted by them:

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*when it also appears that the persons omitted are the only real parties in interest, and that they are infants, and on that account more especially entitled to the protection of the Court, it will pause and suspend its judgment until all proper parties are before it.

[Ed. Note.—Cited in *Hopkins v. Hopkins*, 4 Strob. Eq. 216, 53 Am. Dec. 663; *Fraser & Dill v. Charleston*, 13 S. C. 545.

For other cases, see *Equity*, Cent. Dig. § 288; Dec. Dig. ⇐117.]

[*Contracts* ⇐88; *Principal and Agent* ⇐69.]

[Contracts between agents and principals are always scrutinized with jealousy, even when there is no doubt as to the legal capacity of the principal; but where he seeks to avoid a contract on account of incapacity, inadequacy of price, undue influence, etc., and there is a mass of evidence to prove imbecility of body and mind and incapacity for business, the defendant must show that the plaintiff not only perfectly understood the terms of the contract, and had capacity to appreciate them, but that he entered into it freely and fairly, and that it was rational and upon adequate consideration.]

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 404; Dec. Dig. ⇐88; *Principal and Agent*, Cent. Dig. § 134; Dec. Dig. ⇐69.]

Before Caldwell, Ch., at Laurens, June Sittings, 1848.

The bill in this case was filed by the plaintiff against the defendant to set aside two deeds, made by the plaintiff, conveying all his property to the defendant, on various grounds of incapacity on plaintiff's part to execute them; of inadequacy of price, of fraud, undue influence, unfairness, &c. on the part of the defendant; and also for such matters of account as may exist between the parties; and if the second deed of conveyance, for the tract of land, be not set aside as fraudulent and void, then the defendant to account for and pay over to the plaintiff the sum of twelve hundred dollars, the consideration therein stated; and that he may pay over to the plaintiff one-half of the amount claimed for the building of the bridges (as alleged,) and that defendant may be restrained, by the order and injunction of the Court, from further intermeddling or interfering with the property embraced in the first mentioned deed, and that plaintiff may

be protected in the possession and enjoyment thereof, until the further order of the Court, &c. The answer denies all the charges of incapacity, undue influence, unfairness, fraud, &c. and details minutely the circumstances under which the plaintiff made the deeds to the defendant, and how he has acted towards the plaintiff; the answer alleges that the defendant has paid out large sums of money for the plaintiff, and that he is greatly indebted to the defendant, who sets forth the same in exhibit A. filed with his answer.

After a very full hearing of the case, his Honor decreed as follows:

Caldwell, Ch. In this case there was a great number of witnesses examined, and it is worthy of remark that, although they differed in their testimony, there was no effort to impeach the character of any of them: the great confidence that is reposed in the sincerity, impartiality and truth of the witnesses, increases the difficulty of deciding some of the questions that arise in the case. The plaintiff, T. Y. Neely, was the brother of the wife of the defendant, Dr. Joel Anderson; he was possessed of a valuable plantation and thirty three negroes; he was a bachelor, residing on his plantation, and within a short distance of his brother-in-law: he had for years been the victim of intemperance, not by occasional but by habitual indulgence; his body and mind had been affected by it, but the extent of the injury was the principal point of controversy. The defendant and his wife

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entertain*ed serious apprehensions that the plaintiff intended to marry a woman in the neighborhood whom they thought unfit and unworthy to become his wife, and it was alleged they had fears that under improper influences he would dispose of his property. The condition of the plaintiff's nervous system, and his defect of vision arising from his habits, independently of their influence upon his mind, rendered it necessary that some one should attend to his business, which was becoming somewhat embarrassed; the defendant acted as his agent. The plaintiff's health had not been good for a considerable time before the execution of the deeds, and the defendant was his physician.

The two deeds were executed by the plaintiff on the same day, 6th of May, 1847, to the defendant: the one (exhibit A.) conveyed two tracts of land, the first containing between one thousand and eleven hundred acres, lying in the fork of Saluda and Reedy Rivers, in Laurens District, and the second containing two hundred and fifty-five acres, west of Saluda River, in Abbeville District: and also conveyed thirty two negroes and all his plantation tools and stock of every description, and his interest in the charter of a bridge over Reedy and Saluda Rivers, (granted to plaintiff, George Anderson and

Robert Cunningham) in trust to pay out of the income of said property, as early as practicable, all his just debts, and to permit him to reside at the homestead place, where he then lived, during his life; but the said Anderson was to superintend and manage the plantation and slaves, and all the other property conveyed, to the best advantage, and to pay over to him, annually, the net income of the same during his life, and, at his death, to continue his supervision and management of said estate, for the sole and separate use of plaintiff's sister, Rebecca, during her life, and at her death, to divide the estate and the increase of the slaves, if any, amongst such children as the said Rebecca might leave surviving her, share and share alike: the children of any deceased child to take the share to which their parent would be entitled if living: but should plaintiff survive his sister, then, and in that event, the said trustee was to divide said property equally amongst her surviving children at plaintiff's death, including the children of any deceased child who was to take the share which the deceased parent would take if living. The other deed (B.) was a conveyance of one hundred and seventy acres, lying in Laurens District, in consideration of twelve hundred dollars, to the defendant, in fee simple, in the usual form and with a general warranty. There was no money paid, or note given, when these deeds were executed by the plaintiff. The first question is, was the plaintiff insane on the 6th of May, 1847, when he executed the two deeds of which the exhibits A. & B. filed

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*with the bill are copies? Upon this point there was the widest difference of opinion among the witnesses: some of them thought that he had been insane before that time, and that he continued in the same condition for some considerable period afterwards: other witnesses, and particularly the subscribing witnesses to the deeds, entertained and expressed a very different opinion of his capacity, and thought that he was competent to make the contract.

These discrepancies of opinion, no doubt, arose from the different powers of observation, and from the different opportunities they had of seeing and conversing with the plaintiff. There are some conclusions from the evidence that I think are irresistible. The testimony of several witnesses concurs in establishing the fact, that the plaintiff was insane at particular periods; but there is a material difference between occasional and continued insanity—it is much easier to establish the former than the latter: indeed in cases of partial insanity, it is often extremely difficult to detect the exact condition of the mind; in a general conversation, or in the common occurrences of life, one of this particular class often displays more than ordinary ability, but when the subject

upon which he is deranged is touched, his mind seems to lose all its reasoning powers, and he becomes, in a moment, a raving madman. The proof does not bring the plaintiff within that class, and we must therefore enquire into the indicia of a general insanity. The sources from which some of the witnesses drew their conclusions, were from the appearance of the plaintiff, his conversations, and sometimes from his conduct: to take any of these things separately, (except on particular occasions, when he was insane, beyond all doubt,) might be insufficient to convince us of the fact, but to add them together would produce a much stronger belief of his insanity, were it not that other witnesses, from the very same sources, but at different times, deduced the contrary conclusion, and some of them even made contracts with him. One of the most intelligent witnesses, who attended him as a physician, and was well qualified to judge of the state of the plaintiff's mind and body, and who, in addition to his ability and experience, had the best opportunities, except the defendant, of forming a correct opinion, thought that Neely was insane at the time he executed the deeds, that he had been so sometime before, and continued to be so sometime after their execution.

There are several witnesses who not only corroborate the opinion of Dr. Richardson, by concurring in it, but by what I consider much stronger, the statement of facts that are calculated to raise a strong presumption of some subsisting unsoundness of mind during the period. About one fact I have no doubt, that the plaintiff was occasionally insane;

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his conduct in North Carolina, the incoherent, inconsistent and irrational acts he frequently displayed at his return home, and almost the whole course of his conduct, on his trip to Columbia, are inexplicable upon any other supposition. On the day he made the deeds he appeared to the witnesses to be rational; he conversed intelligibly with the gentleman who drew them, and behaved with decorum; there was nothing indicating insanity on this occasion. It was argued, that as there was no suspicion of his being insane by the subscribing witnesses, that therefore there was no effort made to detect it,—this may be possible, but where there is a general insanity, a few minutes of conversation will usually develop it. The proof is sufficient to establish the plaintiff's insanity, before and after the execution of the deeds, but it is difficult to say, except by relying on a presumption drawn from circumstances, that he was insane on the day he made the deeds. It may have been the case, that his mind, on that occasion, notwithstanding it had been greatly impaired, by his body having been wasted and worn down for years by habitual drunkenness, may have resumed, to a considerable extent, its functions, and the lamp of reason, although sinking to

extinction, may have, for a short time, relumed with a brighter and a steadier light. We well know that there are lucid intervals in lunacy, and this species of insanity (which is becoming almost an epidemic,) may have its paroxysms; this may, in some degree, account for the difference of opinion between witnesses of such intelligence and respectability.

If the plaintiff had committed a crime during this period, it would have been difficult for a jury to have found him guilty, on the proof of the general condition of his mind, unless the evidence had been clear and conclusive of his having had the use of his reason when he perpetrated the offence. From a comparison of the proof, and from the general weight of the evidence, there is a reasonable doubt raised as to the general soundness of the plaintiff's mind for a period of some months, both before and after 6th of May, 1847. But the case does not depend upon the plaintiff's being insane at the making of the contract: the next question, therefore, becomes one of importance, whether he was in such a condition of bodily and mental weakness, connected with the circumstances under which the contract was made, that entitles him to a rescission of it? The defendant occupied peculiar relations to the plaintiff, and such as were calculated to create great affection and confidence; he was his brother-in-law, his agent, and his physician; these would naturally give the defendant influence over him, if he had been of strong mind, but over one of such enfeebled body and imbecile mind, there can be no doubt the influence would be irresistible. Neely's necessities almost compelled him to

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have an agent; he was not only unable but unfit to attend to business, and no one from their neighborhood and connexion could have been selected as suitable as the defendant. The contracts between agents and principals are always scrutinized with jealousy, even when there is no doubt as to the legal capacity in the principal; but when there is such a mass of evidence, (as in this case) of his imbecility of body and mind, and of his inability and unfitness to attend to business, the defendant must shew that the plaintiff not only perfectly understood the terms of the contract, and had capacity to appreciate them, but that he entered into it freely and fairly, that it was rational, and the consideration was adequate.

But the case does not stop here; the defendant was a physician, and at the time of making the contract, was the medical adviser of the plaintiff, who made it at the defendant's house; no one probably knew the exact condition of his mind, body, habits and peculiar influences that would operate upon him, as well as the defendant.¹

The witnesses testify to very strong dec-

¹ Dent v. Beant, 18 Cond. E. Ch. Reps.

larations made by the defendant as to the plaintiff's incapacity; these declarations are entitled to great weight, and cannot well be resisted; they have been corroborated both by the course the defendant has adopted towards the plaintiff, and by the testimony of several intelligent witnesses, who concur with the defendant's declarations in the opinion, that Neely was incapable of making a contract; if his declarations were taken to their full extent, they would establish the plaintiff's insanity, but in the most mitigated view, they go to shew that he thought Neely incapable of making a contract of marriage; if that opinion was sincere and correct, of course he was unable to make a contract of the magnitude of this, disposing of his whole estate. From whom did the proposal to make this contract, proceed? Can any one believe that it originated with Neely? The plaintiff, as far as we can judge from the evidence, had no pre-existing or adequate motive to make it until after the defendant had expressed his fears that the plaintiff might be induced to marry a worthless woman; the defendant had a motive, which it is very easy to perceive, to prevent the marriage, and to secure the property from Neely's improvidence, and from the improper influences of others. The defendant's declarations gave color to his conduct through the whole transaction. When one undertakes to make a contract with another, of doubtful capacity, the burden lies upon him who sets up such a contract, to shew clearly that it was fair and reasonable, and that there was an adequate consideration; on these points the defendant's proof has failed, and when counterbalanced with the plaintiff's evidence on the question of capacity, the case comes within the well established rules of equitable

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relief. The gross inadequacy of *consideration connected with the plaintiff's imbecility, will be sufficient to set aside the contract, but when these things are considered in conjunction with the confidential relations of agent and physician, the conclusion is irresistible.²

It is therefore ordered and decreed that these contracts between the parties, and the deeds described in the pleadings, are null and void, and that they be set aside; that the said deeds be delivered to and be cancelled by the Commissioner. It is further ordered and decreed, that the matters of account embraced in the pleadings, between the plaintiff and defendant, be referred to the Commissioner to ascertain and report the same.

The defendant appealed from so much of the decree as sets aside the deeds, and moved to reverse the same in that respect, on the following grounds:

1st. Because there was no evidence, whatever, to show that the complainant was in-

sane at the execution of the deeds, and the proof on the part of the defendant was conclusive that he was in his proper mind.

2d. Because his Honor is mistaken in supposing that the fact of the complainant's "insanity at particular periods," was established by the testimony. The proof was, that he indulged in fits of drunkenness, and had occasionally stupified himself in such a way as to be incapable of transacting business.

3d. Because if it had been clearly proved that he was occasionally insane, still this would not affect the deeds made in his proper mind, or leave the impression that they were executed in a state of derangement.

4th. Because his Honor has erred in attaching any importance to the mere opinion of Dr. Richardson, as to complainant's insanity, at the time of executing the deeds, when it was in proof that the doctor neither saw him at the execution of the deeds, nor on the day they were executed.

5th. Because his Honor is mistaken in stating that the proof is sufficient to establish the plaintiff's insanity before and after the execution of the deeds.

6th. Because his Honor has misapprehended the declarations of the defendant in supposing that they go to show that Neely was incapable of making, at any time, a contract of marriage. His apprehensions were, that in a fit of drunkenness, he might be induced to contract a marriage which would be void.

7th. His Honor is also mistaken in supposing that Neely had no adequate motive to make the contract. Dr. Anderson was to take charge of his property, manage the same, and pay over to him the nett proceeds of it during his life. This was certainly some consideration, and might be, to a man in Neely's situation, without wife or child, or the pros-

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pect of *having either, an adequate consideration for securing the property in remainder to an only sister, and her children.

8th. Because his Honor has erred in decreeing that the burden of proof lies on the defendant, to show that the contract was full, reasonable, and founded on an adequate consideration, when the rules of law require that the burden of proof shall be on the party attempting to set aside an agreement, to show that it was entered into unfairly, and without consideration.

9th. That the case was not brought by the testimony within the rules of equitable relief.

10th. Because both deeds were executed fairly and bona fide, when the complainant was competent, and upon not only a good, but a valuable and adequate consideration.

11th. Because the decree is in all other respects contrary to law, and the well established principles of equity jurisprudence.

Sullivan and Perry, for motion.

Irby and Young, contra.

² Small v. Gasque, Charleston, Jan. 1848. Rutherford v. Ruff; 4 Des. E. R. 350.

DARGAN, Ch., delivered the opinion of the Court.

On the circuit trial, this case underwent a very careful and patient investigation by the Chancellor who presided. The question upon which the present disposition of the case by this Court will turn, was not considered by him; not having been made in the pleadings nor in the argument on the circuit. Nor is it made in any of the grounds of appeal upon which the case has been brought before this Court. It is with reluctance, therefore, that this Court feels itself compelled to consider an objection, which has not been presented by any of those forms of pleading and practice by which issues of fact and law are brought under the cognizance of Courts of justice, and which was alluded to only in the latter stage of the argument on the appeal, on a suggestion thrown out incidentally by one of the members of this Court. As the judgment now about to be rendered will be upon a question of pleading, it is my purpose to avoid any expression of opinion upon the merits of the case, or upon any of the various grounds of appeal assumed against the Chancellor's decree.

By one of the deeds, the validity of which is involved in these proceedings, the complainant conveyed to the defendant his plantation containing between one thousand and eleven hundred acres, lying in the fork of Saluda and Reedy Rivers, in Laurens district, and thirty two slaves, and all his plantation tools and stock of every description, and his interest in the charter of a bridge over Saluda and Reedy Rivers; in trust, to pay out of the income of said property, all his just debts, and to permit him (the complainant) to reside at the homestead place,

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where he then lived, during his life; *but the said Anderson was to manage and superintend the said plantation and slaves, and all the other property conveyed, to the best advantage, and to pay over to him annually, the nett income of the same during his life, and after his death to continue his supervision and management of the said estate for the sole and separate use of the complainant's sister Rebecca (defendant's wife) during her life, and at her death, to divide the estate and increase of the slaves, if any, among such children as the said Rebecca might leave surviving her, share and share alike; the children of any deceased child to take the share to which their deceased parent would be entitled if living; but should the complainant survive his sister, then and in that event, the said trustee was to divide the said property equally among her surviving children at the complainant's death, including the children of any deceased child, who were to take the share which the deceased parent would take if living. These are the provisions of the deed of trust.

The bill was filed by the said T. Y. Neely against the trustee, Joel Anderson, to set aside this deed, and also another deed which he executed to the said Anderson, conveying to him, absolutely, another and a smaller tract of land, for the consideration expressed of \$1,200, on the ground that the said complainant, at the time of their execution, was not of sound and disposing mind, and that undue influence had been exercised over him.

The bill was filed on the 29th July, 1847, while the defendant's wife was living, but she was not made a party. She was dead at the time of the trial, and on her death, according to the construction of the deed, which this Court has adopted, the rights of her children whom she left surviving her, became vested, and certain, by way of remainder, to take effect in possession and enjoyment at the death of the complainant. On that event, according to the provisions of the deed, the trust estate was to be equally divided among the children whom the complainant's sister should leave surviving her, with the right of representation on the part of the children of those who should not be living. This is the clear and obvious construction of the instrument.

At the time of the trial, then, the children of Mrs. Anderson had a vested estate in remainder as tenants in common, the enjoyment of which was only postponed to the period at which the precedent life estate should expire. And not being parties to the bill, it is very clear that any decree which this Court might make in the present state of the pleadings, would be nugatory as to them.

The rule in this Court as to parties, is, that all persons interested in the subject matter of the litigation, should be made parties, either complainant or defendant. The reason of the rule is twofold. With all parties in

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interest before it, *the Court can do more perfect and complete justice, and adjudicate their rights definitively and conclusively, and thus put an end to all future controversy. And secondly, it is but simple justice, that the party against whom the Court enforces its decrees, should be protected in the performance of what he is required to do, which protection cannot be afforded against a person who is not a party to the cause. The rule being a general one, admits of a variety of exceptions. It was adopted as one convenient and conducive to the due and proper administration of justice, and would not be regarded as inflexible, where its application would be absurd, impracticable, or lead to inconvenient delays. It is unnecessary to discuss the circumstances under which the rule would be relaxed, as the case before us does not constitute one of its exceptions.

The proper way to take advantage of the want of proper parties to a bill, as Lord El-

don observed, in *Cockburn v. Thompson*, 16 Ves. 325, is by demurrer, if the omission appears on the face of the pleadings; and by a plea, if it does not so appear. It is the duty of the defendant who objects to the complainant's bill for the want of proper parties, to inform him by pleading, who are the proper parties; or in law phrase, "to give him a better writ."

But this rule is within the discretion of the Court. And when it is perceived, as in this case, that the parties who are directly interested, are not before the Court, that they will not be bound by its decrees, but be entitled to another hearing in a suit to be instituted by them; when it also appears that the persons omitted are, with the exception of the defendant as a creditor, the only real parties in interest, and that they are infants, and on that account more especially entitled to the protection of this Court, it will pause and suspend its judgment until all proper parties are before it. It is perhaps a duty incumbent on the Court to pursue this course lest the rights of some of the omitted parties might be prejudiced by its premature action. It is necessary to a full adjudication of the rights of all the persons interested in the trust deed, that the decree be set aside, and the case be remanded to the circuit, with leave to the complainant to amend his bill by making the proper parties.

In regard to that part of the bill which seeks to set aside the deed of the complainant for the smaller tract of land, no other parties are necessary. By that deed, no trust is created, and no other persons are interested than the defendant. And the case might now have been retained, and a decree rendered as respects this deed. But this Court is disposed to avoid any expression of opinion upon the merits of this controversy at the present stage of the proceedings. As that portion of the case which involves much

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the larger interest is *necessary to be remanded, it is thought to be most conducive to justice, that the whole case should go back to the Circuit Court, divested of the influence which any expression of opinion here might exert upon the result of the trial.

It is therefore ordered and decreed that the circuit decree be set aside, and the case be remanded to the circuit for a new trial, with leave to the complainant to amend his bill by making the children of Mrs. Rebecca Anderson, parties defendants.

JOHNSTON, Ch., and DUNKIN, Ch., concurred.

Decree set aside and case remanded.

2 Strob. Eq. 272

THOMAS GARRETT v. JOHN W. GARRETT et al.

(Columbia. Nov. and Dec. Term, 1848.)

[*Equity* ⇨330.]

Multifariousness is a good ground of demurrer to a bill in Equity; but if the defendant, at the hearing, waive the objection of multifariousness to any part of the bill, the demurrer as to that part will be overruled.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 663; Dec. Dig. ⇨330.]

[*Executors and Administrators* ⇨109.]

The custom is to allow executors, or administrators, reasonable charges for the hire of auctioneers and clerks of their sales, as expenditures for the benefit of estates.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 438; Dec. Dig. ⇨109.]

[*Wills* ⇨583.]

Testatrix, in general terms, gave and bequeathed all her property, &c., and the will contained no indication of an intention on her part, to detract from its ambulatory capacity—held that all the personal property, of which she died possessed, passed under the will, although a part of it only had been specified therein.

[Ed. Note.—Cited in *Swinton v. Egleston*, 3 Rich. Eq. 205.

For other cases, see *Wills*, Cent. Dig. § 1271; Dec. Dig. ⇨583.]

[*Wills* ⇨565.]

The general rule is that testaments take effect, or, as it is sometimes expressed, speak, at the death of the testator, and are to be applied to his personal estate as it exists at that time. And this should be the construction in all doubtful cases.

[Ed. Note.—Cited in *Scaife v. Thomson*, 15 S. C. 358; *Welborn v. Townsend*, 31 S. C. 412, 10 S. E. 96.

For other cases, see *Wills*, Cent. Dig. §§ 1233-1238; Dec. Dig. ⇨565.]

[*Wills* ⇨481.]

Where it can be pronounced, with confidence, that the testator meant to announce an intention confined to the state of affairs existing at the date of his will, either in reference to the specific subjects which he wished to pass under it, or the persons to enjoy them, or truly intended in any other way to abridge the ambulatory capacity of the instrument, the construction must be such as to conform to the special intention thus indicated or expressed.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1005; Dec. Dig. ⇨481.]

[*Executors and Administrators* ⇨111.]

[When a party litigates for himself under the character of executor, he cannot charge the estate with the fees paid to counsel.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 462; Dec. Dig. ⇨111.]

Before Caldwell, Ch., at Edgefield, June Sittings, 1848.

Caldwell, Ch. This case comes up on exceptions, by both parties, to the report of the Commissioner, and his report thereon.¹

¹ Vide 1 Strob. Eq. 96.

Plaintiff's Exceptions.

1st. The first exception was allowed by the Commissioner, and appears to be in conformity to the decree.

2d. The second exception is, "because the

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Commissioner *has erroneously charged the payments, made to his solicitors by Thomas Garrett, for professional services in these cases, and for counsel and advice touching his administration of the estate of John C. Garrett, to, and deducted them from, the estate of Elizabeth Garrett, deceased; whereas it is submitted that the said payments should have been charged to and deducted from the estate of John C. Garrett."

The difficulty of deciding on this exception, arises from the report not specifying what services were rendered by counsel to the executor of John C. Garrett, as no exception has been definitely made to the amount. When the party litigates for himself, under the character of executor, he cannot charge the estate with the fee. But it would seem that some fee, in a case like the present, ought to be allowed the executor for the estate generally, but the evidence and the report do not show what it ought to be. I must, therefore, recommit the report for further evidence to illustrate the point.

3d. The third exception is allowed by the Commissioner.

4th. The fourth exception is, "because the Commissioner erred in deciding that the notes on C. J. Garrett, Polly Hammond, Robert J. Merriwether, and the account on Wm. Garrett, bearing date subsequent to the date of the will of testatrix, (and amounting, with interest, as stated by the report, to \$1053.73,) were intestate property, and adding that amount to her supposed intestate estate for distribution; whereas it is submitted that the said notes and the account on Wm. Garrett, do pass under and by said will, and the amount thereof should have been set down and charged in said report as testate property, and distributed among the legatees of Elizabeth Garrett."

The terms of the will define the property given—"my notes of hand, amounting, at this time, (date of will 9th March, 1843,) to two thousand six hundred and fifteen dollars; judgments, at the Court of Edgefield, amounting to \$370; cash, at present, (including part of my crop of cotton,) amounting to \$540, all of which property, I give and bequeath in the following manner," &c. What notes these were must be a matter of parol proof; no schedule of them, at the time of making the will, has been proved; but it would seem that only such notes as were found in her possession at her death, bearing date before the date of the will, ought to be considered as embraced within it, but those dated afterwards could not be claimed as bequeathed by it. The character of such a legacy is specific, and if the note, or bond,

or judgment, be not designated either by time, place or other circumstances, it will be difficult to find any rule by which it can be considered as specific: I cannot, therefore, from the evidence, even presume that the notes dated after the will were renewals of those designed to be bequeathed by the

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*will, and as the aggregate of notes specified in the will exceeds the amount of \$2615, I think the Commissioner has properly refused to allow these notes. The account on William Garrett, clearly, does not come within either the letter or spirit of the will.

5th. The fifth exception is, "because the Commissioner erred in deciding that all the personal chattels of Elizabeth Garrett, except the specific articles mentioned in the will and stated in the report, were intestate property—the chief articles of which were the crops of cotton, corn, and other provisions, farming utensils and household furniture, as appears by the inventory and sale bill, and the gross amount of the sales thereof is set down in the report at \$3431.11: whereas it is submitted that the whole of the said property passed under and was bequeathed by the general terms used in said will, and the amount of the sales thereof, (\$3431.11,) should have been added to the testate estate of Elizabeth Garrett, and distributed among her legatees accordingly. The report should also have stated the nature and kind of property which is set down and charged as intestate." This question has already been virtually decided by the Court, and cannot be reconsidered here; the only way to reach it would be by a bill of review, or on a bill for a re-hearing. This exception is overruled. These views dispose of the sixth exception, which only presents the question of the construction of the will in a more general form, as to other property of Elizabeth Garrett, (which the Commissioner considered intestate,) than the fourth and fifth exceptions present it.

Defendant's Exceptions.

1st. That the Commissioner has erred in allowing the executor, Thomas Garrett, commissions for paying out his own share. The Commissioner overrules this exception, on the ground that "it is immaterial and will not vary the effect." It may be so, but the principle is settled by the express terms of the Act,² that no executor or administrator, who may be creditors of any testator or intestate, to whom any sum of money or other estate, may be bequeathed, shall be entitled to any commissions for paying or retaining to themselves any such debts or legacies: this exception must be sustained.

2d. That the Commissioner has erred in allowing said executor, as expenses of administration, his payments to the auctioneer \$10, to the clerk of the sales \$20, to the Or-

² A. A. 1789.

dinary, after bill filed, \$, and to his counsel in these suits \$250. Part of this exception has already been disposed of. On inquiring into the practice of the Ordinaries, in passing upon the accounts of executors and administrators, I find great discrepancy as to the allowance of the two charges of auctioneer and clerk. If there had been any

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settled and uniform practice throughout the country, it might raise a presumption that such was the construction given by those who passed the Act of 1789. Whatever the executor or administrator can do in performing the duties of the office, another ought not to be paid to do, nor should he be allowed to employ others to do it for him, and charge the estate with services. The Act only allows executors or administrators $2\frac{1}{2}$ per cent. for receiving, and $2\frac{1}{2}$ per cent. for paying away in credits, debts, legacies, or otherwise, for their care, trouble and attendance in the execution of their several duties. I have understood that these charges have been heretofore considered and decided upon, but I have not been able to find such decision either in the reports or manuscripts.³ The English cases can furnish no light on the subject, as in that country executors or administrators receive no compensation for their services, and are therefore allowed to charge expenses incurred in travelling, employing bailiffs to collect debts, &c., which have been refused to be allowed here. There is a class of services which the executor or administrator cannot render, and which the estate he manages must frequently require, and of course the estate must pay the expense, such as counsel fees, copies of certified papers, overseers' wages, &c.; these are exceptions to the general rule; but the services of the clerk, and (probably) of an auctioneer, do not come within the reason of the exceptions, although the charges for the services of the latter have been allowed by some Ordinaries in adjusting the accounts of administrators and executors, on the ground that these services enhance the value of the estate sold. When there is any doubt, I am inclined to disallow such charges, and to give a strict construction to the statute; as compensation for extraordinary services is provided by it, and if the executor or administrator renders them, he can resort to his remedy at law. The exception as to these two charges is sustained, but as to the Ordinary's fees is overruled. The question as to the counsel fees, (notwithstanding they come within the exceptions to the rule,) in relation to which there is no evidence, must be remitted for further proof.

3rd. That the Commissioner has erred in regard to the cash on hand at the death of Elizabeth Garrett, \$924.75, and notes for \$ of principal, and judgments for \$

principal, as passing by the will, whereas no cash, or at most \$540, and notes and judgments, to the amount only of \$370, did so pass.

By the terms of the will, the testatrix disposed of only \$540 in cash; whether the identical cash then on hand was continued in her possession till her death, there has been no evidence to establish; but as she left a larger sum, it may be fairly presumed that

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the \$540 were kept by her, and added *to, until it accumulated to \$924.75 at her death; but I cannot perceive how the accumulated amount of \$384.75, which was not in esse at the execution of the will, and was not intended to be embraced in it, can pass under it. The words are "cash at present," (including part of my crop of cotton;) but had they been "cash in future" or "cash at my death," such words would have warranted a different construction and have been sufficient to carry the whole amount found on hand. It would be dangerous to extend the construction to this article, when a different construction is applied to all others. Suppose she had converted the whole of her personal property, not enumerated in the will, into cash, would it pass under such a will? I am of opinion the amount stated in the will must govern, and the exception must be sustained as to the balance of the cash (\$384.75.) As to the judgments and notes, that were in existence at the date of the will, they would seem to pass under it, and it would be too stringent a construction of the will, to restrict the notes and judgments to the exact amount, when the things, the subject matter of the specific legacy, were bequeathed, and not the exact sum; in this respect they materially differ from the cash at present, about the amount of which there could be no dispute.

The specifying the amounts of the notes and judgments was unnecessary, and may be considered as being mere matter of description, of such an immaterial character as not to invalidate the specific bequests, and ought no more to deprive the legatees of the notes and judgments than the evidence brings within the terms of the will, than an incorrect estimate of the number of acres of a tract of land, whose boundaries were well defined, would defeat the owner from recovering under a valid devise or deed. The part of the exception relating to the notes and judgments is overruled.

As to the issue relating to the tract of land, claimed exclusively by the heirs of Robert Garrett, ordered to be tried at law, the verdict appears to have been well warranted by the evidence, and I have heard no sufficient ground to set it aside.

Here this part of the case would have ended, but the plaintiff Thomas Garrett, filed an amended bill, (after the trial of the issue at law,) to which the defendant demurred. These proceedings bring up new and import-

³ Thuring v. Winthrop, executor, Charleston, 1847.

ant questions not heretofore prosecuted by the pleadings. The amended bill states that there is a mistake of fact, in the statement of his original bill, filed 18th November, 1843, that plaintiff's father was seized of the tract of land of 440 acres, whereon Robert Garrett, in his lifetime, resided; that in reality the said tract was owned in fee by Henry Ware in his lifetime, and at the date of his death—that the said Henry Ware was the father of plaintiff's mother, the said Elizabeth Garrett, and the said Henry Ware, on the 9th January, 1801, duly made and pub-

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lished his last will and testament, bearing date the day and year last aforesaid, and afterwards died, leaving the same of force and unrevoked; and that in and by the third clause of that will, he devises the said tract of land to plaintiff's mother in fee; which said will was duly admitted to probate in common form before the Ordinary of the said District, on the 14th January, 1814, a copy of which is filed with the amended bill and marked Y. That immediately on the death of the said Henry Ware, the plaintiff's father, in right of his wife, and by virtue of the said devise, entered upon and took possession of the said tract of land, and that afterwards the said Robert Garrett, under the circumstances and about the period stated in the original bill, came into the possession of the said tract of land, by the permission and as the mere tenant of the plaintiff's father; that the character of the said Robert Garrett's possession of the said tract of land continued unchanged until his death, although he, in common with the plaintiff and the other members of the family, may have erroneously supposed that the said tract of land was held in fee by the plaintiff's father, and upon his death passed under his will, or descended to his heirs; yet the plaintiff avers, that the said Robert Garrett, in his lifetime, never claimed the land as his sole property, or pretended that his possession thereof was adverse to the rights of his mother or brothers, as he and they understood them to be. That since the death of the said Robert Garrett, the defendants John W. Garrett and John A. Houston and his wife Amy, claimed that the said Robert Garrett died seized of the said land, in severalty and in fee, have received among them all the issues and profits thereof that have since accrued, and the said John W. Garrett is now in possession of the same, the said Houston and wife having conveyed to him their supposed moiety of the same, as the plaintiff has been informed. The plaintiff states that he is advised that as respects the said tract of land, the said Elizabeth Garrett must be regarded as having died intestate, and that the same is distributable between plaintiff and the children of his two deceased brothers, Robert and Henry Garrett, who

with him are the next of kin and heirs at law of the said defendant.

The amended bill further states that plaintiff is seized in fee of a tract of land situate in the District aforesaid, bounded by lands of Wm. King, Margaret Jones, and others, containing 122¼ acres, more or less; whereof mention is made in the cross bill exhibited by the said J. W. Garrett and J. A. Houston and his wife Amy, against the plaintiff and the other parties to this suit, upon the trust, however, that he shall hold one moiety thereof for his own use in fee, and the other moiety for the use of the children of his brother Henry Garrett, in fee, to be equally divided

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among them, share and share alike; *that the last mentioned tract of land consists almost entirely of woodland, and that the plaintiff is desirous that a partition thereof should be made between himself and his cotenants, and is persuaded that the interests of all concerned will be thereby promoted. The amended bill prays that the defendants may answer, and that the tract of 440 acres may be adjudged to be parcel of the real estate whereof the said Elizabeth Garrett, the plaintiff's mother, died seized in fee, and may be ordered to be divided among her heirs at law, according to their respective rights, and that John W. Garrett and John A. Houston and his wife Amy, may be ordered to account with plaintiff for the issues and profits thereof accrued since the death of Elizabeth Garrett, and pay to him such sums of money as shall appear to be of right due and owing to him in this behalf; and that the tract of 122¼ acres may be divided between the plaintiff and the children of Henry Garrett, so that each may have specifically his or her portion thereof, or its pecuniary equivalent, to be enjoyed in severalty; and general relief. To this amended bill the defendants demurred, for the following causes:

1st. That it appears by the said bill, that the same is exhibited by the said plaintiff against these defendants and Susanah Garrett, Richard M. Johnson and others, as defendants thereto, for several distinct matters and causes; in some of which these defendants are no way interested, by means whereof these defendants are put to unnecessary charges and expenses.

2d. That it appears by the said bill that the same is exhibited by the plaintiff against these defendants and others, for partition of the estate of Elizabeth Garrett, and account for the mesne profits of a portion thereof, said to be in possession of defendants, or one of them; whereas the original bill before such amendment was for partition and account of the real estate of John C. Garrett, deceased; by means whereof the said bill is inconsistent and multifarious.

3rd. That it appears by said bill exhibited as aforesaid, that the defendants, or one of them, claim the tract of land which is the

subject matter of controversy, absolutely and exclusively, and yet these defendants are required by said bill to disclose their title to said land, and this Court is besought to try such title, by means whereof, these defendants are to be deprived of their freehold without trial by jury or the law of the land.

The plaintiff has encountered an obstacle in his amended bill that it will be difficult to overcome. Multifariousness is a good ground of demurrer, and I cannot see how he can get around the objection; neither the same parties are interested in all the subject matters of the amended bill, nor are the subject matters at all connected with each other, direct-

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ly or indirectly. Where there is no connecting link that binds both parties and subject matter, the objection is fatal. The plaintiff has an interest in the partition of both tracts of land, if his claims be supported; but the heirs of Robert Garrett have no interest in the tract of 122¼ acres, and how can they with propriety be made parties to its partition? They set up an exclusive and adverse interest in the tract of 440 acres, as to which the issue was ordered. In addition to this, the allegation now is that the latter tract is intestate property of Elizabeth Garrett, which would be the proper subject of partition by a separate bill, and has no connexion with the distribution of her estate under her will, or as connected with her husband's estate. The litigation of other questions between the parties cannot properly draw in the discussion of the rights of the heirs of Elizabeth Garrett, to this tract of land, in the original case, and must be left where it was found, the subject for another suit, as the defendants object. It is ordered and decreed that the demurrer be sustained.

Elizabeth Garrett's Will.

In the name of God, Amen. I, Elizabeth Garrett, of the State of South Carolina and district of Edgefield, being of sound mind and memory, and reflecting on the uncertainty of life, do make, appoint, constitute and ordain this my last will and testament, in form and manner following, (to wit:) first, my will and desire is that all my property, consisting of one tract of land containing two hundred and sixty-nine acres, bought of G. A. McKie and Thomas McKie, three negroes, Clara and her child Richard and Mariah, six Mules, two Waggon, &c., should be exposed to public sale by my executors hereafter named; by notes of hand, amounting at this time to two thousand six-hundred and fifteen dollars; judgments at the Court of Edgefield, amounting to three hundred and seventy dollars; cash at present (including part of my crop of cotton,) amounting to five hundred and forty dollars; all of which property I give and bequeath in the manner following, (to wit:) first, I give and bequeath to my grand-son John W. Garrett, five dol-

lars, to him and his heirs: secondly, I give and bequeath to John A. Houston and his wife, Amy, five dollars, to them and their heirs: thirdly, I give and bequeath to my son Thomas Garrett, one half of the residue or remainder of my estate, to him and his lawful heirs: fourthly, I give and bequeath unto my son Thomas Garrett, one-seventh part of the remaining half, in trust for the benefit, use, and behoof of Richard M. Johnson's wife Elizabeth and her heirs: I give and bequeath my son Thos. Garrett one other seventh part as aforesaid, in trust for the use and benefit of the wife and children of my grandson John C. Garrett: sixthly, I

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give and bequeath one-seventh *part of the remaining half of my estate as aforesaid to Henry Key and his wife Mary; the remaining four-sevenths of one half of my estate aforesaid, I give and bequeath to my four following named grand-children, (to wit:) Sarah Ann Garrett, Caroline T. Garrett, Susannah Garrett and Martha Garrett, each one-seventh part, to them and their heirs: lastly, I do hereby nominate, constitute and appoint my son Thomas Garrett, executor to this my last Will and testament, to carry the same into effect, hereby revoking all other Will or Wills heretofore by me made.

In witness whereof I have hereunto set my hand and seal, this the 9th day of March, in the year of our Lord, one thousand eight hundred and forty-three.

Elizabeth Garrett, [L. S.]

Signed, sealed and acknowledged }
in the presence of us }

Wm. Garrett,
Wm. G. Hammond,
S. Broadwater.

The plaintiff moved the Court of Appeals to reverse, in part, the circuit decree pronounced at June Term, 1848, upon the grounds:

1. So much of the plaintiff's 4th exception as relates to the notes of C. J. Garrett, Polly Hammond and R. Merriwether ought to have been sustained, as the general terms of the will "my notes of hand," are sufficiently comprehensive to embrace the said notes, though made subsequently to the date of the will.

2. The plaintiff's 5th exception should have been sustained, as all the articles of property therein mentioned, were clearly within the contemplation of the testatrix, and as the words of her will sufficiently manifest her intention to dispose of the same.

3. It is respectfully submitted, that the matters embraced in the 5th exception of the plaintiff have not been adjudged in this case, as the only question respecting the construction of Elizabeth Garrett's will, heretofore suggested by the pleadings or considered by the Court, was whether her portion of her husband's intestate estate was disposed of by her will.

4th. The defendants' 3d exception ought to have been over-ruled, so far as the same relates to the sums paid by the plaintiff to the clerk and auctioneer, at the sales made by him as executor; such charges being reasonable and customary, and the services of such persons being generally beneficial, upon such occasions, to the estates of the deceased.

5. It is submitted that the decree is erroneous in sustaining so much of the defendant's 3d exception as relates to the surplus of cash on hand, (\$384.75,) at the death of

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the testatrix *over and above the amount on hand at the date of her will, (\$540:) And the plaintiff will endeavor to maintain, that all the cash had by the testatrix at the time of her death was effectually bequeathed, and that the mention made in the will of the amount of money in hand at its execution, was intended merely to indicate how her cash account then stood, and not to limit the bequest to that particular sum.

6. The demurrer to the bill of amendment, filed since the trial of the issue at law, ought to have been over-ruled, as the defendants at the hearing distinctly waived the objection of multifariousness in respect to so much of the bill as relates to the tract of land of 122 acres, and as the joinder of the matter in the bill of amendment relating to the tract of land of 440 acres, with the matter of the original bill, can breed no confusion, occasion no inconvenience, and subject the defendants to no hardship, all the parties having an interest, and in the same relative proportions, in the matters contained in both bills.

Carroll, defendant's solicitor.

The defendants John W. Garrett and John A. Houston and wife, also appealed from the decree of the Chancellor, on the ground:

That there was no proof that the notes and cash on hand of Mrs. Elizabeth Garrett, returned by the executor, were in existence at the date of the execution of her will; and that at most, not more than the amount of notes and cash mentioned in her will, passed by her will.

Wardlaw, defendant's solicitor.

JOHNSTON, Ch., delivered the opinion of the Court.

A majority of my brethren concur with the Chancellor, in so much of his decree as sustains the demurrer to the amended or supplementary bill; except that, in their opinion, it should have been limited to the tract of 440 acres. In relation to that tract, they conceive the demurrer was well taken; and they deem it unnecessary to add any thing to the observations of the Chancellor. On this point, I have not been able to concur with my brethren: but cheerfully obey their instruction to announce their opinion, as the opinion of the Court.

With respect to the tract of 122 acres, the Court is of opinion that, under the agree-

ment of the parties, the demurrer should not have been sustained; but that a writ of partition should have been awarded; and it is so ordered.

2. The Court sustains the plaintiff's fourth ground of appeal, relating to the sums paid for the hire of the clerk and auctioneer. The custom is to allow such charges, as expenditures for the benefit of the estate. It is not

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expected *that executors and administrators are to perform such services; and the expenditure is allowed upon the same principle as overseer's wages. Few trustees are qualified to act as auctioneers; and a clerk not only performs a useful part in the sale, but in his recollection and in his memorandums are secured valuable and accurate testimony for the estate, in relation to the contracts made at the sale. It is not suggested that the sums paid to these agents were, in this instance, unreasonable: and this inquiry being spared, the Court has no hesitation in allowing them upon general principles.

The remaining questions, in the case, relate to the crops, provisions, farming utensils, household furniture, notes of hand, judgments, and cash on hand, at the death of the testatrix, Elizabeth Garrett.

3. In relation to the crops, &c., covered by the plaintiff's 5th exception, the Chancellor was very naturally led into error by the terms in which the Court delivered its opinion in this case, upon a former occasion.⁴ Certainly, the Chancellor on that occasion, did insist very strongly upon the terms of the will, as evidencing an intention in the testatrix to make a limited disposition. But the question before him shews that the object of his observations was to establish a point wholly foreign to the inquiry embraced in the exception now under consideration. The question then presented was thus stated by the Chancellor. "On the part of those interested under Mrs. Garrett's will, it was contended, that in addition to the direct benefit which she derived under her husband's will, she was entitled to one third of his entire real and personal estate (except the negroes) absolutely, as he had made no ultimate disposition of it: And that this interest in her husband's estate passed, by the true construction of her will, to Thomas Garrett and the children of his deceased brother, Henry W. Garrett."⁵

The single question presented, was whether Mrs. Garrett intended to dispose of a distinct body of property, which she regarded as her estate, apart from another body of property, in which she may have been interested, but still considered as her husband's estate. The Chancellor dwells on her enumeration and description, wholly inapplicable to the latter, but strictly applicable to the former, as evidence that her testament

⁴ 1 Strob. E. 96.

⁵ *Id.* 98.

was intended to be confined to the former. He insists that she could not have forgotten the latter; and therefore her omission of it could not be set down to the account of a defective enumeration, but to a studied silence proceeding from a total indisposition to dispose of it. This intention pervaded the whole will. The residuary clauses were residuary clauses relating to a specific body of property, and not sweeping clauses extending to other property in which she might have an interest.⁶

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*The questions now presented are wholly different.

The opinion of the Court is that her will intended to dispose of the whole of the property which she considered as belonging to her: "all my property."

The supposed defect in the enumeration of the property, to which the 5th exception refers, is not a defect which goes to the disposing provisions of the will, but to an act of administration to be performed as preliminary to the disposition or distribution of the estate. It is apparent from a perusal of this inartificial and ungrammatical instrument, that the testatrix contemplated her property as consisting of two general classes, one of which required to be sold for convenience of distribution, while the other required no such process. Now "all her property," of both classes, she intended to dispose of; and it was only in the direction for a sale of the tangible property, in order to prepare it for distribution, that the enumeration is defective. We cannot suppose this deficiency in the mere detail, is evidence of want of purpose as to the end or object to which the detail tended.

4. The Court is of opinion, that all the notes of hand, and cash, existing at the death of the testatrix, passed under her will.

Wills of personal property, like wills of real estate, are actually nothing more than the declaration of the testator's intention as it exists at their date, and as it arises from a contemplation of the state and condition of his property at that time. But there is a material difference between the two, in this; that wills of realty are essentially conveyances (though revocable,) and therefore can operate on no lands not then belonging to the testator; whereas wills of personalty, are not only revocable, but as a general rule, ambulatory, and will operate upon after-acquired property answering to the terms of the instrument, provided it be in the testator's hands at his death.⁷

The general rule, then, is that testaments take effect, or as it is sometimes expressed, speak, at the death of the testator, and are to be applied to his personal estate, as it

exists at that time. And this should be the construction in all doubtful cases.

Where we can pronounce with confidence that the testator meant to announce an intention confined to the state of affairs existing at the date of his will, either in reference to the specific subjects which he wished to pass under it, or the persons to enjoy them, or truly intended in any other way to abridge the ambulatory capacity of the instrument: the construction must be such as to conform to the special intention thus indicated or expressed.⁸

Thus if he refer to a specific thing, as the subject of disposition, or to a class of things,

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with an intent to individualize them, and make them the specific instruments of his intended bounty; or to a specific person, or a carefully described class of persons, with an evident design of constituting them the beneficiaries; we cannot go out of the terms of the will, without the hazard of defeating or departing from his intentions.

But if no such special intention appear in the will, the general rule obliges us to regard it as ambulatory from the time it was written till it became actually operative by the testator's death.

In the case before us the only question is whether the testatrix, in the gift of her notes of hand and cash, referred to their present amount, with the intention of individualizing them, so that none other should pass, or whether this reference was a merely immaterial suggestion, the intention being, that her notes and cash should pass, irrespective of their present value or amount.

There are circumstances which persuade us that the intention was not to limit the bequest to the securities and money then on hand. One is that to which I have already alluded. The testatrix intended to dispose of all her property; from which we may infer an amplitude of intention in relation to the different classes of property mentioned in the will. Having mentioned notes and cash we are to presume that she did not intend any of them to remain undisposed of. Another circumstance is that there is no general residuary clause; from which we may presume that in her conception her legacies went to the full extent of her estate. The third circumstance is the phraseology of the clause itself. In speaking of the present amount of the notes and cash which she gave, does not the testatrix imply that at another time the legacies might be of a different amount? If she had this meaning, it follows that she intended the bequest to be of a fluctuating, and not of a fixed character; in other words she did not intend to detract from the ambulatory capacity of her will. Our opinion is, that the testatrix intended to give her notes and cash, whatever there might be of them; and that her allu-

⁶ Id. 99.

⁷ *Houston v. Houston*, 3 McC. R. 492, [15 Am. Dec. 647;] *In re Elcock's Will*, 4 McC. R. 41, [17 Am. Dec. 703.]

⁸ 1 Jarman on Wills, Ch. X.

sion to their amount was an immaterial suggestion not intended to affect the bequest.

It is ordered that the decree be modified according to this opinion.

DUNKIN, Ch., and DARGAN, Ch., concurred.

CALDWELL, Ch., concurred so far as relates to the demurrer.

Decree modified.

2 Strob. Eq. *285

*JAMES B. COLEMAN & Wife v. THE BANK OF HAMBURG et al.

(Columbia. Nov. and Dec. Term, 1848.)

[Execution \hookrightarrow 250.]

Where unfair means have not been employed to prevent competition at Sheriff's sales, inadequacy of price, however great, is no ground for setting them aside.

[Ed. Note.—Cited in Ramsay v. Sims, 12 Rich. Eq. 441; Ex parte Cooley, 69 S. C. 155, 48 S. E. 92.]

For other cases, see Execution, Cent. Dig. § 703; Dec. Dig. \hookrightarrow 250.]

Before Dunkin, Ch., at Lexington, June Sittings, 1848.

Dunkin, Ch. The facts of this case appear from the pleadings and the evidence, written and parol, which accompanies this decree. Certain points, however, seem to the Court sufficiently well established. At the sale of John G. Blewer's estate, made, for partition, by the Commissioner in Equity, for Edgefield District, on the 5th April, 1837, the widow (now Mrs. Coleman,) and Peter Redheimer, became the purchasers of the real estate, and gave bond to the Commissioner for the purchase money, secured by a mortgage of the premises. The land was subsequently divided between them. Several payments were made on the bond, and on the 26th of September, 1842, a meeting of the heirs of Blewer was held at the office of the Commissioner, for the purpose of a final adjustment. The circumstances are fully detailed in the examination of James Terry, Esq. The amount due to Mrs. Blewer, in her own right, as widow of the intestate, and as guardian of her son, John P. Blewer, exceeded the amount of her purchase. Peter Redheimer, who had married a daughter of the intestate, and had also made several payments on his purchase, fell in debt about \$1450. The other heirs had been fully paid, and the balance due by Redheimer belonged, says the Commissioner, to Mrs. Blewer, in her own "right, or as guardian of John P. Blewer; and at her instance, and by the agreement of Redheimer," says the witness, "the bond and mortgage were delivered to Mrs. Blewer, to enable her to demand and receive from Redheimer the balance due by him on said bond. They were delivered," adds he, "to Mrs. Blewer, as furnishing evidence of and security for

the payment of the balance due by Redheimer, on 26th September, 1842."

Prior to this settlement (as was proved by Robert Hankison, who had married another daughter of the intestate,) Mrs. Blewer had sold to her son, John P. Blewer, at cost, the land purchased by her, and had settled with him for his share of his father's estate in this way.

Afterwards the widow of Blewer intermarried with the complainant, James B. Coleman, who thereby became entitled to demand and receive the balance due by Peter Redheimer. Redheimer having fallen into pecuniary embarrassments, and judgments to a considerable amount having been rendered against him, his property, real and personal,

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was *seized under various executions, and sales were made by the sheriff, on the sale days, in August and September, 1843.—When the land was put up for sale, the complainant, Coleman, was present, and exhibited the mortgage, on which he said about \$1500 was then due. The land was sold subject to the mortgage, and was knocked off to the complainant for one dollar. Some question is made in the pleadings in relation to the sale of the personalty, but it appeared, at the hearing, that the personal estate was sold for about its value, and that no advantage would result from the pressing for a re-sale, and this matter was not noticed in the argument, and will not be further considered by the Court.

Complainants, Coleman and wife, live about $\frac{3}{4}$ of a mile from Redheimer's, and complainant has a Saw Mill on his place, and there is also a Saw Mill on Redheimer's. After the sale in August, 1843, Redheimer, who has six or seven children of his own, and some orphan children residing with him, was permitted by Coleman to remain on the place, and in January following, (1844) Coleman engaged his services by written agreement at \$300 per annum, to superintend the place and carry on the Saw Mill, under which agreement he has since continued—the lumber being shipped to Charleston and sold by the factor on account of the complainant, Coleman.

It is difficult to perceive on what ground the sale of the land to Coleman can be impeached. A crowd was present at the sale, the mortgage was handed about amongst them, and notice was given of the amount due on it. It is true that Redheimer was permitted to remain in possession of the premises. But since Kidd v. Rawlinson, 2 Bos. & Pull. 59, it has not been doubted that even chattels, bid off at sheriff's sales, may be permitted to remain in the possession of the defendant. The distinction is recognized in Smith v. Henry, [1 Hill, 16,] as well as in Martin & Walter v. Evans, 2 Rich. Eq. 374. It is not the voluntary sale of his prop-

erty, by a debtor to one of several creditors, who permits him to remain in possession, and thereby implies some secret agreement; but it was a public and forced sale in which all had the opportunity of competition. The purchaser, at such sale, is protected, because, says Chancellor Kent, "though the goods were suffered to continue in the possession of the defendants, yet the transaction was necessarily notorious to the whole neighborhood, and the execution notice to the world, and the cases, being free from fraud, in fact, were, under these circumstances, free from the inference of fraud in law."¹

Something was said about want of notice to the Bank of Hamburg, (the defendant) of the existence of this mortgage. But the Bank, like the rest of the defendants, are merely judgment creditors, and not mortgagees or purchasers. Even if it be held necessary to record a mortgage, taken under

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a judicial sale for partition, the defendants would derive no benefit from the omission to record this mortgage. Again, it was said that the Commissioner, in his annual report, for June, 1843, had reported the case of Blewer's estate to be "settled." This was only to inform the Court that the estate was no longer in his hands. But of what importance is this to the defendants, whose debt was contracted on the 15th February, 1842?

The court is well satisfied that the complainant purchased the equity of redemption at less than its value, but none of the witnesses of the defendants attribute any fraud or improper conduct, at the sale, to the complainant. And since the case of Stockdale v. Yongue, Rice Eq. 3, and others to the same effect, it is too late to entertain the inquiry whether mere inadequacy of price will vitiate a sheriff's sale; and it is worthy of remark that the other moiety, (J. P. Blewer's) sold Sept. 1844, for \$1500.

It is ordered and decreed that the injunction be made perpetual, and that the cost be paid by the Bank of Hamburg.

The defendants appealed, and moved to reverse or modify the decree of his Honor the Chancellor, and for a decree that the said land be resold by the Commissioner of this Court, for the benefit of the defendants, as judgment creditors, and of the complainant, if it shall appear that any thing yet remains due, and that he is entitled to the same, under said mortgage, on the following grounds:

1. Because it did not appear on the hearing of said cause, that any balance remained due and not paid on said mortgage to J. Terry, Esq., at the time of the sheriff's sale.

2. Because the said mortgage was never recorded, and could not, therefore, be set up against subsequent judgment creditors, without notice of its existence.

3. Because the Commissioner of the Court, at June term, 1843, made a report, stating that the case was settled in full, and that he had taken the receipt of the distributees, including Redheimer and wife, in full of their respective shares.

4. Because the complainant, Coleman, by producing and exhibiting at the sheriff's sale, the said mortgage, with an apparent balance, for a large amount, unpaid, was enabled thereby to purchase the land for one dollar, which was proved on the hearing to be worth five or six thousand dollars.

5. Because the said plaintiff, by his declarations and conduct at the sheriff's sale, induced persons, who were otherwise disposed to bid and purchase, not to bid—and the sale was therefore void.

6. Because the decree is contrary to the evidence and the law of the case.

Bauskett, for the motion.

Boozar, contra.

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*DARGAN, Ch., delivered the opinion of the Court.

In this case very little is necessary to be said, in addition to the views taken by the presiding Chancellor in his decree. It is as well to remark, that the manner in which the case has been presented in the brief does not meet the approbation of this Court. All the evidence bearing on the questions raised in the grounds of appeal should be printed with the brief, which has not been done in this case.

Upon a careful review of the evidence, I perceive no reasons for impeaching the fairness and validity of the sale by the sheriff to the complainant. It is settled law, that where unfair means have not been employed to prevent competition at sheriff's sales, inadequacy of price, however great, is no ground for setting them aside. Whether wise or not, this is the law of South Carolina. While the stern policy of the law requires that the unfortunate debtor shall submit to take the highest bid, that is fairly made, it is in the highest degree important that these forced and peremptory sales, so frequently attended with sacrifices and loss to a suffering class of the community, should be preserved pure and free from any taint of fraud. To subject the debtor to a forced sale of his property, at whatever price it may bring, is a hard case enough. The policy of the law, however, and the inviolability of contracts, demand that concession to the rights of creditors. To make him the victim of corrupt combinations or artifices on the part of unfeeling and voracious speculators, is what this Court will not permit. The rule laid down in *Martin & Walter v. Evans*, will be applied, in a case proper for its application, either on the part of the debtor himself or of creditors interested in the sale of his property.

But between that case and this, there is no

¹ 2 Com. 469.

analogy. There is not a circumstance here which, when properly interpreted, warrants the imputation of unfairness in the sale. The only evidence which can be distorted into such a view of the transaction, is that of the witness John Cullum. It appears that this witness, together with the complainant, was the surety of Peter Redheimer for a debt due to Richard Coleman, executor of M. Coleman. Peter Redheimer had given his sureties a mortgage of negroes, as indemnity for their liability on this debt. Cullum, however, was not satisfied with his position, and had come to the sheriff's sale with the intention of bidding on the land, to the amount of the debt due the estate of Coleman; which was at that time in execution against himself, his co-surety, and their principal, Peter Redheimer. His intention to bid was not communicated to Coleman. He applied to the complainant to release or indemnify him on his debt. This the complainant had refused telling him he must get rid of the judgment in the best way he could. The expression used by the

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complainant to this *witness, so much commented on in the argument, when he told him "not to be troubled, he should not be hurt," is fairly susceptible of an innocent and entirely different interpretation. I think he referred to the joint indemnity, which he and the witness held in the mortgage of the negroes; which from all that appears was entirely sufficient. Between two and three years afterwards, the complainant assumed upon himself the liabilities of Cullum on the debt of the executor of Coleman, on Cullum's assigning to him his interest in the mortgage of the negroes. This, however, was not claimed by Cullum as a fulfilment of any agreement, express or implied, as growing out of the sheriff's sale of the land. But on the contrary he testifies that he "did not observe Coleman say or do anything to injure the sale of the land." The land was sold subject to a mortgage due to the complainant's wife. This mortgage he exhibited, as he should have done, with a correct statement as to the amount due upon it, \$13 or 1400. The land having been exposed at sale subject to the mortgage, was bid off at one dollar; which made its cost to the complainant, the balance due upon the mortgage.

This Court perceives no ground whatever for impeaching the validity of the sale. The decree is affirmed and the appeal dismissed.

The whole Court concurred.

Decree affirmed.

2 Strob. Eq. 289

WM. A. OWENS et al. v. N. G. W. WALKER et al.

(Columbia. Nov. and Dec. Term, 1848.)

[*Executors and Administrators* ⚡531.]

It was the duty of the Ordinary, under the Act of 1789, to grant only such relief to a peti-

tioning surety of an administrator, as would not impair or affect the rights of the parties interested in the estate.

[Ed. Note.—Cited in *Bobo v. Vaiden*, 20 S. C. 277, 278.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 2428; Dec. Dig. ⚡531.]

[*Executors and Administrators* ⚡531.]

The proper manner for the Ordinary to give relief to a petitioning surety, is to take a new bond with additional sureties, or to revoke the administration.

[Ed. Note.—Cited in *Gilliam v. McJunkin*, 2 S. C. 449.]

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2406-2430; Dec. Dig. ⚡531.]

[*Guardian and Ward* ⚡30.]

A guardian, or other person standing in place of a guardian, may furnish a minor, from the income of his estate, such articles as are proper for his condition in life. And there is no such inflexible rule as that a riding horse may not be regarded as necessary for a minor.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 116, 117; Dec. Dig. ⚡30.]

[*Executors and Administrators* ⚡513.]

On a settlement with the Ordinary by an executor or administrator, it ought to appear on the face of the settlement what was the nature of the evidence on which the return was accepted and allowed; and although the evidence with the Ordinary is not per se conclusive in favour of the executor or administrator, it ought to be received for as much as it is worth; and the value must depend on a variety of circumstances; the regularity of the accounts, the death of witnesses, loss of vouchers, and the lapse of time, must all be taken into consideration. Vide 2 McC. C. R. 197.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2267; Dec. Dig. ⚡513.]

[*Executors and Administrators* ⚡531.]

[Cited in *Bobo v. Vaiden*, 20 S. C. 279, and *Hall v. Hall*, 45 S. C. 179, 22 S. E. 818, to the point that act 1789, provides that the court, on petition by securities for administrators who conceived themselves in danger, may make such order as shall be sufficient to give relief. On a citation issued after a petition by one of the several sureties, the administrator appeared, with a third person, who signed and sealed the original bond as a substitute of the petitioning surety, and the ordinary made on the face of the bond a decree that the former was released from date, the latter having been substituted. Held, that the release was a nullity, since to hold it valid would discharge the co-sureties, and the ordinary had no right to release them, to the injury of creditors.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2428; Dec. Dig. ⚡531.]

[*Executors and Administrators* ⚡531.]

[Act 1789 provides that the court, on petition by securities for administrators who conceived themselves in danger, may make such order as shall be sufficient to give relief. On a citation issued after a petition by one of the several sureties, the administrator appeared with a third person, who signed and sealed the original bond as a substitute of the petitioning surety, and the ordinary made on the face of the bond a decree that the former was released from date, the latter having been substituted. Held that, the substitution and appointment being invalid a sum of money paid by the substitute as surety to one interested in the estate in consideration of his being saved harmless from his lia-

bility could not go to the relief of the sureties really liable.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2406; Dec. Dig. § 531.]

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*Before Dargan, Ch., at Barnwell, February Sittings, 1848.

Dargan, Ch. On the 12th December, 1830, John A. Owens, of Beaufort district, departed this life, leaving unrevoked his last will and testament, and leaving as executor and executrix to his last will, his father, William A. Owens, and his widow, Mary W. Owens, and leaving also three children, William A., Edwin W. and Sarah E. Owens, now the wife of the complainant, John E. Tobin. The executrix qualified on the will, and assumed the management of the estate. In August, 1834, she intermarried with the complainant, J. J. Fogler, who thereafter acted as executor in right of his wife. On the 21st March, 1836, Mrs. Fogler died, and on the 12th April following administration with the will annexed, was granted to James G. Owens by the Ordinary of Beaufort district, with Robert Goode, Seth Daniel and J. B. Ellis as sureties. The administrator inventoried the estate, and in May or June, by leave of the Ordinary, sold a considerable portion of the perishable property, of which he never made any return. He sold the crops of cotton and a considerable quantity of other produce, which he has in part returned. In July, 1837, Robert Goode petitioned the Ordinary for relief, in accordance with the provisions of the Act of 1789. Some action was had in the matter, but nothing definite was done until April, 1838, when the Ordinary, upon the second application of Goode, issued his citation to the administrator to appear and give further surety, that Robert Goode may be released. In obedience to this citation, on the 4th May, the administrator appeared with W. B. Bowers, and Bowers signed and sealed the original bond as the substitute of Goode. The Ordinary making on the face of the bond the following decree, "Robert Goode released from any responsibility after this 4th May, 1838, W. B. Bowers having been substituted in his place." "M. J. Buckner, Ordinary B. D."

On the 23d May, 1839, the administration of J. G. Owens was revoked, and letters of administration granted to one Michael Brown. In 1840 Robert Goode, the surety, died, and administration of his estate was committed to his widow Martha E. Goode, and Mack Goode. In the same year the testator's son, Edwin W., died an infant and unmarried. In May, 1842, the administrator Owens, died insolvent; administration of his estate was granted to N. G. W. Walker in 1846. W. B. Bowers, in January, 1843, gave his note to the complainant, W. A. Owens, for five hundred dollars, who thereupon gave him the subjoined receipt, "Received, January, 1843, from Wm. B. Bowers his note for five hun-

dred dollars, in consideration of which I do hereby agree and bind myself to indemnify him and save him harmless against his liability as

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one of the sureties to the bond of James G. Owens, as administrator of the estate of John A. Owens.—

Witness my hand and seal.

W. A. Owens, [L. S.]

Witness, B. F. Brown.

The bill was filed in October, 1846, with W. A. Owens, Tobin and wife, and Fogler, as complainants, against the representatives of Owens, Goode, Daniel, Ellis and Bowers.

The defendant Walker, by his answer, states he is ignorant of all the matters stated in the bill of the complainants; that his intestate died utterly insolvent, and that he has never received one dollar of assets. The defendant Daniel, admits the execution of the bond by the administrator Owens, with Goode, himself and Ellis as sureties, but is ignorant of the "actings and doings," of the administrator, and asserts that he was neither apprised, nor did he consent, to the substitution of Bowers for Goode, nor does he believe that his co-defendant Ellis did, and claims if Goode be released that he may be also. Mack Goode by his answer, admits the execution of the bond, but claims that his intestate was released after a certain date by the Ordinary. W. B. Bowers pleads in bar that he is not liable, because the Ordinary did not revoke the letters of administration and re-grant them with new security, nor did he cause the said W. B. Bowers to enter into a new bond without revocation, but that he caused him to sign and seal the old bond as substitute for Goode, and that as the Ordinary had no power to discharge Goode, he, Bowers, is not liable. Bill pro confesso as to others.

It appears by the Commissioner's report that the amount due by the administrator, Owens, on the 4th May, 1848, is \$5,471.81. A statement annexed to the Commissioner's report will show the amounts respectively due the complainants in various aspects. The representatives of Robert Goode except substantially to the Commissioner's report. 1st. Because he has not credited the administrator with the price paid by him for a horse for W. A. Owens, one of the complainants, while an infant. 2d. Because the Commissioner has decided that W. B. Bowers is not liable on the administration bond of James G. Owens, and that Robert Goode is not released. 3d. Because the Commissioner has not allowed the administrator Owens, the sum of \$270.06 contained in his returns to the Ordinary. 4th. Because if Robert Goode or his representatives are liable after 4th May, 1838, W. B. Bowers is jointly liable with them, and they are entitled to avail themselves of all the consequences, equitable and legal, resulting from the transactions between one of the complainants and Bowers.

The defendant W. B. Bowers excepts to

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the Commissioner's report, because the Commissioner, although deciding that he is not liable at all, yet credits the administrator, Owens, with five hundred dollars which he paid in January, 1843, to W. A. Owens.

The complainant, W. A. Owens, excepts to the report, because the Commissioner has credited the administrator Owens and debited the said W. A. Owens with the sum of \$500, paid in 1843, by Wm. B. Bowers, and the Commissioner having decided that the said W. B. Bowers is not liable at all on this supposed bond, it is contrary to equity that either the administrator or the first sureties should be benefited by a payment made by one who is neither a surety, nor co-surety, nor in any manner liable.

The Act of 1789,¹ under which the surety petitioned for relief, contains the following provision, "That if the securities for administrators conceive themselves in danger of being injured by such surety-ship, they may petition the Court to whom they stand bound, for relief, which Court shall summon the administrator to appear, and thereupon make such order or decree as shall be sufficient to give relief to the petitioner."

The Act of 1839, p. 43, sec. xix, on the same subject, contains the following provision, "It shall be the duty of the Ordinary, in whose office an administration bond is lodged, upon a petition filed by any of the sureties of the same, who conceive themselves in a condition to be injured by such surety-ship, to summon the administrator before him, and make such order or decree for the relief of the petitioner as may not impair or affect the rights of the parties interested in the estate."

I apprehend that a correct interpretation of the Act of 1789 would impose upon the power of the Ordinary the same restrictions that are by express terms annexed to its exercise by the Act of 1839, to wit: that he shall grant relief to the petitioning surety in such a manner as not to impair or affect the rights of the parties interested in the estate. And consequently an order or decree of the Ordinary necessarily having this result, would transcend his jurisdiction, and would be null and void. He is not the party interested beneficially in the administration bond, but has simply, by virtue of his official character, the legal custody of the instrument, and can do no act to discharge the liabilities of the obligors, or to prejudice the rights of the parties interested, but in the exercise of the legitimate authority conferred on him by law. The erasure of the name of one of the obligors from the face of the bond, from wantonness or corruption, would not extinguish the liability of such obligor, or in any manner impair the rights of the distributees secured by the bond. It would be extra ju-

dicial and beyond the scope of his authority.²

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*I will now direct my attention to the legal effect of the substitution of Bowers in the place of Goode on the administration bond. I mean its legal effect, on the supposition that the act was legitimate, and had the operation intended, of discharging Goode from all future liability. Upon the plainest principles of law, can it be doubted for a moment that if Goode is discharged, Ellis and Daniel are also discharged? There is no proof that they assented to the substitution; in other words, to the alteration of the contract. By the exoneration of one, and the substitution of another obligor, and that without their assent, it ceases to be the contract to which they became parties, or by which they bound themselves. The obligee has made a new contract, and by discharging one, he discharges the whole of the joint obligors who have not assented to the alteration. It might very well be that Ellis and Daniel would be willing to become bound as the sureties of Owens, the administrator, in association with Goode, and not with Bowers; at least they have the right to say so, even if Bowers were a wealthier man than Goode. They are not bound further than they are bound by the bond, which is jointly and severally with Goode and not with Bowers. In *Ives v. Pickett*, Oats & Giffith, 2 McC. L. R. 271, it was held that even in the case of a parol contract, the signature of a party after the others had signed, and without their knowledge or consent, did not make him a joint contractor.

The effect, then, of the discharge of Goode would be the discharge of Ellis and Daniel, who did not petition, or so far as appears, desire relief; an effect not contemplated by the Ordinary, and which would operate very prejudicially to the distributees of the estate. It would leave the estate still in the hands of the administrator, with very inadequate security, with one surety in the place of three, even if Bowers was bound at all. In my opinion he was not. This would be affording relief to the petitioning surety, not in accordance with what I regard as the proper interpretation of the Act of 1789, viz: That it must be afforded in such a manner as "not to impair or affect the rights of the parties interested in the estate." My opinion is that Goode had no right to withdraw from his position of joint responsibility with his co-sureties, in that bond, without their assent. And the Ordinary having no right to give relief in that form, the release of Goode is a nullity. The proper manner for the Ordinary to give relief to a petitioning surety is to take a new bond with additional sureties, or to revoke the administration. And I cannot conceive any other mode in which he can relieve a surety apprehensive of danger, and at the same time have a due

¹ 5 Stat. 111, sec. 24.

² *Hill v. Calvert*, 1 Rich. Eq. 56.

regard to the interest of the estate. In the *Ordinary v. Bigham & Hudson*, 2 Hill L. R. 512, it is said, "the Ordinary may make such order as will give relief to the petitioner; he may revoke the letters of administration

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and grant *administration de bonis non, or he may decree that the administrator shall substitute a new surety and a new bond," &c. And in *Gramling v. Woodward*, 2 Rich. L. 623, it is said that "the only way in which an Ordinary can make an additional security to an administration bond, liable, is to take a new bond," &c, and "that one signing an original bond who was not originally a party, would have no effect." Bowers is therefore not bound. On this point see also *Hill v. Calvert*, [1 Rich. Eq. 56.] already quoted. The consideration on which Bowers agreed to become bound, to wit: the release of Goode, having failed, it would be unreasonable that he should be held liable. The judgment of the Court is, that for the devastavits of James G. Owens as the administrator of John A. Owens, his original sureties, and the representatives of those who are dead, are liable, and that they pay to the complainants the amount that may be found due by the said administrator.

William B. Bowers, the substituted surety, apprehensive that he might be held liable as surety of James G. Owens, has paid the sum of five hundred dollars to William A. Owens, in consideration of his being saved harmless from that supposed liability, which the said William A. Owens has by his written obligation undertaken to do. This sum the Commissioner, in adjusting the accounts, has passed to the credit of the securities who are liable, and has also debited said William Owens, who is one of the distributees, with the amount thus received, as a part of his share of the estate. From the view I have taken of the case Bowers has no connection with the estate as surety. If he is not liable as such, the sum thus paid should not go to the relief of those who are. It was paid to William A. Owens as a premium for assuming the responsibility of Bowers to the estate. It was a transaction between them which seems to have been fair, and William Owens, in consideration of the risks which he assumed upon himself, involved in the issue of rather a nice legal question, received the five hundred dollars, and is justly entitled to it. The exception to this part of the report of the Commissioner is sustained. All the other exceptions are overruled. And the Commissioner is directed to re-adjust the accounts and amend the report in conformity with this decree.

The defendants, Mack and M. G. Goode, administrators of Robert Goode, appealed.

1. Because, by the decree of the Ordinary, Robert Goode, as one of the sureties of James G. Owens, was released or discharged, and W. B. Bowers, becoming voluntarily a

party to the bond, was substituted in his place, there being no evidence that Ellis and Daniel did not assent to such substitution, and the presumption, in the absence of evidence to the contrary, is, that the Ordinary acted legally in the premises.

2. If Robert Goode was not released or

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discharged by the *decree of the Ordinary, yet W. B. Bowers, by voluntarily becoming a party to the administration bond, became severally bound with the original obligors.

3. If W. B. Bowers did become severally bound with the original sureties, as it is respectfully submitted he did, the latter are entitled to all the advantages resulting to Bowers from the release and guaranty given to him by one of the complainants.

4. Admitting that Bowers is not legally or equitably bound, yet the \$500 which he paid to one of the complainants, were paid by, and received from, him, "as one of the sureties to the bond of James G. Owens as administrator of John A. Owens," and therefore the sureties are entitled to credit for the same.

5. Because the 3d exception taken by these defendants to the Commissioner's report, viz: that the Commissioner has not allowed the administrator, Owens, credit for the sum of \$270.06 included in his returns to the Ordinary and duly vouched, ought to be allowed, inasmuch as there is positive evidence of the destruction of the administrator's papers, in addition to the lapse of time, and the death of parties.

6. Because the 1st exception taken by these defendants to the Commissioner's report, viz: that he should have credited the administrator with the price paid by him for a horse for W. A. Owens, one of the complainants, while an infant, should have been sustained.

Patterson, for the motion.

Bellinger and Hutson, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The view taken by the Chancellor in relation to the liabilities of Robert Goode and William B. Bowers, seems to the Court well sustained by the authorities, and the four grounds of appeal from this part of the decree are therefore overruled.

The subject matter of the fifth ground of appeal must be referred for further inquiry. "The settlement before the Ordinary," as remarked by the Court in *Wright v. Wright*, 2 McC. Eq. R. 197, "is intended as a security for the executor, as well as for the distributees." The vouchers should be exhibited to the Ordinary, before the account is passed, but they are retained by the executor. "It ought to appear on the face of the settlement what was the nature of the evidence on which the return was accepted and allowed: and although the evidence with the

Ordinary is not conclusive, per se, in favor of the executor, it ought to be received for as much as it is worth; and the value must depend on a variety of circumstances; the regularity of the accounts, the death of witnesses, loss of vouchers, and the lapse of time, must all be taken into consideration." In that case, sixteen years had elapsed since the account was passed, and it was held to

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be a complete protection, unless the other party could show error or fraud in the transaction, and that the burden of proof was on them. The evidence before us does not enable the Court to determine what are the items of the account which were rejected by the Commissioner, nor at what time the charges were made, or the account passed. The Commissioner will report upon the subject in reference to the principles herein indicated.

And so in relation to the sixth ground of appeal. The Court is not in possession of such evidence as will warrant a final decree. There is no such inflexible rule as that a riding horse may not be regarded as necessary for a minor. Prima facie, perhaps, only boarding and lodging, clothing and education, of some sort, fall strictly within the description of necessities. In *Rainwater v. Durham*, 2 N. & McC. R. 524, [10 Am. Dec. 637,] it was held by a divided Court, that an action could not be maintained against an infant for the price of a horse sold to him. His contracts generally were not binding, and this did not fall within the exception of necessities furnished. "The object of the law," says the Court, "is to guard the infant against his supposed indiscretion." But it never has been doubted that a guardian, or other person standing in the place of a guardian, may furnish a minor, from the income of his estate, such articles as are proper for his condition in life. There is no necessity in such case that "the supposed indiscretion of the infant" should be under the protection of the law. The articles are supplied at the discretion of the guardian and subject to the supervision and correction of the Court in passing his accounts. The ground of appeal is that the defendant should have been allowed the sum which he paid for a horse purchased for the minor. We think the Commissioner should have received testimony as to the fortune and condition in life of the minor, or any other circumstances shewing the propriety of the charge, and that the result should depend on the effect of such testimony.

It is ordered and decreed that the decree of the Circuit Court be modified according to the principles herein stated.

JOHNSTON, Ch., CALDWELL, Ch., and DARGAN, Ch., concurred.

Decree modified.

2 Strob. Eq. *297

*JOHN N. WILLIAMS et al. v. J. ELI GREGG.

(Columbia. Nov. and Dec. Term, 1848.)

[Evidence ⇐271.]

The books of an agent, kept by himself, or those acting under him, are not, in general, evidence for him of the disbursement of money on account of his principal: he should prove his disbursements by strictly legal evidence.—*Vide* Bail. Eq. 226.

[Ed. Note.—Cited in *Wells v. Hays*, 93 S. C. 172, 76 S. E. 195, 42 L. R. A. (N. S.) 727.

For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. ⇐271.]

[Evidence ⇐354.]

An agent, accounting in Chancery, may discharge himself, by his affidavit, without voucher, when the amount of the item is under forty shillings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1470; Dec. Dig. ⇐354.]

[Principal and Agent ⇐81.]

Where an agent is continued from year to year, and finally withdraws voluntarily from his office, he is entitled to the compensation agreed upon for his services, and liable only for specific loss by his misconduct or neglect, which must both be alleged and proved.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 211; Dec. Dig. ⇐81.]

[Corporations ⇐310.]

Although the general agent of a company is not responsible for the bad debts, or for the negligence or faithlessness of agents whom he has necessarily employed, yet it is his duty to see that the debts due to the company are collected, and he must show that he exercised ordinary diligence for that purpose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1358; Dec. Dig. ⇐310.]

[Corporations ⇐310.]

An agent is not responsible for a contract made with an infant, known to and acquiesced in by the principal; especially where the contract was conditional, and no actual loss resulted from it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1352; Dec. Dig. ⇐310.]

[Corporations ⇐190.]

[Where a stockholder, as general agent for the company, was held responsible to other stockholders, and two of them who with others had called him to account had managed extensive transactions for the company, he was held entitled to an order that they should account therefor, to enable him to render the account of his agency more complete.]

[Ed. Note.—For other cases, see Account, Cent. Dig. § 23; Corporations, Cent. Dig. § 725; Dec. Dig. ⇐190.]

Before Caldwell, Ch., at Darlington, February Sittings, 1848.

The bill was filed on the 21st November, 1844, by John N. Williams, William Munterlyn, Smith Mowry, Brown Bryan, and the personal representatives of John McLenaghan, stockholders in the Planters' and Merchants' Steamboat Company, against J. Eli Gregg, also a stockholder.

It states the incorporation of the company for the purpose of navigating steamboats between Cheraw and Charleston, capital \$20,-

000, with authority to increase it to \$60,000; the appointment of the defendant, Gregg, President and general agent for the purchase of a boat, and for the entire management and superintendence of the business; his receipt of the capital stock (\$20,000); that, throughout the whole time of the company's active existence, he, Gregg, was sole agent of the company; that all persons acting in the business of the company were his agents, for whose acts he was responsible; that he represented that for sixteen thousand dollars he could procure a suitable boat ready for operation, or had contracted for one such; the company accepted the contract; the "Anson" steamer was obtained and commenced running; and that Gregg never informed the company, nor any member, that the Anson cost any more than \$16,000, until the company were about to discontinue their business; that at an early period in the progress of the business, Gregg represented that their business had then yielded a profit of ten or twelve thousand dollars, and at his instance, another steamer, the 'Swan,' was purchased by him and the

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said Gregg, *as agent, continued for some time to run both boats; that defendant received also all the moneys accruing from freights, passage money or otherwise; states further the interest of complainants severally in the Stock; the determination of the company to discontinue the use of their charter, and close their business; that they accordingly sold the boats, &c.; that afterwards, upon the representation of Gregg, that it was necessary, in order to pay the debts, complainants paid to him five hundred dollars on each share owned by them; that he has been applied to for an account of his agency, which he has refused; prays that defendant may answer, may account fully for all moneys received by him belonging to the company, and for all moneys due and owing to the company; and may be decreed to pay over to complainants, according to their respective rights, any balance found.

Defendant's answer, filed on the 9th of January, 1845, admits the incorporation; his election as one of the Directors, and his appointment as President by the Directors; while such he acted as superintendent of the concerns of the company on the river, with necessary and subordinate assistants; but denies that he was sole agent, or responsible for others employed in the business of the company; says that LaCoste was at first agent at Cheraw; he gave it up to Bryan, without consulting defendant; that the bye laws provided for yearly election of officers; that but one election ever took place; that defendant acted as President until January, 1841, when he resigned his office and agency and left the State, having given up the books of the company to Brown Bryan; denies any representation by him as to what the boat

would cost; says that the Anson cost more than defendant expected; assigns some reasons why he could not give as much personal attention as he desired; that when the building of the Anson had already cost more than \$20,000, and more money was called for, defendant consulted with two members of the company, viz: LaCoste and Bryan, who, as he supposes, knew as much about the cost of the boat as defendant did; denies any intention or desire to conceal any fact from the company; says that the books embracing the accounts of his agency were kept in Cheraw, where most of the members resided, and that they were accessible at all times; that at the suggestion of LaCoste, and with the assent of Bryan, S. Mowry was appointed agent, in Charleston, to superintend the completion of the boat, LaCoste writing to Mowry for that purpose; that the Anson cost, according to the best estimate defendant can make, about \$29,000; that he can't say certainly what she did cost, because she was partly paid for by Barden, the captain, out of the profits made, and in Barden's account, the settlement of which was made with S. Mowry, but revised

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by defendant, the expenditures *on account of construction and on account of navigation, are so blended that defendant can't accurately distinguish them; that defendant did, at one time, think the company was doing a "fair" business, and may have so said to complainants, but he had no better means of judging than they, as the books kept by him were always open to their inspection; denies that he ever designedly deceived any of the members by mis-statement or concealment of facts; does not recollect or believe that he ever estimated the profits at any particular sum; did recommend that the company should get another boat of lighter draft than the Anson; and, upon consultation of the company, it was determined to build one; the Swan was accordingly built at a cost of \$12,000; admits the business proved profitless, but insists he is not responsible morally or legally; that such result is more injurious to himself than to any one else, he being the largest stockholder; that the disastrous result was owing partly to unforeseen causes, against which no prudence could guard, and partly to errors of the complainants, equally as of the defendant; that while in the service of the United States, on the coast of Florida, for wages of \$3,000 per month, a shaft was broken, the repairs rendered necessary by which cost \$3,500, besides losing the contract; that two tow boats were built for the company in Charleston at a cost of \$2,800, and three others bought at a cost of \$2,000; one of which was sold to the company by John N. Williams, and another by Brown Bryan; and these three, being old and worthless, proved a total loss; denies that the whole capital stock came into his hands; says a rule of the company required every

captain employed to own at least one share of stock, the original value of which was \$1,500; accordingly one share was reserved for the captain; that when Barden ceased to be captain, this share was accounted for to the company; afterwards W. Lubbock being appointed captain, this share was transferred to him, but he never paid for it; when defendant gave Lubbock a certificate of stock for this share, it was on condition it should be first paid for, and never having been paid for, it remains the property of the company, and the common loss of all; files, as an exhibit A, a true statement of the capital stock actually paid in, and its disbursements; denies that defendant received all the moneys accruing from freight, passage, &c., but says that nearly or quite all the down freights were received by S. Mowry in Charleston, and if any was paid by Mowry to defendant it is charged against defendant in the books; that part of the freight was received at Cheraw by LaCoste, and part by Bryan, and all the passage money and some of the freight was received by the clerk of the Anson, and by him accounted for; and these receipts by the clerk, defendant believes, were not enough to pay current expenses of the boat; some of

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the freight was *received by agents in Georgetown; that the books of the company, kept at Cheraw, show all the monies received and disbursed by defendant on account of the company, except a small sum of \$150 or \$200, disbursed on board the Anson, which cannot be accounted for, because the Anson's books are not in defendant's possession, but, as defendant is informed, are in the possession of S. Mowry; admits the sale of the boats, the proceeds of which have been applied to the payment of debts; says that \$1,000 per share was assessed on fifteen shares (Lubbock's share not being assessed) for payment of out-standing debts; denies that all this passed through his hands; received only one-half the assessment on McLenaghan's stock, five hundred dollars and some interest, which, with the six thousand dollars (\$6,000) assessed upon defendant's own stock, has been applied by him to the company's debts; is satisfied that the assessments on the other stockholders have been so applied, except that of Bryan, which defendant insists Bryan may be decreed to pay; says that, since the assessment, he has paid debts of the company, and that the company is indebted to him, and prays an account and payment; says that the books of the company, kept by defendant and Bryan, are in the possession of some of the complainants, and he has been refused the use of them, without which it is impossible for him to account fully; prays a general account from the company; that Mowry and Bryan may account; insists that Dunlap & Marshall and Lubbock shall be made parties; corrects the statement of the proportion in which the

stock is owned; says he has always been willing and anxious to account, and has several times proposed to do so, and is now glad complainants have appealed to the law.

At February Term, 1845, the following orders were made by the Chancellor:

"On motion of G. W. & J. A. Dargan, defendant's solicitors, it is ordered that all the books and accounts, and other documents of the Planters' and Merchants' Steamboat Company, mentioned in the defendant's answer as being necessary to the defendant's making a full and complete answer, and under the control of the complainants, be placed in the office of the Commissioner of this Court, so that the said defendant may have access to the same for three months from the first day of March next, and that the said defendant have leave to file a further answer to the complainants' bill."

(Signed) David Johnson."

"On motion of McIver, solicitor for complainants, it is ordered that J. Eli Gregg, the defendant in the above stated case, do deposit with the Commissioner in Equity for Darlington District, on the first day of March

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next, the books *containing the bye laws of the company, mentioned in the bill, and also that he do deposit with the said Commissioner, at the same time, such other books as he may have in his possession belonging to said company, and that the books, so deposited by the said defendant, shall remain in said Commissioner's office for the space of three months, subject to the inspection of the said company. It is further ordered, that the defendant do make his return to this order on oath, and that the accounts of the said Gregg be referred to the Commissioner. 14th February, 1845.

(Signed) David Johnson."

Defendant's supplemental answer, filed 29th July, 1845, states that the exhibits filed therewith marked AA, A, B, C, D, E, F, G, H, together with the exhibit filed with his former answer, "constitute a full, true, and perfect answer, to so much of the complainants' bill as prays for an account from this defendant as agent and member of the said company."

Complainants, on the 12th January, 1846, filed an amended bill, and had a new service of subpoena on defendant. The amended bill makes Dunlap & Marshall and W. Lubbock complainants; repeats in a more ample and distinct manner, the statements and charges of the original bill; adds that original stockholders were induced to enter upon the enterprise by defendant's representations of the profits to be realized, and by their confidence in the judgment, integrity and skill which defendant, as president and agent, would bring to bear upon it; that defendant was to receive a stated salary; that he directed and controlled all the business of the company, appointed all agents, made all contracts, governed the movements of the boats,

&c.; that he never made to the company any exhibit of his acting, and altogether neglected to place before the stockholders any statement by which they could inform themselves of the state of its business, only saying generally to them as to others, that the boats were doing a prosperous business, and that the stock was very valuable; that the two steamers continued running from the day of , 1838, until 1st July, 1841, the defendant all the while having the sole direction, control, and management of the whole business, for a compensation paid him by the company; that if the business were really unprofitable, from causes for which defendant was not responsible, he carefully avoided giving the least intimation of it, and went leisurely on to the certain wreck of their interests, although he knew that complainants trusted entirely to him to take care of those interests and to warn them of danger; that they never suspected that the business had not been skilfully managed, and that the expectations excited by defendant's repre-

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sentations were un*founded, until about 1st July, 1841, when they discovered for the first time, that the whole capital had either been sunk under his unskilful management or otherwise disposed of by him; that he has been applied to to account for capital, assessment of contributions, freight, and passage money, which he either collected or failed to collect from neglect or mismanagement of himself or his subordinates, and that he refuses such account; charges, in addition, "that complainants were deceived by defendant as to the original cost of the Anson, and that he unnecessarily paid away a much larger sum therefor than comported with the business in which they were about to engage, and his own representations as to the cost; that he negligently and unskilfully purchased a boat of such dimensions as were obviously unsuited to the navigation of the Pee Dee river, and of a style and finish incompatible with the business had in view by the company; that the company employed no agent but Gregg; that he only, had power to appoint, and did appoint, all subordinates, and should account for them; that he is bound to account for all debts due to the company which he has not diligently endeavored to collect; that he is responsible for all losses sustained by unskilful management, or for such a concealment of the actual state of their affairs as resulted in loss, whilst he was making such general representations of the business as he knew would lull them into security." Prays that defendant may account for all uncollected debts, and for all losses resulting from the unskilfulness or neglect of himself or his agents, or his concealment or misrepresentation of facts concerning the business of the company, besides the prayers of the original bill.

In the progress of the references before the

Commissioner on defendant's accounts, he, [defendant,] deemed it necessary to have discoveries from S. Mowry and J. N. Williams, two of the complainants, touching certain items in his accounts. For this purpose he filed a bill in Charleston, on the 26th of August, 1846, against Mowry, requiring said Mowry to discover whether he did not receive from defendant for the company, the following sums, to wit, \$1,000 on the 5th Sept. 1838, \$600 on the 19th Sept. 1839, \$418.96 on the 5th Nov. 1841, and \$18.66 on same day to pay a debt to Guerry; stating that Mowry's account in defendant's possession admitted the receipt of the sum of \$1,000, but did not show from whom received; that Mowry's solicitors had a copy of his account, which they refused to show on the reference, and were seeking to strike out these items from defendant's account as insufficiently proved; that he had applied to Mowry for acknowledgments or vouchers to sustain his charges, which he, [Mowry,] had declined or omitted to give.

Mowry's answer, filed 25th September, 1846,

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denies re*ceiving the sums of \$1,000 and \$600, as stated in the bill, or having admitted in any account rendered, such receipt; says he received from A. P. LaCoste \$1,000, on 17th Sept. 1838, and credited it to the company in his accounts, and that on 19th Nov. 1839, he received \$689.06 from freights collected, and credited it to the company; admits that on the 10th Nov. 1841 he received from Gregg \$436.90, of which sum \$18.96 was paid to Guerry; denies any application by Gregg to him for acknowledgments of the charges set forth in his bill, and that he ever refused to answer such application; admits receiving from Gregg a letter dated 17th June, 1846, in which he asked an acknowledgment of the receipt of the item of \$437.60, and says that he, Mowry, by letter, dated 29th July, 1846, acknowledged his receipt of the sum of \$436.90, as before mentioned, of which letters copies are exhibited.

The bill against J. N. Williams was filed 8th February, 1847, and seeks a discovery whether a certain statement and settlement on page 32, ledger B, of the company (of which an exhibit is filed) was not made at Williams' instance and under his inspection and in his presence; whether Gregg did not go to W.'s store with the books at W.'s request; whether the settlement is correct; whether it was not, at the time, believed to be correct; if not correct, wherein is it erroneous? if W. did not claim credit for a payment of \$700, made to Watchman & Bratt through Bryan; whether that payment was not intended as a credit on W.'s note of \$974.33; if he ever paid any part of said note to Gregg; if so, how much, when and where; whether he had paid any part of said note to any one else; how much, when and where and to whom; whether the said note was not

in Bryan's possession, where the note then was, and if he, W. had ever taken it up. Also a discovery, whether W. did not sell the pole boat General Jackson to the company, in the spring of 1838, at least as early as June; whether the settlement, in which the boat was paid for, was not some time after the sale; whether she was not sent to Georgetown for repair, and whether she did not need repair. The bill does not state any previous application to Williams for the information sought.

The answer of Williams filed 8th February, 1847, protests that Gregg's resort to a bill of discovery was wholly unnecessary, as defendant was present at the reference when the information, now sought, became necessary, and was willing and offered to testify and discover; says there has been no settlement between himself and Gregg, in reference to the Company transactions, since that at which he gave his note for \$974.33 to Gregg — admits that, at G.'s request, he put into Bryan's hands \$700, to be paid to Watchman & Bratt; supposes that payment was to be

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credited on the note, but re*members no agreement or understanding to that effect, at the time: does not know that said note was ever in Bryan's possession, nor what has become of it; believes it has been paid to Gregg, as he does not remember ever having paid any thing for company account to any one else, except the \$700. As to the correctness of the settlement, he, W., knows nothing; says that he was entitled to the two credits of \$178.83 and \$42, as appears from a settlement made with G., before the date of the note of \$974.33; that the settlement on page 32, ledger B, was not made in his W.'s, presence, and he has no knowledge on the subject of the making of that settlement. As to the pole boat, answers affirmatively as to the time of sale and payment; knows nothing about her needing repairs or being sent to Georgetown for that purpose; affirms that Gregg, before the "Swan" was bought, represented to W. that he, Gregg, as agent of the company had in hand the sum of \$12,000 profits arising from the company's business, and consulted whether they should declare a dividend or purchase a boat better suited to the river, which G. said could be done for \$7,000 or \$8,000; denies that he, W., ever expressed himself satisfied with the agency of Gregg; but says, that once, in the presence of J. J. Marshall, he, W., said that if G.'s accounts were all straight, as Marshall then stated was the case, he, W., could only conclude that G. was totally wanting in capacity for the management of a business of such magnitude; that in February, 1840, Gregg stated to him, W., that the nett profits of the company then were \$3,000 per month, and the only debt due was one of \$4,000 to Mowry.

On the 20th January, 1848, E. A. Law,
2 STROB. EQ.—11

Commissioner, filed his report upon the defendant's accounts, to which report, on the 15th February, 1848, the complainants and defendant filed exceptions. On the same day, the Commissioner brought in his report upon the exceptions; and, in this condition, the case came on for a hearing before his Honor the Circuit Chancellor, who rendered the following decree, on the ——— day of ———, 1848. The exceptions are embodied in the decree.

Caldwell, Ch. This case comes up on the report of the Commissioner, and fourteen exceptions on the part of the plaintiffs and two on the part of the defendant, and the report thereon. The original bill was filed by the plaintiffs, on the 21st Nov. 1844, and the amended bill on the 12th of January following, against the defendant, for an account of his actings and doings as agent and superintendent of the "Planters and Merchants Steamboat Company," and for the moneys received by him as the capital stock, and assessments upon the shares, for freight of goods, fare of passengers, and for all moneys received by

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him belonging to the *company, and for all moneys due and owing to the company, &c. This company was incorporated by an Act of the Legislature, in 1837, and the capital was \$20,000, with the privilege of extending it to any amount not exceeding \$60,000; and defendant was elected President, and constituted general agent for the purchase of a boat; and he was entrusted (as the plaintiffs, who are stockholders, allege,) with the entire management and superintendence of the business. The capital stock of \$20,000 was paid in and assessments were made on the shares.

Reference must be made to the bills and answers, accounts, and the voluminous testimony taken, as they are too massive to be embodied in a decree, and I shall therefore only refer to them when they are material.

The plaintiffs's exceptions are:

1st. "Because the Commissioner hath in his said report certified that certain books of account, to wit, day-book, journal and ledger, were admitted as evidence as the books of the company; whereas they were the books only of individual agents, either the said Gregg himself or those acting under him."

It is self-evident that the business of such a company could not be managed without suitable books, and the proof is sufficient to shew that these were the books of the company. A printed label of the name of the company was on the books, the entries in them are in favor of the Steam-boats Anson and Swan, and pole-boats that belonged to the company, and made by Bryan, one of the plaintiffs, and by LaCoste, and their clerks; and above all, the witnesses identified them as the books of the company, and the plaintiffs themselves produced and delivered these very books under an order of the Court,

made in 1845, that all the books and accounts and other documents of "The Planters' and Merchants' Steamboat Company," mentioned in the defendant's answer, be placed in the office of the Commissioner, so that the defendant might have access to them, &c.

These books were recognized by the company, and under the bye laws subject to the inspection of the stock-holders at all times. It would be difficult to conceive of more conclusive proof of the books belonging to the company than what has been offered. The exception is overruled.

2d. "Because the Commissioner hath in his said report certified, that the small book marked A, was admitted as evidence to establish certain of defendant's charges, as a book of the company; whereas it should have been rejected, as only a private memorandum book of the defendant, not purporting to contain all his transactions." There is no reason to reject a book because it does not contain all the transactions of the company; generally no book does contain

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all; *every book has its appropriate use, and there is no rule of law that requires a certain number of books to be kept and no others, and no bye-law of the company required it. In conducting a large and extended business, for such a company as this, which had many branches and subordinate agencies, more than the ordinary number of books would have to be kept, and the entries in this book were certainly not the private memoranda of the defendant, for they were connected with the affairs of the company, and were made in the hand-writing of several other members and agents of the company, which properly gave it the character of being a company book; it contains the only account of the disbursement of the original stock. Its genuineness is conclusively confirmed by the original entries made in it being transferred to the other books of the company. From the appearance of the book, and the mode and matter of the entries, nothing could be inferred against it, and there is no ground to suspect that it was a fabrication, and the Commissioner reports that the only circumstance that has had the slightest effect in discrediting it, is the fact that it was not (according to the Commissioner's recollection) lodged in the Commissioner's office at the precise period fixed by the order of the Court. The defendant's answer refers to and relies upon the entries made in this book, which has been recognized as one of the company's books, by the incorporators and their agents using it, and a large part of the charges contained in this book was established by satisfactory vouchers and parol evidence. This exception is overruled.

3d. "Because the Commissioner hath in and by his said report certified that he has allowed the defendant sundry charges of postage, whereas the said Commissioner

ought, upon the evidence before him, to have rejected said charge as not proved." The charge was \$45.00, for six quarters postage. The amount was not only reasonable, according to the evidence of the extensive correspondence, but defendant offered to produce all his letters relating to the business of the company, which the plaintiffs did not require, and in addition to this, the charge was proved from the entries in the books. There can be no sufficient reason why the company should not pay for their own postage, as well as a bank or a partnership; and it would seem to be unreasonable for their President and general agent to bear this burden, unless he had expressly stipulated to do so. The exception is overruled.

4th. "Because the said Commissioner hath in and by his report certified that he has allowed charges of defendant under \$10, on the 40s rule established in the English Court of Chancery, upon the defendant's own oath, whereas the said rule is not known to the practice of our Courts of Chancery."

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*The rule is well established in England, that a defendant on account shall be discharged by his oath, of sums under forty shillings.¹ One of the earliest cases was an account between the plaintiff who was a gardener, and the defendant a seedsman. The latter was allowed sums sworn to under that amount, by way of discharge, but the former was not allowed for trees sold and delivered, without other proof than his own oath. The rule is however subject to these limitations: the defendant must swear positively that he has actually expended the sums, and must specify to whom, and when paid, the whole of the items so established must not exceed £100, and there must be no reasonable ground to doubt the defendant's oath. Chancellor Kent, in *Remsen v. Remsen*, suggests that as forty shillings sterling was the sum established in the early history of the Court, perhaps twenty dollars would not be deemed an unreasonable substitute. Our Act of 1721 provided that the Court of Chancery "shall proceed, adjudge and determine in all causes brought into the said Court, as near as may be according to the known laws, customs, statutes and usages of the kingdom of Great Britain; and also as near as may be according to the known and established rules of his Majesty's high Court of Chancery in South Britain;" and by this we must be controlled, unless the practice of the Court has been changed, either by statute, by decisions, or by our own rules of Court. There has been no statutory provision on the subject of the 40 shillings rule, nor any decision of our Courts reversing it; but it has frequently been adopted in prac-

¹ 2 Cases in Ch. 249, 1678. 2 Vern. R 176.
¹ Eq. C. Ab'd. 11.—1 Ib. 282. 2 Atk. 410.
² Smith, Ch. P. 117. 2 Story's Eq. J. 743. 2 Johns. C. R. 510.

tice; although I can find no case in which it has been expressly considered and decided by the Court of Appeals. In the case of *Wright v. Wright* [2 McCord. Eq. 185] it constituted one of the reasons for the Court sending the case back to the Circuit Court, and remanding the accounts to the Commissioner; and in conformity to this view of the practice, the rule was adopted in discharge of the accounts of an administrator on oath, in the case of *Neal and wife v. Saunders*, administrator, in which the parties acquiesced. The reason of the rule is manifest; so small a sum would generally be too slight a temptation to commit perjury. The fiduciary relation that the defendant has occupied, raises the presumption that he is certainly worthy of credit on oath for that small amount, when the parties have entrusted him with a hundred times as much without an oath; and moreover, that it would in many items, cost as much to obtain the witness's attendance to prove the amount under 40 shillings, as the sum established by his testimony. The limited amount and the mode of administering justice within the jurisdiction of a magistrate, may also furnish an analogy. Many of these items were vouched, and no proof was offered to rebut the defendant's oath. The exception is overruled.

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*5th. "Because the said Commissioner hath in and by his said report certified that he has allowed defendant's charge of \$400 in schedule D, as paid to S. Mowry, Jr. whereas the said Commissioner ought to have rejected the charge as insufficiently proved."

This sum was entered in the books of the company as having been paid to S. Mowry by draft on Kirkpatrick & Co., and the defendant held the account of S. Mowry against the company, in which this sum was credited generally as having been paid by a draft on Kirkpatrick & Co., without stating from whom the draft had been received, and the balance was struck. This certainly was sufficient to raise a strong presumption that defendant paid it, as he was of all the stockholders, the only one that should pay it, and especially as no other member has pretended or claimed to have paid it. The entry in the books is supported by the receipt, and corroborated by the circumstances, so as to leave no reasonable doubt of the defendant having paid it. This exception is therefore overruled.

6th. "Because the said Commissioner hath in and by his said report certified that he has allowed the defendant's charges of \$600, \$300, and \$800, for services; whereas, the said defendant was not entitled to this compensation." This exception, like the preceding, is a question depending upon the evidence, which is clear and conclusive, as to what the defendant was to receive, how long, and the manner in which he served. The charges

were entered in the book before the assessment was made in 1841; the plaintiffs admit in their amended bill that he was to be paid \$600 per annum, and the testimony of LaCoste, Henning, Douglass, and others, prove that his services were worth that amount.—This exception is overruled.

7th. "Because the said Commissioner hath in and by his said report certified that he has allowed the defendant's charges of payments to F. Barden; whereas, the said charges of payments ought to have been rejected as insufficiently proved." This exception depends upon the evidence furnished by the books, by a receipt in defendant's possession, and by the examination of F. Barden; which, taken together, is sufficient to establish them. This exception is overruled.

8th. "Because the said Commissioner hath in and by his said report certified that he refused to charge the defendant with the unsettled accounts or debts due to the company; whereas, upon the evidence as to defendant's duty, he ought to have been required to account for them, or to explain why they had not been collected."

There is no proof that the defendant has received any of the assets of the company

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for which he has not accounted, *and before he can be held accountable for debts due them, they must establish his laches. His agency terminated in January, 1841, and there were other agents of the company, who were as much bound to collect the debts as the defendant; and there was no proof that any of the accounts were lost by his neglect; and the testimony of LaCoste, Henning, Wingate, and Douglass, exonerate him from such a charge; and when it is remembered that he owned 6-15ths of the stock, no one had so much interest at stake, or had so strong an inducement to collect the debts as he had, and he is the greatest sufferer in the losses of the company. After his agency ceased, it was no more his duty to collect the debts than it was the duty of any other Stockholder. This exception cannot be sustained.

9th. "Because the said Commissioner hath in and by his said report certified that he has charged the defendant only with his own receipts and disbursements, not those of LaCoste and others; whereas, upon the evidence, LaCoste and others, acting in the business of the company, were sub-agents of defendant, and accountable to him only." The defendant's agency was one of a general character till January, 1841; but from the nature of the business of the company, it was indispensably necessary that other agents should be employed to attend to it likewise; and their liabilities to account to the company did not devolve upon him; he discharged the functions of his own agency; and for the performance of the duties of the other persons, who had been necessarily em-

ployed in the management of the concern, the company must resort to them respectively. It would be just as reasonable to make the President of a Bank responsible for the default of the out-door clerk, as to hold the defendant liable for the captain of a boat not accounting for the delivery of freight, or the passage money which he had received.—The rule is, that where an agent appoints another to do his duty, and substitutes him in his place, he is liable for his negligence or default; but here there is no proof of that kind; indeed, the whole weight of the evidence goes to show that defendant exercised great industry, diligence, and perseverance, in discharging his duty, and so far from falling short of doing what he was bound to perform, he did much more. In addition to this, the plaintiffs have failed to prove any specific acts of negligence, or any actual loss or damage resulting to the company from the misconduct of the agents.—The exception is overruled.

10th. "Because the Commissioner hath in his said report certified that he has allowed defendant's charges of articles furnished and payments made, on the evidence only of defendant's own entries in the book A, and the other books produced on the reference;

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whereas, he ought to have held such *evidence insufficient for the purpose." These books have been, from the organization of the company, subject to the inspection of the Stockholders, and have been established to be the books kept by the agents of the company, and as they charge the defendant with his receipts, it would seem they ought to be competent to credit him with his disbursements, unless the plaintiffs could falsify them. When the agents make entries in books kept for their principals, which are necessarily connected with the business they are employed to transact, they are to be considered prima facie as if made by their principals; and if such entries are sufficient to bind third persons, they certainly ought to bind the parties, particularly with such strong circumstances of corroboration, many of the items having been vouched, some proved by the witnesses, and all sworn to by the defendant, and no proof on the part of the plaintiffs to rebut the truth of his answer. This exception is overruled.

11th. "Because the Commissioner hath in and by his said report certified that he has allowed defendant's charges contained in exhibit F; whereas, the evidence upon which, as appears by the said report, these charges were allowed, ought to have been held insufficient."

These disbursements, in the aggregate, amount to \$1,417.07; in 1838 are entered in the book A, and transferred, on the first of January, 1839, to the journal, and from thence to the ledger. LaCoste made entries, under the transfer, in the journal. In addition

to this, some of these demands were proved by receipts, others by evidence of witnesses, and many of them came under the amount of forty shillings, and there was no evidence offered on the part of the plaintiffs to rebut this proof, or to raise a presumption that the items were improperly charged. This exception is overruled.

12th. "Because the said Commissioner hath in and by his said report certified that he allowed the testimony of Wm. Godfrey, taken by commission, to prove the payment by defendant of three notes in the bank, which notes the said Godfrey testified were not in the bank at the time of testifying; whereas, the said Commissioner ought to have required the production of the books of the bank, from which the witness professed to speak, and the notes themselves; which, if paid by defendant, were presumptively in his possession."

The company owed the notes in the Bank of Cheraw, none of the Stockholders claimed credit for their payment but defendant, who was the general agent of the company, and ought to have paid them; he had credited himself with the amounts, and had some of the renewals in his possession, and it was expressly proved by Godfrey that he paid them. The exception is overruled.

13th. "Because the said Commissioner

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hath in and by his *said report certified that he has refused to charge the defendant with the note of W. Lubbock; whereas, the said Commissioner ought to have charged defendant with the said note, as taken by him from one that defendant knew to be under age at the time, and who, upon that ground, refused to pay it." The Commissioner states the circumstances under which the sale of a share of the stock was made by the defendant to Lubbock, (who had been appointed captain of the boat, and it had been a bye law or rule of the company that the captain should own a share,) at \$2,000, which was \$500 above par, on the condition that when he paid for it, it should be his. During Bryan's agency, this note was entered in the journal and transferred to the ledger. It appears that Lubbock was an infant, and turned out to be insolvent. It is not alleged that the defendant did not act bona fide in the sale, and as no objection was made to what was notoriously known by the Stockholders, that Lubbock was captain, and had bought a share, it would exceed any rule of liability ever presented for agents, to hold that the defendant should make the share good, especially when the contract was conditional, and the title to the share in stock was reserved in the company till Lubbock paid for it; this prudent reservation of the title exonerates the defendant from neglect, and it left the share where the contract found it, and the company cannot complain of any actual loss, and an agent is certainly

not liable for any other kind. This exception is overruled.

14th. "Because the Commissioner in his said report hath certified that exhibit A, thereto attached, contains a statement of the account between the parties; whereas, in the said statement, the said Commissioner has charged the company with negro hire due the defendant as on the 31st December each year, and defendant's own salary as of same date, when the said charges, if due at all, were due the first of January succeeding; and the statement does not contain a charge against the defendant of a sum proved to have been received by defendant of J. N. Williams." The plaintiffs have not pointed out any error in the calculation of the Commissioner connected with this exception, and he states that there was no evidence before him of any sum having been received by defendant from J. N. Williams, which occurred to his recollection. This exception must therefore be overruled.

The defendant's exceptions are:

1st. "Because the Commissioner disallowed the charge of \$250, which was charged in the Anson's books as paid by Gregg for the company, which said charge was transferred to the books of the company." This excep-

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tion depends on the *testimony of George Douglass, who proved the loss of the book in which these charges for sundries furnished the boat were entered, that there were other entries in the said book on the credit side for passage money received on board by the clerk, which was about enough to furnish the boat with provisions. As no credit had been given the company for the passage money entered in the same book, the Commissioner thought there would be no propriety to allow the charge without allowing the credit, when it might well be that the passage money had been so applied. The witness did not prove the specific entries which made the aggregate of the claim connected with the business; when a party relies upon original entries in a book to support his demand, and the proof establishes credits in the same book sufficient to discharge it, it requires explicit proof before such a claim ought to be allowed. The onus of proof is upon the defendant, and it may be his misfortune that the book has been lost, as he is bound to show clearly how the transaction stood.—Its loss cannot be imputed to the plaintiff's negligence, and ought not to be perverted to his injury, as it would be dangerous to indulge in conjectures, when the evidence ought to make matters certain. A reasonable doubt of the correctness of such a claim is sufficient ground, under the circumstances, for its disallowance. The transfer of an aggregate amount, without specifying the items that composed it, to a book of the company, where there has been no accounting or settlement or any act of the com-

pany admitting it, cannot have any weight. The exception is overruled.

2d. "Because the Commissioner disallowed the charge of three hundred dollars, amount paid John McLenaghan's note at bank, which was specifically charged in book A and in journal and ledger of the company, as an amount paid for the company by defendant, and for which defendant should have been credited."

The payment of a debt of McLenaghan by defendant, did not authorize him to charge the company for so much money paid for their use, without some agreement with them to that effect, and no proof has been offered of any such contract, either express or implied. A question of this sort depends entirely upon evidence, and unless the misapprehension or mistake of the Commissioner is clearly pointed out, or may be fairly presumed from the proof, his report must be considered at least *prima facie* correct on matters of fact; and no evidence has been brought to my view sufficient to establish this charge. This exception is therefore overruled.

The next important question in the case is as to the costs. As this is a matter for the discretion of the Court, it must depend upon the circumstances of the case, and the conduct of the parties. After examining the

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books of the company, *it is apparent that they have not been kept by the defendant with either skill or clearness, however honest and fair his intention may have been. That he acted *bona fide* is presumed, and it was not urged that he did anything with an intention of defrauding the stockholders; he seems to have been by far the greatest sufferer by his own miscalculations; he represented the business as prospering, and bought other shares some time after the company commenced business.—This, together with his industry and perservance, indicates that he acted as an honest man, but that he has been mistaken in the calculation of the profits. The business has terminated in a ruinous result to the interest of the stockholders; but while this disaster is not to be considered as criminal, it is palpable that the complicated machinery of the concern, the number of agents, the high, not to say extravagant, cost of the boats, the want of adaptation of one of them as a river boat, however suitable she was for the sea, the confusion of the accounts and the difficulty of straightening them, and the uncertainty of what were the actual expenditures, even at the hearing, shows that even with good motives, a man may involve himself and his friends in great losses. The stockholders called on defendant to make a showing of the affairs, and he answered the call by proposing to bring forward the accounts, or submit them to the investigation of others. This is sufficient to exculpate him from

blame, as to coming to an account: had he refused, he ought to have paid the costs of the case, but from his willingness to account, he exhibits a disposition to do what is right. But for the defective mode of keeping his accounts, the difficulty of showing the plaintiffs how they stood, what had been received, what had been invested in boats, what had been expended, and what profits had been derived or losses sustained—he was bound to do all this; and if he had been incapable of doing so, he ought not to have assumed the agency. The duty of an agent is plain; he must be able to account to his principal satisfactorily, and ought to show how he has discharged his trust, so as to leave no doubt about his receipts and expenditures; and if his principal calls him to account before the Court, and he has to ransack the whole country for proof, that he ought to have taken in shape of vouchers, and been able to exhibit any moment,—he must not expect that his principals should pay for the expense of bringing forward his proof.

It is therefore ordered and decreed that the report be confirmed, and that the plaintiffs pay their costs, and the defendant pay his own costs.

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*Grounds of Appeal.

From the foregoing decree the complainants appealed, upon the following grounds, viz.:

1st. Because his Honor the Chancellor held that certain books of account mentioned in the proceedings, to wit: those styled day book, journal and ledger, and that distinguished as book A, were competent evidence for the defendant in establishing his account of disbursements and of articles furnished for the company.

2nd. Because his Honor held that the 40s. rule, as recognized in the English Chancery practice, is in force in this State, and that, in virtue of this rule, an agent accounting in Chancery, may prove charges of any sums under ten dollars, by his own oath alone.

3rd. Because, if this rule be in force, a larger amount in gross was permitted to be so proved in this case than the rule itself authorizes.

4th. Because his Honor held that the defendant was properly allowed compensation for his services as agent, the right to which the complainants insist he had forfeited.

5th. Because his Honor held that defendant was properly allowed certain charges of money paid to F. Barden, the evidence that payment was by defendant being, as complainants contended, insufficient.

6th. Because his Honor held that defendant was not bound to account for the debts due to the company, which had not been collected.

7th. Because his Honor held that defend-

ant was bound to account only for his own receipts and disbursements, and not for those of agents, appointed by him, in the transaction of the company's business.

8th. Because his Honor held that defendant was not bound to account for the note of William Lubbock.

9th. Because the defendant has not accounted for the loss proved to have resulted from an unauthorized use of the boats of the company, in the service of the United States, on the coast of Florida.

10th. Because his Honor ought to have decreed that all the costs in the principal case and in the ancillary suits for discovery, should be paid by the defendant in the principal case.

11th. Because the decree of his Honor is, in other respects, contrary to law and equity.

McIver, for the motion.

Dargan, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The Planters and Merchants Steam Boat Company was incorporated in December, 1837,

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and went into operation in *1838. The defendant was appointed President, and general agent for the purchase of a boat, and for the entire management and superintendence of the business. He continued in that office until January, 1841, and, in July of that year, the company appears to have been dissolved.

This bill was filed by the stockholders against the defendant (who was also a stockholder of rather more than a third of the capital) for an account. His salary was six hundred dollars per annum. The cause had been referred to the Commissioner, and several questions arose on exceptions to his report.

The principal objection was because the Commissioner had admitted in evidence, to establish certain charges of the defendant, the books called the books of the company, day book, journal and ledger, and also a small book marked (A.) kept by the defendant. This exception was overruled by the Chancellor, and constitutes the first ground of appeal.

The general rule is that the best evidence, of which the case is susceptible, must be adduced. Merchant's books are admitted in evidence to prove the sale of goods or merchandize, and this was, in some sort, from necessity, but they are never allowed to prove cash loaned, or money paid. But the rule on this subject, and the reason of it, are distinctly stated in *Rowland v. Martin-dale*, Bail. Eq. R. 226, and we do not desire to depart from it. "As a general rule," says Mr. Justice Johnson, "there can be no question but that an agent must prove his disbursements by strictly legal evidence. No

man of business pays money without evidence of the fact, other than his own knowledge; and the accountability of the agent renders it still more necessary to take and preserve satisfactory vouchers of his payments. With proper attention it is always in his power to do so, and it ought never to be dispensed with." The case of the *Sinclair v. administrator of Price*, 2 Hill Eq. R. 160, note, is then noticed, and the reason of the exception stated. But the books here tendered constitute no exception. They are not what are properly called corporation books, which record the proceedings of the corporation, but they are no more than the books kept by an agent showing his transactions as such. It is said in the decree, that book (A.) "contains the only account of the disbursement of the original stock." How can it be said that this is the best evidence of the disbursement of twenty thousand dollars? *Kerr v. the Steam Boat Company*, Cheves' Eq. R. 189, was a case between the company and their agent. The assumption of jurisdiction by the Court of Equity is there based upon the principle that the agent must be prepared to prove every charge that he has made, and, in consequence of this, he is entitled to the facilities of accounting afforded by the practice of the Court of Equity. If the books, such as those now offered, were evidence for the agent, he would require no

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aid *from the Court of Equity. But we think also that the practice in this State is in accordance with the practice in Westminster Hall, as stated by Chancellor Harper, that the agent "discharges himself by his affidavit, without voucher, when the amount of the item is under 40s."

The next ground of appeal is because the defendant had forfeited his compensation as agent.

This ground is entirely too general. It was due both to the defendant and to the Court that the causes of forfeiture should be specifically set forth. But the reply is that the defendant was continued from year to year as agent, and ultimately withdrew voluntarily from the office. If there existed general dissatisfaction with his conduct, it was in the power of the company to have removed him. If he has caused any specific loss to the company it should have been alleged and substantiated, and his liability would depend on the proof.

The 6th and 7th grounds of appeal may be considered together. The defendant was the general agent of the company—all subordinate agents were responsible to him. Thus the defendant says in his answer, that Barden's account was settled with Mowry, but "was revised by the defendant." The company looked to their president and general agent. It was his duty to see that the debts due to the company were collected, and he

must shew that he exercised ordinary diligence for that purpose. Of course it is not meant to be said that he is responsible for bad debts, or for the negligence or faithlessness of agents whom he necessarily employed.

But as the defendant is responsible to the other stockholders, and two of the complainants, Smith Mowry and Brown Bryan, who have called him to account, had extensive transactions for the company, it is proper that they should account for those transactions, in order to enable the defendant to render more complete and satisfactory the account of his general agency. In view of this accountability, the defendant, at a previous stage of these proceedings, moved, unsuccessfully, for an order to that effect. This Court is of opinion that, as between them, the defendant is entitled to such order, and it is hereby so directed.

The Court has considered the exception in regard to Lubbock's note, and are satisfied with the views presented by the Chancellor.

No exception was taken to the Commissioner's report in relation to the unauthorized employment of the boat on the coast of Florida. It should have been made a specific charge, and an opportunity thereby offered to the defendant to justify or exculpate himself.

The only remaining question is in relation to the costs, and as, from the view taken by the Court, the accounts must necessarily be remanded to the Commissioner, the decree

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on that *point is opened, and the question of costs reserved until the hearing on the final report.

It is ordered and decreed, that the report be recommitted to the Commissioner, for the purpose of hearing testimony and stating the account upon the principles of this decree—on all matters not hereby otherwise ruled the decree of the Circuit Court is affirmed.

JOHNSTON, Ch., and CALDWELL, Ch., concurred.

Decree modified.

2 Strob. Eq. 317

EDWARD FOOTMAN, Trustee, et al. v. B. R. PENDERGRASS et al.

(Columbia. Nov. and Dec. Term, 1848.)

[Witnesses \hookrightarrow 54.]

It is an established principle, that the husband or wife should be excluded from giving evidence in a case where either the legal or equitable interest of the other is involved in the issue.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 142; Dec. Dig. \hookrightarrow 54.]

Before Caldwell, Ch., at Williamsburg, March Sittings, 1848.

Caldwell, Ch. This was a bill for the specific delivery of the negro slaves mentioned

in the pleadings, and for compensation for their loss while out of the possession of the plaintiffs, who claimed them under a deed¹ made by William C. Footman, which is as follows: "State of Georgia, Bryan county. Know all men by these presents, that I, William C. Footman, of the county and State aforesaid, for and in consideration of the sum of one dollar to me in hand paid by Edward Footman, of said county and State, and before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have granted, sold and delivered, and by these presents, do grant, sell and deliver unto the said Edward Footman the following negro slaves, to wit:—Prince, Nancy and their children, Matilda, Little Prince, Henrietta, Binah, Mary, Rosina and her children, Malissa, George, Sarah, Phoebe and Thomas, Harriet, Nelly and Caroline, Christmas, Chloe and Primus. To have and to hold the aforesaid named negroes, together with the future increase of the female slaves, unto the said Edward Footman, his executors, administrators and assigns forever, free and unrestricted from any debts and contracts which may hereafter be incurred or entered into by the said William C. Footman; upon condition, nevertheless, to and for the sole and separate use, benefit and behoof of Mrs. Mariah H. Footman, and her children Peter Oliver Footman, Mary Elizabeth and John Maxwell Footman, with any future issue

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hereafter to be begotten between *the said William C. Footman and Mariah H. his wife, in trust upon the condition above stated; and lastly, I, the said William C. Footman, the above named property, in trust as aforesaid, will warrant and forever defend. In witness whereof, I have hereunto set my hand and seal, this fifth day of March, in the year of our Lord, eighteen hundred and thirty-two.

(Signed) Wm. C. Footman, [L. S.]

Signed, sealed and delivered }
in presence of

Joseph A. Pelot,

Joseph S. Pelot.

Georgia, }

Bryan county. } Clerk's office of Superior
Court, recorded in book C, page 74 and 75,
April 11th, 1832, and examined by

Joshua Smith, C. S. C.

The parties and slaves then resided in Bryan county, Georgia: the donor had formed the intention of removing to South Carolina in January before the execution of the deed, and accordingly did remove to the State afterwards; after the execution of the deed, the negroes remained in Georgia about a year longer, and were then brought here. The child Peter Oliver Footman has died, and the following children of William C. and Mariah H. Footman have been since born.

to wit: Eliza Juliana, Mariah Isabel, Amelia Almira, Richard Morgan and Henry Edward Footman, who, together with the trustee, Edward Footman, and their mother and brother John Maxwell Footman, and their sister Mary Elizabeth and her husband Robert A. McKelvy, with whom she has intermarried, are the plaintiffs in this case, and allege that the donor was out of debt when he made the deed. The defendant Benjamin R. Pendergrass, denies that William C. Footman was out of debt, and states that he was then embarrassed with debt and has continued so up to the present time—that Mrs. Footman assumed the relation of feme sole trader in the community. The defendant admits that the negroes were in the possession of William C. Footman, and alleges that defendant, on the second of February, 1837, loaned to William C. Footman and wife \$2282, taking their bond payable at ten years, to secure which they mortgaged a tract of land in Williamsburg District, supposed to be worth six or eight hundred dollars, and four slaves, Malissa, Sarah, Henrietta and Binah; that sometime in 1845, the parties being indebted to him for interest credited on the said bond and for supplies of corn and money advanced, executed, on the 11th of March, 1845, their bond to him for \$1070, payable on the 11th of March, 1846, and to secure the same gave him a mortgage of the negroes Matilda and her children Elvira, Rose and Betsy, Mary and her children

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Charlotte and Frederick, Prince, Nancy, Prince Junior, George, Rosina, Thomas, Caroline, Jacob, Edgar and Nelly, and when the mortgage was due he proceeded to foreclose the same, taking, through an agent, the negroes mentioned in the bill as captured, intending to sell the same in the mode prescribed by law. Three of the negroes, Matilda, Rose and Betsy, have run away from him, and, as he has heard and believes, are in the possession of the family of Footman and wife. The defendant denies that until he had so seized the negroes he had any notice or intimation of any such deed, and submits that the whole contrivance is a fraud on the part of William C. Footman and wife to defeat the just rights of the defendant in the premises—that the deed as to the defendant is null and void, as he occupies the position of a bona fide creditor and purchaser for valuable consideration without notice.

The first question is whether the deed is fraudulent. When it was executed by William C. Footman, he, and his wife, and their three children and trustee Edward Footman, and the negro slaves conveyed by it, resided in Bryan county, Georgia, and the first inquiry is, was the deed valid according to the laws of that State? There is no law, either common or statute, that prohibits the making of such a deed in the State of Georgia, and

¹ Deed, March 5, 1832.

the evidence does not establish any subsisting debt against the donor at the time of its execution sufficient to invalidate it. No creditor has preferred any such claim; and the suggestion that he owed debts at its date which would now be barred by the statute of limitations, or that may have been since paid, is not enough to set aside the deed for fraud. There was no sufficient proof of any debts then subsisting against him that have not been discharged. It is incumbent upon the defendant to make the proof of indebtedness; which he has failed to do, while the plaintiffs have satisfactorily established that all the debts that he probably then owed, have been discharged. The next question is, do the laws of Georgia require the deed to be recorded? However expedient such a statute might be to prevent fraud, there was no law of Georgia at the time the donor made this deed that required it should be recorded; the law of that State leaves it altogether optional with the party whether a deed of personal property shall be recorded or not.

The Act of 1785² relating to the recording of deeds of real estate has always been construed merely in reference to enabling the party having his deed so recorded to give it in evidence without any other proof of its execution, and under this construction all the subsequent statutes have been adopted, except the late Act relating to marriage settlements, passed during the session of 1847, but which does not affect this case.³

The Act of 1819 provides that "all convey-

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ances of person*al property duly executed or bearing date after the passage of this Act may be recorded, and shall be admitted as evidence, under the same rules and regulations as govern in cases of real property;" and the Act of 1827 prescribing how future deeds are to be admitted to record, provides "that every deed of conveyance or mortgage, of either real or personal property, hereafter to be made, may, upon being executed in the presence of and attested by a Notary Public, Judge of the Superior Court, Justice of the Inferior Court, or Justice of the Peace, (and in cases of real property by one other witness) be admitted to record and made evidence in the different Courts of Law and Equity in this State, as though the same had been executed, proved and attested as heretofore required by the laws of this State in cases of deeds of real property."

Absolute conveyances are required to be recorded within twelve and mortgages within three months. From these Acts it is apparent that agreeably to the laws of Georgia it is not necessary to record a deed of personal property, and that it is entirely optional with the party whether he record it or not; and the benefit derived from recording

is the right to offer the deed in evidence without proof. The Acts have no reference to the rights of creditors or purchasers, but are intended to protect the parties or privies to a deed, by enabling them to establish it without proof of its execution. This deed has been executed, witnessed, recorded in the proper office and certified in the usual mode prescribed by the laws of that State—the only proof of recording, then, is the attestation of the Clerk on the document recorded. But the execution of the deed was proved by one of the subscribing witnesses, who was examined by commission, independently of the effect of recording, and therefore the question as to the recording of it becomes immaterial: it was a valid deed in Georgia when it was made, and the right and title of the negroes vested in Edward Footman the trustee; and the only remaining question is, did the removal of the donor, the cestui que trusts and the property to South Carolina, make it necessary that the deed should be recorded here? If this deed be considered as a post nuptial settlement, making provision for the wife and her issue, the Act of 1785⁴ embraces only such marriage settlements "that shall hereafter be entered into for securing any part of the estate, real or personal, in this State," and therefore cannot affect property and persons out of the State when their rights vested. But it has been argued that as the donor intended, before he made the deed, to remove to South Carolina, and he and his wife mortgaged the property to the defendant without giving him notice, it is a fraud, and the deed ought to be considered null and void, as the defendant is both a creditor and purchaser. But there is no proof, except what may be presumed

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from circumstances that occurred *subsequently to the execution of the deed, that William C. Footman or his wife or the trustee intended to practice a fraud when the deed was made, and whatever wrong he has done, has been effected after too great a lapse of time to raise any reasonable presumption of an intention to defraud. The mortgage was given nearly five years after the deed, and however unfair and fraudulent it may have been to give a mortgage of property to which he knew he had no title, it cannot have the retrospective effect of invalidating this deed. There was very strong proof offered at the hearing to show that Wm. C. Footman had paid all his debts, as far as his factor knew; and there appears to be no sufficient ground to believe that the deed at its execution was intended to defraud any of the persons that he then owed; its terms repel such a presumption, as its object seems to have been entirely prospective. There were rumors that Mrs. Footman was a feme-sole-trader, but if she had been

² Prince's Dig. 162.

³ Ib. 215, sec. 3.

⁴ 4 Stat. of S. Ca. 656.

she was not competent to make such a mortgage; her contracts, to be valid, would have to have been confined to her sole-dealing; and it is well settled that lands and negroes are not the subjects of feme-sole-trading. But there was no proof that either she or her husband made any such representation to the defendant; and fraud, to invalidate the deed, cannot be inferred from her legal disability to make a bond and mortgage.

The defendant has also relied upon the ground that he was a purchaser for valuable consideration without notice, but this cannot avail against a legal title. This is certainly a hard case against the defendant, who has been greatly wronged and injured by the confidence he has reposed in the bond and mortgage of William C. Footman; but there are others interested in the property who are not only innocent but are under the disability of infancy, and their rights must be protected. The charge of fraud against Mrs. Footman was not sustained by sufficient proof: there are many married women who are ignorant of their being incapable in law to make a contract, and it is a popular error that a married woman who is interested in a trust estate can make a contract to bind that interest.

It is therefore ordered and decreed, that the defendant, Benjamin R. Pendergrass, be perpetually enjoined from selling the said negro slaves under the said mortgage, and he do forthwith deliver them that are in his power or possession to the plaintiffs who are entitled to the same under the deed, and that he do account to the said plaintiffs for the hire of such negro slaves as have been under his control or in his possession, and that it be referred to the Commissioner to ascertain and report the same. The plaintiffs to pay their own costs, and Wm. C. Footman to pay the costs of the defendant Benjamin R. Pendergrass.

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*The defendant moved the Court of Appeals to reverse the decree of the Chancellor, on the grounds:

1. Because all the circumstances of the whole transaction shew that the deed originated in fraud, and the Chancellor should have so decreed.

2. Because the deed being the voluntary conveyance of the husband to his wife and children after marriage, was void against subsequent creditors and purchasers.

3. Because the deed is to be regarded as a post nuptial settlement, and void against creditors and purchasers, for want of record according to law.

4. Because his Honor, the presiding Chancellor, held that the deed was recorded in the proper office in the State of Georgia—and that there is no law of Georgia requiring the recording of such an instrument. Whereas it is respectfully submitted, there was no sufficient or competent proof in the case, that

the said deed had ever been recorded in Georgia. And it is also submitted, that the Act of 1785 of that State⁵ requires such a deed to be recorded, and on failure thereof, it cannot operate to defeat the rights of a subsequent creditor and purchaser in South Carolina, without notice.

5. Because there was proof of indebtedness existing at the time of the execution of the deed, unsatisfied at the time of filing the bill.

6. Because his Honor permitted the commission for the examination of the witness in Orangeburg to be received in evidence, although it had been conveyed from the Commissioners by the said William C. Footman, who, the appellant submits, was not a competent bearer thereof, inasmuch as he was interested in the event of the suit.

7. Because in any event the Chancellor should have decreed the interest of the said W. C. Footman, as a distributee of the deceased child Peter Oliver Footman, under the said deed, liable to the mortgage.

8. Because the decree is in other respects against justice, equity and conscience.

F. J. Moses, for the motion.

Rich and Haynesworth, contra.

CALDWELL, Ch., delivered the opinion of the Court.

From the statement made in the defendant's brief, we cannot separate the testimony of the witnesses so as to ascertain what weight ought to be given to the testimony of Wm. C. Footman, the husband of Maria H. Footman, who is one of the plaintiffs: the case must therefore be sent back to the Circuit Court. As the question has been made by the parties, whether the husband, (who is one of the defendants,) is a competent witness on the part of the plaintiff, we have deemed proper to decide it. Although no

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other relation is excluded, *it is a well established general rule, that the husband or wife cannot testify for or against each other, either in civil or criminal proceedings: to this, there are several exceptions, but we are not satisfied that in this case the husband can come within any of them.

In Wyndham v. Chetwynd, 1 Bur. 428, the Court, relying upon the decision in Hilliard v. Jennings, held, that a husband could not be a witness for the wife, on a question touching her separate estate. But the decisions have not been uniform upon this subject. In Richardson v. Learned, 10 Pick. 261, which appears to have been a well considered case, the Court came to the conclusion that the husband was a competent witness, under the following circumstances: the plaintiff, who was trustee of the wife, brought an action of covenant to recover money in trust for her sole and separate use; the wife had a general power of appoint-

⁵ Prince's Dig. 159.

ment, and the property, if recovered by the plaintiff, would be held by him subject to her direction and appointment, without the control of her husband, who could have nothing but a contingent interest in the suit; and the Court therefore held that the husband was admissible as a witness for the plaintiff.⁶

The case of *Davis v. Dinwiddy*, 4 Term, 678, appears to have a strong analogy to the case under consideration: that was an action brought by the executor of a surviving trustee under a marriage settlement, to recover the value of certain goods which had been sold by the defendant, as sheriff, under an execution against the husband of the cestui que trust; the husband was offered on the part of the plaintiff to prove the identity of the goods, and in this respect his testimony would have been against his own interest, (as he would still be liable for the debt, which would otherwise be satisfied by the sale of the goods,) yet the Court held that he was incompetent, as his testimony directly affected his wife's interest.⁷

The same principle was recognised and applied by Sir John Leach, in the case of *Gregg v. Taylor*, 5 Russ. 19, and he lays down the rule broadly, that it makes no difference whether the interest of the husband or wife, to be affected by the testimony, is legal or equitable. Indeed so far has this principle been extended, and so strongly has it been supported, with a view of removing all distrust, and of establishing the most unlimited confidence between husband and wife, as well as promoting the most perfect union of their interests and affections, the Courts have held, that even after the parties have been separated by a divorce dissolving the marriage for adultery, they are incompetent to give evidence of what occurred during the marriage. Even the death of one of the parties does not render the survivor competent.⁸

Independently, therefore, of the interest of the parties, it would seem that the peace of

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families and public policy are *sufficient grounds upon which the principle should be established, that the husband or wife should be excluded from giving evidence in a case where either the legal or equitable interest of the other is involved in the issue.

It is ordered and decreed that this case be remanded to the Circuit Court for rehearing.

The whole Court concurred.
Case remanded.

⁶ 1 Phil. on Ev. 77, 81.

⁷ *Hopkins v. Smith*, J. J. Marshall Rep. 263.

⁸ *Bland v. Surley*, 2 New Rep. 331; *Doker v. Hasler*, 1 Ry. & M. 198; 3 Phil. on Ev. 150; *Munroe v. Tirellton*; *Aveson v. Ld. Kinnaird*, 6 Ed. 192.

2 Strob. Eq. 324

PETER SMITH v. THOMAS PETIGRU.

(Columbia, Nov. and Dec. Term, 1848.)

[Venue \hookrightarrow 19.]

The Court of Equity is one of general jurisdiction, but the right of a defendant to have the case tried in the district in which he resides, is reserved under the provisions of the Acts of 1791 and 1793.

[Ed. Note.—Cited in *Trapier v. Waldo*, 16 S. C. 283.]

For other cases, see Venue, Cent. Dig. § 33; Dec. Dig. \hookrightarrow 19.]

[Appeal and Error \hookrightarrow 1009.]

On a question of fact, the circuit decree will be sustained, unless the Chancellor was mistaken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3970; Dec. Dig. \hookrightarrow 1009.]

Before Caldwell, Ch., at Abbeville, June Sittings, 1848.

The following decree of the Court of Appeals explains the whole case:

CALDWELL, Ch. On calling this case on the docket at Abbeville Court House, at June Term, 1848, and after hearing affidavits on both sides relating to the residence and domicile of the defendant, the circuit Chancellor made the following order. "It appearing to the Court the defendant does not reside in Abbeville district, but that his residence is in Charleston district, it is ordered, that the bill and all the papers connected therewith, which are filed in the office of the Commissioner of Abbeville district, including the testimony taken before the Commissioner, be transferred to the office of the Register in Equity for Chancellor district, and that the case be docketed for trial in the said Charleston district." From this order the plaintiff appealed, upon the following grounds. "1. Because the affidavit submitted shewed that the defendant's residence in Abbeville district was his domicile. 2. Because causes of equitable cognizance are to be tried where the subject matter of litigation lies; and the jurisdiction of the Court does not depend upon the domicile of the parties. 3. Because, by the notice served upon the complainant, the defendant acknowledged himself a party in Court."

The first Act in relation to the Court of Chancery, after the change in this country from a proprietary to a provincial government, was passed in 1721,¹ and all causes in this Court were by its provision to be heard in Charleston; this continued to be the case

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during the whole period of the Royal *government. The constitutions of 26th March, 1776, and of the 19th March, 1778,² made no change as to the place where the Court of Chancery should be held; the former vested its powers in the Vice President of the Col-

¹ 7 Stat. 163, 4—5.

² 1 Stat. 128, 142.

only and a majority of the Privy Council, and the latter provided that the Lieut. Governor and a majority of the Privy Council for the time being, should, until otherwise altered by the Legislature, exercise the powers of a Court of Chancery. After the Revolution, the Act of 1784³ re-established a Court of Chancery consisting of three Judges, who were required to hold the Court at stated terms, for the full and solemn hearing of causes, at the place where the Courts of Common Pleas are usually held in Charleston. The Act⁴ further provided that "the sheriff of the district in which the party against whom any process of the said Court issues, resides, or the estate to be affected thereby, lies, shall execute and make a proper return of all such process, writs of subpoena only excepted."

The constitution of this State, adopted on the 3d of June, 1790, introduced a new system; and provided that "the judicial power shall be vested in such superior and inferior Courts of Law and Equity, as the Legislature shall from time to time direct and establish."⁵ Accordingly the Legislature, in 1791, enacted that "it was expedient that a Court of Equity, with adequate powers, be established in this State and that the laws now of force for establishing and regulating the Court of Chancery within this State, be, and they are hereby declared to be, and continue, of force, in this State, until altered or repealed by the Legislature thereof, subject nevertheless to such alterations, amendments and restrictions as are herein after directed."⁶ And as great inconveniences had been experienced in the remote parts of the State, on account of the Court of Chancery having been hitherto held in one part of the State only, in remedy thereof the Act provided "that all future sittings of the Court of Equity, for the full and solemn hearing of causes, shall be held at the times and places herein-after directed," &c. and after designating Columbia and Cambridge as the two other additional places where the Courts were to be held, it says, "and at Charleston for all causes wherein the defendant shall reside in either of the districts of Charleston, Beaufort or Georgetown, on the second Monday in March, the second Monday in June, and the second Monday in September," &c. The Act of 1793⁷ remedied the omissions of the Act of 1791 in cases where there were several defendants residing in different districts, or a greater number, or an equal number, residing in different districts, by providing that "the complainant shall commence and pursue his proceedings in that Court which takes cognizance over the districts in which the greatest number of de-

fendants shall reside; but when an equal

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number of the defendants reside in districts ranged under different Courts, the complainant may elect in which of such Courts he will commence his proceeding; and the Judges of the said Court of Equity shall or may make all proper and necessary rules for carrying the intention of this clause into effect."

The subsequent Acts organizing the Courts of Equity, modifying its powers, prescribing its practice, or arranging its circuits, do not affect these provisions of the Acts of 1791 and 1793. Although this is a Court of general jurisdiction, it is clear that the rights of defendants are reserved under the provisions of these Acts.

The first question submitted by the appeal is one of fact: all the affidavits that were read before the circuit Chancellor have not, (as they ought to have been) brought before us, but the vague statements of three presented on the part of the plaintiff, and the admission by his counsel of what was sworn to in the affidavits of the defendant and his overseer, make it clear, that the defendant's family (consisting of his wife and children) resided permanently in Charleston, where they had lived for several years; and that although he occasionally visited Abbeville district, where he owned a plantation and had a comfortable house, yet it could not be considered as his domicile.

It is a rule that has often been reiterated, that on a question of fact, the circuit decree will be sustained, unless the Chancellor was mistaken. Here we think the proof establishes his conclusion.

The extension that the various Acts of the Legislature have given as to places where the Courts of Equity are to be holden, would be of little benefit to defendants if the plaintiffs could ad libitum file their bills in any district in the State, and compel defendants to have the case tried where they did not reside; the objects of these Acts would be defeated.

While it is incumbent on this Court to protect the rights of defendants, it is clearly within its power to prescribe such rules as will carry out the intention of these Acts. Although we are not prepared to say that a defendant may not make this objection in his answer, where he resides in a different district from that in which the bill has been filed and he has been served, yet it would seem reasonable that he should apprise the plaintiff, as early as he could conveniently, of his intention to make a motion to transfer the case. While there is no rule of practice that requires this question to be presented by a plea in abatement, it is but just that the plaintiff should not be taken by surprise; after having incurred trouble and expense in preparing for trial, subpoenaing witnesses, and attending in person, and

³ 7 Stat. 209, sec. 8.

⁴ Id. sec. 11.

⁵ 1 Stat. 189, Art. 3d.

⁶ 7 Stat. 258.

⁷ Id. 283, sec. 5.

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when the defendant had given no notice of his wish to remove the cause to the district where he resided, the plaintiff would have strong claims to have his case heard, and under such circumstances, a capricious objection on the part of the defendant would not be sustained. But in this case the defendant has stated such circumstances as furnish very satisfactory reasons for his motion; that from conversation with the Solicitor on record of the plaintiff, he was led to believe the cause would by agreement be tried in Charleston, and that under this impression, he prepared his answer and exhibited it to the said Solicitor, and that "he was and has been always ready to proceed to trial in the said City."

There was nothing in the notice referred to in the third ground by which the defendant waived his right to make this motion: the object of the motion was to enable him to offer in evidence an office copy of a deed at the trial; and as he appears not to have taken the plaintiff by surprise, but to have acted towards him with fairness in preparing for a hearing of the cause at his place of residence, he is entitled to have it removed to the district of Charleston. It is therefore ordered and decreed that the appeal be dismissed, and the circuit order be confirmed.

The whole Court concurred.

T. Thompson, for the motion.
Perrin and McGowan, contra.

Order confirmed.

2 Strob. Eq. 327

PLEASANT MOON et al. v. NANCY T. MOON.¹

(Columbia. Nov. and Dec. Term, 1848.)

[Wills ⌘601.]

Testator begins his will by expressing a desire "to dispose of all his worldly estate," &c., then the clause materially affecting the question, is as follows:—"I give to my wife, Nancy T. Moon, the tract of land whereon I now live, containing two hundred acres, more or less; also two negroes, (to wit: my man Stephen and my girl Harriet,) during her natural life or widowhood," remainder over, &c.—held that these subjects were disjoined, and that the general devise of the land carried the fee.

[Ed. Note.—Cited in *Glover v. Harris*, 4 Rich. Eq. 36, 37; *Blackwell v. Ridgill*, 10 Rich. Eq. 345; *Mobley v. Cummings*, 35 S. C. 125, 14 S. E. 721.

For other cases, see Wills, Cent. Dig. § 1349; Dec. Dig. ⌘601.]

[Life Estates ⌘21.]

Tenant for life, who removes the property from the State, may be arrested under a writ of ne exeat, and compelled to give security not

to depart the State, but abide the judgment of the Court, &c.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 20; Dec. Dig. ⌘21.]

[Life Estates ⌘6.]

Tenant for life, who has sent slaves of the life estate beyond the limits of the State, should be required to give bond and good security to the Commissioner for the delivery of the slaves and their increase to the remainderman, at the expiration of the life estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 18; Dec. Dig. ⌘6.]

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*Before Caldwell, Ch., at Greenville, June Sittings, 1848.

The original bill was filed by Pleasant Moon, Robert D. Moon, John Moon, Sarah Cureton and David Cureton, her husband, Elizabeth Fair and her husband, and Caroline Cureton, against Nancy T. Moon. The plaintiff states that John Moon departed this life some years since, leaving a will duly executed, of which the exhibit A is a copy. The clause out of which the controversy arises, is as follows: "1st. After the payment of my debts and funeral expenses out of my estate by my executors, hereafter to be named, I give to my wife, Nancy T. Moon, the tract of land whereon I now live, containing two hundred acres, more or less, also two negroes, (to wit) my man Stephen, and my girl Harriet, during her natural life, or widowhood, and further give to my wife, Nancy T. Moon and her heirs forever, the following property, after my decease, (to wit) one black horse, named Charley," &c.

The plaintiff states that the negroes, with their increase, have remained in the possession of the said Nancy T. Moon, ever since the death of the testator, until within a few days past; that the plaintiffs have understood, and verily believe, that the said slaves, (to wit,) Harriet, Henry, John and Hannah, have been removed by the tenant for life, for the purpose of defeating the interest of the remaindermen; that the brother of the said Nancy T. Moon, who ran off some years since to Texas, has been lately seen in this State, and plaintiffs believe that he has returned with a view of aiding and assisting his sister in the removal of herself and property from and without the limits of this State. If the slaves are permitted to be removed out of the limits of this State, the plaintiffs' interest in them, at the death of the defendant, will be entirely lost; that they will be sold by the tenant for life, and it will be impossible for the remaindermen ever to find them and identify them. The slaves have not been seen at the house of Mrs. Moon, the defendant, since Friday last, and she refused to give any satisfactory account about their absence. The plaintiffs prayed for the writ of ne exeat against Nancy T. Moon, enjoining and restraining her from going out of the State, and requiring her to enter into security

¹ [See dissenting opinion of Caldwell, Ch., post, p. 407.]

for the forthcoming of the said slaves at the expiration of the life estate in them, and to answer and abide the decree of this Court, &c.

The plaintiffs filed an amended bill, stating that the slave Harriet is a breeding woman, of the age of twenty-three years; Henry is about five years old, John is about three years old, and Hannah about nine months old; and that, from these facts, it is evident that the said property is rapidly increasing in val-

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ue, and will probably be much increased *in value before the termination of the particular estate of the defendant therein; that the said slaves are now worth \$1200, according to the value of negroes at present. Since the filing of the bill the plaintiffs have ascertained, beyond doubt, from information received from the friends and relatives of the defendant, and from other persons, that the said slaves have been removed from this State, and are being removed to the west, for the purpose of defeating the estate of the plaintiffs. They also allege that the defendant, Mrs. Moon, the tenant for life, is cutting down the timber on the tract of land given her during life, and committing waste; and they pray that she may be restrained from committing waste on the same, to the injury of the remaindermen.

The Commissioner, T. P. Butler, Esq., made an order, requiring the sheriff to cause the defendant to enter into bond and security in the sum of \$2,000, not to go or depart from the limits of this State, (and to abide the decree of this Court,) without leave from the Court. The defendant moved to set aside this order before Chancellor Dunkin, who refused the motion.

The defendant's answer states that she is the widow of John Moon, deceased, and was left, by his will, not all the negroes named in the bill, for they were not in existence at his death, but a negro man, Stephen, and a young girl, named Harriet, who then had no children, but who has since become the mother of the three children, Henry, John and Hannah, which are mentioned in the bill; about four years since the negro man, Stephen, died, and the only really serviceable portion of the negro property left to this defendant for her life, by the will of the said John Moon, was lost to her, and the girl becoming a breeding woman, has been ever since an actual incumbrance and expense, and not a benefit to her; she was, from a child, of a delicate constitution, and has required great care and nursing from the defendant; she was lamed and diseased in one of her ancles from accident, which materially injured her value, and at this time she and her children, in this country, would probably sell for less than one-half of the bond required by the plaintiff's writ of ne exeat. The united ages of the three children amount to about nine years—the oldest being about

five, and the youngest one year—that at the time of the filing of the bill the said negroes were doubtless beyond the limits of this State, and beyond the power and control of the defendant then and since. She denies that her brother visited the State of Georgia for the purpose of carrying off the said negroes and herself; she admits, however, without being called on specially to do so, that she did receive a letter from her brother, B. Ligon, one of the two executors of the will of her late husband, John Moon, residing

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in the State of Mississippi, who urged *her, as a brother, and executor of the estate, to bring or send the negroes to that State, and to come and live at his house the remainder of her days, and the negroes were sent off to that State in anticipation of her own future removal. This course the defendant felt constrained to adopt by many pressing hardships and severe trials growing out of the loss of the only serviceable portion of the negro property before mentioned—the consequent want of other means to cultivate the tract of land, devised to her by the will of her husband, the necessity she found herself under of actually supporting, instead of being supported by, the negro girl and the three small children. In addition to all this, she was annoyed by threats of lawsuits and menaces from the plaintiff, Pleasant Moon, who forbade her clearing any of the land she lived on. The defendant was disposed to surrender the said negroes at once to the remaindermen under the will, and did propose to the said Pleasant Moon, long before the filing of the bill, to give up to him, as the executor of the will, the said negro girl and children, to rid herself of their possession and the incumbrance consequent upon it, with the understanding that the negroes might be sold, and the defendant to receive the interest on the net amount, the capital sum to be secured to the remaindermen, to be paid them after her death. It is certain that, to be obliged to keep the negro girl in this country as a life estate without the privilege of selling her, would be an injury instead of a benefit to any one having no other slaves to assist in her support, as is the case with this defendant; and she cannot be persuaded that any just code of morals or principles of equity can require of the defendant, at her time of life, to become the nurse of little negroes, and a servant of servants, for the plaintiffs and their posterity; especially when the will of her late husband evidently intended that she should be supported by the negroes left to her.—The executor, Pleasant Moon, refused this proposition, principally on the ground that the increase of the negroes would be stopped; but he proposed to take from the defendant the children of the negro girl, Harriet, as fast as they might become of an age to be of some little service, and leaving the small and helpless on her hands. Such

was the accommodation proposed by the plaintiff, Pleasant Moon. Thus was the defendant prepared to listen to the overtures of her brother, Blackman Ligon, the other executor of the will of her husband, and a more responsible one than Pleasant Moon—at least in the opinion of this defendant; and she cannot be mistaken as to his greater kindness and consideration for her welfare; and it has been under his advice that she has acted. What control or agency he has exercised in the disposition of the negroes since they left her possession, is unknown to this defendant.

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*The defendant suggests that she was arrested by a writ of ne exeat, to prevent her from doing what already had been done: sending the property out of the State—which, as tenant for life, she had a right to do, and even to sell her life estate. She has not been able, during her three month's confinement in jail, to have the negroes brought back to this country. She has written, and that immediately after her arrest, through her counsel, to Blackman Ligon, the executor of the will, urging the importance of his exercising every care to secure the negroes, if not already sold; and if sold, that the money should be secured, if possible to be done; but as yet no answer has been received to that communication.

This defendant has committed no act in contravention of the writ since her arrest. The security required by the writ she is, and has been, unable to give, and does not expect ever to be able; and whilst this defendant denies the right of the plaintiffs to the relief sought by their bill, she is willing to do all in her power to meet the just demands of the remainder claimants in the negroes; and she is willing and disposed either to restore the negroes, if in her power, or authorize any one, under the direction of the Court, to receive the nett proceeds of their sale, if they have been disposed of since their removal from this State, or their actual value to be estimated according to the value or price which such negroes would bring in this District, and to have the fund invested to secure the rights of the plaintiffs, this defendant being allowed to receive the interest thereon during her life. This defendant insists that the value of the negroes is much below the amount stated in the bill and affidavit of the plaintiffs, (\$1200.)

As respects the charge of waste, committed on the land devised to this defendant, she entirely denies the right of the plaintiffs to question, before this Court or any other tribunal, her acts in regard to it, as she is advised that the land belongs to her in fee simple, according to the fair and legal construction of the will; and she knows, from the highest authority, his own words, that it was the intention of the testator to give her the said land in her own right; and she con-

fidently submits her rights in the same to the judgment of the Court. But this defendant would state that she has not committed waste on the land, or used it further than was actually necessary for her support on the same. To derive any benefit from the land, it has been necessary for her to clear portions of it, as the older cultivated parts were long since exhausted, and in so doing she has conformed to the universal custom of the country in the management of lands.

Upon hearing the case upon the bill, answer, &c. his Honor decreed as follows:

Caldwell, Ch. The plaintiffs certainly had

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a right to *come into this Court to protect their interest in the slaves that defendant has removed from the State. Her answer admits that it was done in anticipation of her own removal, and if that had been effected, as she designed, the plaintiffs would have no indemnity or security against the injury to their rights, except the remedy of a writ of ne-exeat. The moment she and the property were out of the State, no Court in this State would have jurisdiction, and the mode of redress adopted by the plaintiffs appears to have been peculiarly proper, and the only means of saving the estate of the remaindermen from the irreparable loss that impended it. The defendant's pretence, that her brother in Mississippi is more responsible than Pleasant Moon, has overlooked the material facts, that he resides out of the jurisdiction, and has no property within it, or that he could not be made a party to any judicial proceedings so as to bind him. This makes him entirely irresponsible, and is no excuse for her unlawful act. The provisions of the will indicate the rights and duties of the tenant for life; she has the privilege of enjoying the property for the period of her life, but has no right either to run it off or waste it. It is not within the range of probability that the testator had the remotest idea that the tenant for life would attempt to remove the slaves out of the State, for he made no distinction between their use and the use of the land, and no doubt intended they should be enjoyed together.

The writ of ne-exeat is in the nature of equitable bail, and has been repeatedly applied to cases like this.²

When it was taken out, there was sufficient ground to sustain it, and nothing has intervened since, that can deprive the plaintiffs of their remedy.

The charge of waste made by the bill against defendant, is both admitted and proved. She had no right to clear the eighteen or twenty acres of woodland, and sell the timber. She was a mere tenant for life, and had no right to any other wood but such as was

² Cordes v. Ardrain et al. 1 Hill, Eq. R. 157. [Robertson v. Collier] Ib. 373. Bentley et al. v. Long et al. 1 Stuart, avts. E. R. 43. Smith v. Poyas, 2 Des. E. R. 65.

necessary to repair the fences and houses, and furnish her with fire. The defendant does not disavow her intention to remove from the State; if she had got off, the plaintiffs would have been left without adequate indemnity, as the use of the land cannot be of the value of the four slaves that she has removed. As she has clearly transcended her privileges and rights as a tenant for life, she must be restrained from committing further waste. However reasonable her proposal to sell the negroes was, its rejection by Pleasant Moon did not authorize her to remove them, and she must be left where the process of the Court has placed her, until she complies with the requisitions of the law, the rigor of which this Court cannot relax; however the subject of it may excite sympathy, she must take the consequences of her own improper conduct as

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to the property. The rights of the plaintiffs are much more important to be preserved and protected, than the wishes or feelings of the defendant.

It is ordered and decreed, that the defendant's motion to set aside the writ of ne-exeat be refused. It is further ordered that it be referred to the Commissioner to ascertain and report what is the value of the plaintiff's estate and interest in the slaves mentioned in the pleadings, and what waste the defendant has committed on the said lands: and it is also ordered and decreed, that she, her agents, servants, or any acting under her authority, be enjoined from committing any further waste on the premises.

Grounds of Appeal.

1st. Because the property in dispute was out of the limits of the State when complainant's bill was filed.

2d. Because the original order of the writ of ne-exeat requires that the defendant should give bond "to abide and answer the decree of the Court," &c. The writ of ne-exeat and amount of the bond is also unauthorized by the case stated in the bill.

3d. Because the order enjoining the defendant from waste is not supported by the law and equity of complainants' case; and because the defendant is entitled to a fee-simple in the land, according to the will of John Moon, and if not so entitled, there is no prayer in the bill to make her account for damages by waste.

4th. Because the decree is in other respects contrary to the law and equity of the case.

Thompson and Townes, for the motion.
Pelry, Young and Elford, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

In this case we concur generally, with the views of the Chancellor, in regard to the negroes; but we think he should have decreed that the said slaves, with their increase, be delivered up to the remainder-men at the ex-

piration of the defendant's life estate: and that the defendant is responsible for their delivery accordingly; and that the defendant give bond and good security to the Commissioner for their production and delivery as aforesaid: and it is ordered that the decree be reformed to that effect.

We do not concur in the decree relating to the land.

The testator introduces his will by expressing a desire "to dispose of all such worldly estate as it hath pleased God to bless him with."

Then the clauses materially affecting this question are as follows:

"I give to my wife, Nancy T. Moon, the tract of land whereon I now live, containing 200 acres, more or less; also two negroes, (to wit: my man Stephen, and my girl Har-

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riet,) *during her natural life or widowhood: and, further, give to my wife, Nancy T. Moon, and her heirs, forever, the following property, after my death," (all perishable.)

"It is, further, my will, that, at the death or marriage of my wife, Nancy T. Moon, that the man Stephen, and the girl Harriet, and her increase, be sold by my executor; and the amount arising therefrom be equally divided between my heirs, Robert D. Moon, John Moon, Pleasant Moon, the heirs of D. T. Cureton, Polly Kilgore, Nancy Ligon."

No residuary clause; nor further mention of land.

The general devise of land, with us, carries the fee: and nothing can prevent the fee of this land from passing to the defendant, unless it was intended to be coupled with the negroes, so as to pass with them, upon the terms in which they were bequeathed to the widow.

But we think it very material to shew that these subjects were disjoined, and given with a separate intention as to each; that while the negroes are limited in remainder the testator makes no further mention of the land. If the testator intended to give the land as well as the negroes during life or widowhood, why does he think it necessary to the complete disposition contemplated in the preamble to his will, to make an express disposition of the negroes beyond the particular estate, while he is entirely silent as to the land?

Our persuasion is that the testator supposed he had given the fee in the land, and, therefore, took no further notice of it.

This view renders it unnecessary to consider the question of waste. The defendant was not accountable, the land being her own: and that part of the bill should have been dismissed. And it is accordingly so ordered.

DUNKIN, Ch., and DARGAN, Ch., concurred.

Decree modified.

2 Strob. Eq. 334

G. COLEMAN and Wife v. A. G. DAVIS et al.
(Columbia. Nov. and Dec. Term, 1848.)

[*Infants* ⇨72.]

Plaintiff, while an infant, executed a receipt as a discharge in full of a legacy, to which he was entitled in right of his wife, and when four years had elapsed after the attainment of his majority, filed his bill against the executors to have the receipt set aside, *held* that he was barred by the Statute of Limitations.

[Ed. Note.—Cited in *Motes v. Madden*, 14 S. C. 491; *Roberts v. Johns*, 24 S. C. 588.

For other cases, see *Infants*, Cent. Dig. §§ 180-185; Dec. Dig. ⇨72.]

[*Limitation of Actions* ⇨102.]

When an act is performed by a trustee purporting to be an execution of his trust he is thenceforth to be regarded as standing at arms length from the cestui que trust, who is put to the assertion of his claims, at the hazard of being barred by the Statute of Limitations.

[Ed. Note.—Cited in *Long v. Cason*, 4 Rich. Eq. 63; *Langston v. Shands*, 23 S. C. 153.

For other cases, see *Limitation of Actions*, Cent. Dig. § 505; Dec. Dig. ⇨102.]

Before Caldwell, Ch., at Marion, February Sittings, 1848.

Caldwell, Ch. This was an original and amended bill, filed by the plaintiffs against

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A. G. Davis and Daniel H. Davis, *the surviving executors of Joseph Davis Sr., and against the administrators and heirs of Benj. S. Davis, a deceased executor, for the recovery of a legacy, and to make nine negro slaves, Doll, Stephen, Lisett, Becky, Frank, John, Peggy, Aley and Sarah Ann, of whom it is alleged he died intestate, liable for the legacy. The testator made a last will and testament on the 12th February, 1832, in which there is the following clause: "I give and bequeath unto Mary and Elizabeth, (the plaintiff) daughters of Aley Whaley, one negro girl each, to be purchased by my sons herein before mentioned, the property of my sons herein before mentioned to be subject to the purchase and payment of the said legacies; the said negroes to be of or about the age of the said Mary and Elizabeth severally, the one to Mary to be of or about her age, and the one to Elizabeth to be of or about her age, to them their heirs and assigns forever." The testator died in 1833, and Abraham G. Davis and Benjamin S. Davis qualified as executors on the 11th of February, 1834, and took possession of his effects; but they did not purchase a negro girl between nine and ten years old (the age of the plaintiff Elizabeth) agreeably to the directions of the will. That the plaintiffs intermarried in 1837, and Griffin Coleman admits that he received various small sums of money from Huger P. Fladger, which amounted in the whole to \$125, and he executed a receipt, while he was an infant and unapprised of his rights, as a discharge in full of the legacy to which he was entitled in right of his wife, in 1838; that he

placed the most implicit confidence in the statements of Fladger, who told him that the \$125, was the one half of the proceeds of Pat and Cain, two old negroes which were the only property given by the will subject to the payment of the legacies bequeathed to Elizabeth and Mary, and believing that he was not entitled to anything more, on account of the failure of assets, he executed the receipt. That at the time the legacy should have been paid, (twelve months after the decease of the testator,) a girl of the age of the plaintiff Elizabeth, would have been worth from \$350 to \$400. Plaintiffs insist they are entitled to either the value of the negro girl, at the time above mentioned, with legal interest, after deducting payments, or to be paid in specie, taking into consideration the loss of time. The bill further states that Benj. S. Davis, one of the executors, died in 1843, leaving the other two surviving, and that Julian Davis administered on his estate. The amended bill states that Joseph Davis Sr., died intestate as to nine negroes, and that after his death the executors took them into their possession and management, or Benjamin S. Davis took them into his possession and management with the consent of the other executors, without the warrant or authority of the law, and proceeded to appraise

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and allot them *out among themselves and certain other persons claiming to be the distributees of Joseph Davis, Sen., thereby making themselves executors de son tort, for said slaves.

The answer of the surviving executors admits the will, and that they and their brother, Benjamin S. Davis, qualified as executors; that testator died considerably indebted, and that all the personal estate was exhausted in paying his debts, but the negroes Pat and Cain, whom the executors sold, and divided the proceeds between Elizabeth and Mary Whaley. That the negro left in the will to the defendant D. H. Davis, and Peter, left to A. G. Davis, had been the property of them respectively, and in their possession, long before their father's death, and that there remained nothing out of their individual funds or property, bequeathed them in the will, charged with the satisfaction of their legacy; and that all the assets of testator ought to be marshalled and applied to the due course of administration, and to pay this legacy, and that others ought to be made parties, &c. Their answer states that the heirs at law contested the will, and the executors effected a compromise by giving up a portion of their individual estates to them, to let the will stand, and they insist that if the plaintiffs are allowed any thing from them, that their shares should abate in proportion of property allowed them respectively. Defendants do not admit that plaintiff executed the receipt to Fladger, (who bought the negroes

Pat and Cain, as the agent of defendants in disbursing the fund) when he was in ignorance of his rights or while he was under age, and insist upon strict proof of the same. Defendants set up the receipt as a bar to any further claim to the legacy. That they have administered the estate of the testator more than four years before the filing of plaintiff's bill, and have ceased to act as executors, and they rely upon the Statute of Limitations, and upon the lapse of time and the acquiescence of plaintiffs, &c., and insist that if their legal defence be overruled, that whatever may be decreed for the plaintiffs be settled upon Elizabeth for her sole and separate use.

Their amended answer denies that Joseph Davis died intestate as to the negro slaves claimed, or that he died possessed of any other property than that contained in the appraisal of his estate; that the negro slave Lissett was given verbally to the defendant A. G. Davis's wife before the deed which testator, in his lifetime, made to these defendants, of said negroes, and that they were the property of defendants at his death. That having proved the will in common form after his death, some of his other children instituted proceedings to set aside the same, on the ground of mental incapacity and to avoid a family feud and difficulty, and to preserve harmony with their brothers and

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sisters, and also the will of their father, they consented and agreed to divide said negroes amongst them; but although A. G. Davis gave up his interest in them for the purpose aforesaid, he did not receive any distributive portion of them. They aver that they have administered the estate, and insist that plaintiffs' claim, if they have any, ought to abate in favor of them, who have made sacrifices in giving up their own property to save her rights under the will. That defendants have exhausted the assets of their testator, left for the payment of his debts, and they insist they are not liable to account as prayed for in the amended bill.

The answer of Julia F. Davis, administratrix of Benj. S. Davis, denies that he had the negroes Doll and her family, but has been informed and believes that the same were given to A. G. and D. H. Davis, as stated in their answer, and insists upon the same grounds of defence in her answer to the original and amended bill, and relies upon the same defence as the surviving executors.

There are two questions presented in this case; first, is the receipt given by Griffin Coleman, Jr., a bar to his wife's legacy? He alleges he was under the age of twenty-one years, and was ignorant of the extent of his rights. Giving a receipt by an infant is like any other contract, and is voidable after he arrives of age; and the first inquiry is, what was his age when he gave it? The personal

recollection of the witness, Dozier, who stated to the best of his recollection he was born in the latter part of the year 1819, about a month before his daughter, who was born on the 1st of Nov. 1819; and he says the entry of his age was made in the "Saints Rest," and resembles witness's hand-writing a little; and the witness Rowell made an entry of Griffin Coleman's age, which he transferred from the "Saints Rest" to the Bible in 1821, when Griffin Coleman, Jr. was a child, and appeared to be about two years old, establish the fact conclusively, that he was an infant at the time the receipt was given, and the executors must account for the legacy unless the claim be barred by the Statute of limitations, the lapse of time, or some act of confirmation. As to the Statute of Limitations, it cannot affect a direct, declared, or express trust, it is only applicable to an implied or constructive trust: a legacy is not within the Statute, and length of time only produces a presumption of payment; here the defendants do not pretend they have paid the legacy, but only \$125, by way of satisfaction, and they contest their liability to pay it. There is material difference between a legacy and a debt; the executor has notice of the former by the will which he qualifies to execute, and no further notice is necessary; but debts of the testator may be either dormant or not discovered, and it is incumbent on the creditor to give the notice. The period that has elapsed since Grif-

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fin Coleman, Jr. has arrived at age, is not sufficient to make it a stale claim. The lapse of 40, 35 or 30 years, has been held to afford a presumption that a legacy has been paid, but it appears that presumption, when applied to the last period, may be repelled by circumstances. There has been no act on the part of the plaintiffs since the disability of the husband has been removed to confirm his receipt, and it must be held null and void as a discharge in full, and can only be considered as payment of the amount admitted in the bill; and the executors must account for the legacy (subject to the payment pro tanto) which ought to be settled upon the wife for her sole and separate use, as the husband is insolvent.

The second question arises under the amended bill, are the plaintiffs entitled to the claim they have set up to make the nine slaves liable for their legacy? The first clause of the will is evidently defective, and one word, at least, must be implied before a clear and sensible construction can be given to it; it is as follows: "It is my will and desire, that my executors hereinafter named, in their possession and management all my estate, both personal and real, my personal estate to be kept on my plantation and managed by my executors, until all my just debts be fully paid and satisfied, which my executors are requested to do with all convenient

dispatch." It is apparent that something important has been omitted, and as a single word may make the sense complete, it is probable that the word "take," or "keep," was omitted between the words "named" and "in;" if this construction be given to the will, it is then plain that the testator gave them all his estate, and from his subsequent devises and bequests, it may fairly be inferred that he did not consider the negro slaves Doll, Stephen, Lissett, Becky, Frank, John, Peggy, Aley, and Sarah Ann, part of his estate as they are neither specified nor alluded to, in any clause of the will. The parties offered much evidence on the subject of these nine slaves, and the weight of it is, decidedly, that the testator, for a very strong reason, did not desire these negroes to be disposed of like his other property, or put to hard service. He said he intended to leave these negroes in Abraham and Daniel Davis' hands, to let them be as free as they could, although he could not liberate them. It was also proved that he said he had left them in their hands to take care of them; also that he had said that "he had given them to Abraham and Daniel Davis." Lissett was, for several years, during the lifetime of the testator, in the possession of Abraham G. Davis, and the proof establishes that the others were sometimes under the control of Benj. S. Davis, and of Daniel H. Davis. The repeated declarations of testator, taken in connection with the acts of his sons, and the fact that not one word is said in his will about these slaves, (who if they had been his property, would have constituted the most important and valuable part of his es-

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tate,) leave no *doubt not only that it was not only his intention to give them, but that he actually did give them to his two sons, Abraham G. Davis and Daniel H. Davis. After much deliberation on the subject, such declarations, independently of other proof, have often been held sufficient to establish a gift, even in cases where the property has not gone out of the donor's possession; but as one of the negroes went into one of the donees' possession, and the others were under his and Benj. S. Davis' control, and their names are not mentioned in the will, connected with the testator's declarations, makes the inference irresistible, that these slaves had been given by him to these two sons.

The last question is, what property of the testator is liable to make up the legacy to the plaintiff? The will expressly provides that "the property of my sons hereinbefore mentioned to be subject to the purchase and payment of said legacies." It therefore plainly follows, that all the property (specified in the will) which he devised or bequeathed to his sons, is charged with the purchase and payment of this legacy; as it is a demonstrative legacy, entitled to a preference over the

specific devises and bequests to the sons, the executors were bound to make good the legacy, either specifically or in value. The doctrine of election must be applied in this case; every son who received a legacy under this will, took it subject to the liability of contribution; had the debts been sufficient to exhaust the whole real and personal estate devised and bequeathed to them, so as to leave a balance barely sufficient to purchase the two negroes and pay for them as provided in this clause, the executors would have been bound to have appropriated the balance to these purposes. Those to whom the testator had personally given property, might have declared to take under the will, and could have held what had been given them in opposition to the will, but they cannot take any thing under it without making themselves liable for the contribution it requires. The principle is clear, that no one can claim under, and against a will; and although the testator has no interest or estate in the property he devises or bequeaths, if the owner is one of the legatees, he cannot claim under the will, without giving up his right to the property it disposes of; if he takes the benefit he must bear the burden.

It is therefore ordered and decreed, that the receipt of Griffin Coleman, Jr., mentioned in the pleadings, is null and void as a discharge in full of the legacy bequeathed to Elizabeth his wife, and that the same is only a payment pro tanto, in part of said legacy; that it be referred to the Commissioner to ascertain and report what is the specific value of such a negro girl as the testator directed to be purchased for the said Elizabeth, or the value of the same in cash and interest from the time when the execu-

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tors of his will ought to have made *the purchase and delivered the negro girl, or paid the legacy, after deducting the payment heretofore made to Griffin Coleman, Jr., in part; and that the Commissioner do report what estate, real and personal, the testator left which is liable to purchase and pay the same, and into whose possession the estate aforesaid has come; and that he do ascertain and report who is a fit and proper person to act as trustee of said Elizabeth Coleman, and that the said Commissioner do report upon what terms the said legacy should be settled upon the said Elizabeth Coleman. It is also ordered and decreed that the said executors do account for and pay over and deliver the said legacy to the trustee that may be appointed by this Court for the said Elizabeth Coleman; and that the property of the testator's sons, mentioned in his will, be subject to the purchase and payment of the said legacy (after deducting the payment as aforesaid.) Wherever the said sons have received a legacy under the said will, they (or their lawful representatives) shall respective-

ly and proportionally contribute to the payment of the same.

The defendants moved to reverse the decree of the Chancellor, in this case, on the following grounds, viz:

1. Because the receipt and discharge executed by complainant, G. Coleman, in 1838, purported to be, and was, according to the proof, a full and final settlement with defendants as executors of Joseph Davis, Sr., and the rights of complainants to any further claims were barred by the Statute of limitations, as more than four years had elapsed, by complainant's own shewing, after he came of age, before filing the bill in this case.

2. Because the acquiescence of complainant in the settlement for the length of time, after coming of age, was a confirmation of the settlement, and the discharge is a bar to any further account by the defendants.

3. Because if the executors are liable to account at all, they are not bound to account for more than the personal assets of the testator which were left in their hands after the payment of testator's debts; and the legacy to complainant creates no specific lien upon the real estate devised by the testator.

4. Because his Honor erred in admitting the testimony to prove the age of the complainant at the trial, when it is submitted

the said testimony was not the highest evidence.

W. W. Harlee, defendants's solicitor.

JOHNSTON, Ch., delivered the opinion of the Court.

The doctrine is well established that when an act is performed by a trustee, purporting to be an execution of his trust, he is, thenceforth, to be regarded as standing at arms length from the cestui que trust; who is

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put to the assertion of his *claims, at the hazard of being barred by the Statute of limitations.¹

This change in the relations of the parties in this case was produced by the release of the plaintiff, Coleman, when he received the \$125. The release was a void contract by reason of his infancy. But the transaction out of which it arose gave currency to the Statute; and having neglected his remedy for four years after he attained majority, he is barred.²

It is ordered, that the decree be reversed and the bill dismissed.

DUNKIN, Ch., and DARGAN, Ch., concurred.

Decree reversed.

¹ Moore v. Porcher, Bail. Eq. 195. Stark v. Stark, Car. Law Journ. 503.

² Glover v. Let. 1 Strob. Eq. 79.

APPEALS IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF ERRORS OF SOUTH CAROLINA

WITHIN THE TERMS INCLUDED IN THIS VOLUME.

2 Strob. Eq. *343

*ELIZABETH JAGGERS v. JOHN ESTES.¹

[*Deeds* ⚡7.]

A future interest, in a chattel, can be created by deed otherwise than by way of trust; and even by parol.

[Ed. Note.—Cited in *Trimmier v. Thomson*, 10 S. C. 183.]

For other cases, see *Deeds*, Cent. Dig. §§ 10-12; Dec. Dig. ⚡7.]

[*Deeds* ⚡7.]

A person can, by a deed duly delivered, give to another a chattel, reserving to himself a life estate therein; provided that by the operation of the deed a present title in the chattel passes to the donee, with the right of future enjoyment.

[Ed. Note.—Cited in *Alexander v. Burnet*, 5 Rich. 194, 196, 197, 198; *Carter v. King*, 11 Rich. 130; *Babb v. Harrison*, 9 Rich. Eq. 115, 70 Am. Dec. 263; *Williams v. Sullivan*, 10 Rich. Eq. 220, 221; *Cribb v. Rogers*, 12 S. C. 566, 32 Am. Rep. 511; *Merck v. Merck*, 83 S. C. 333, 65 S. E. 347.]

For other cases, see *Deeds*, Cent. Dig. §§ 10-12; Dec. Dig. ⚡7.]

[*Gifts* ⚡18.]

One cannot by parol give a chattel to another, reserving to himself a life estate, on account of there being no delivery of dominion over the chattel, or of a deed or title as a substitute therefor.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 29-33; Dec. Dig. ⚡18.]

[*Wills* ⚡88.]

In all cases where the donor, by an instrument in writing, gives personal property to another, reserving to himself a life estate, or providing that the interest of the donee shall commence at his death, if it appears, from the construction of the whole instrument, that he intended to do an irrevocable act, and pass a present title to the property, deferring only the enjoyment of the donee, then it is to be considered as a deed and not as a will; provided always that it has been duly delivered.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 210; Dec. Dig. ⚡88.]

[*Sales* ⚡215.]

[Where there is a deed or writing conveying the title to chattels, no delivery of possession of the chattels is necessary to the perfection of the title.]

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 577; Dec. Dig. ⚡215.]

Before Caldwell, Ch., at Chester, July Sit-tings, 1847.

Caldwell, Ch. This was a bill filed by the plaintiff against the defendant, for the specific delivery of eleven slaves, and for their hire, since the death of Thomas G. Jaggars, in 1844. The plaintiff claims the slaves under a deed made by Thomas G. Jaggars, on the 12th of April, 1820, of which the following is a copy:

"South Carolina. Know all men by these presents, that I, Thomas G. Jaggars, of the District of Chester, and State aforesaid, for and in consideration of the love, good will, and affection which I have and do bear towards my sister, Elizabeth Jaggars, of the District of Chester, and State aforesaid, do give and make over one woman and child, named Polly and Joe, unto the aforesaid Elizabeth

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Jaggars, her *heirs, executors or administrators or assigns, the above named negro woman and child, with her increase, to the said Elizabeth Jaggars, and her heirs of her begotten, forever, in as ample and full a manner as I am capable of bestowing: to have and to hold the said negroes, Polly and Joe, unto the said Elizabeth Jaggars, her heirs and assigns, from henceforth and forever, as her lawful right and property, at my death. In witness whereof, I hereunto set my hand and seal, the 12th day of April, in the year of our Lord, one thousand eight hundred and twenty, and in the forty-fifth year of the Independence of the United States of America. Signed, sealed and delivered in presence of us.

(Signed) Thomas G. Jaggars. [L. S.]

"Test witness—John P. Roden,
Caleb Davis."

On the 6th of September, 1820, John P. Roden made oath that "he saw Thomas G. Jaggars sign and acknowledge the seal to the above instrument of writing," and it was recorded in the office of the Register of Mesne Conveyances of Chester District, on the same day. The bill states that some time after the execution of the deed, the plaintiff's man-

¹ [See dissenting opinion of Caldwell, Ch., post, p. 397.]

sion house was consumed by fire, and the original deed was destroyed. That although the deed purports to have been executed in consideration of love and affection, yet, in fact, there was a valuable consideration rendered to Thomas G. Jaggars by plaintiff, for the property—that for about three years anterior to the execution of the deed, she attended night and day, in nursing the said Thomas—he being confined, during the whole of that time, to his bed, by some indisposition; and that at the time of the execution of the deed, the said Thomas did not expect to survive but a short period; and that he was desirous of having the deed so drawn, that the use of the property should immediately vest in the plaintiff; but that he was prevailed upon by her to retain the use of the property during his lifetime, as there was a probability of his recovering from the indisposition with which, at that time, he was afflicted. The eleven slaves are Joe, Polly, and her increase, of whom Thomas G. Jaggars, during his lifetime, had the use and benefit, and retained the possession, agreeably to the stipulations in the deed. That defendant, shortly after the death of Thomas G. Jaggars, took possession of the slaves in 1844, and still retains such possession, and has received the hire and profits of said slaves, and refuses to deliver them, or account for their hire, to the plaintiff; but claims them as his own, under a last will and testament of Thomas G. Jaggars.

The defendant, in his answer, states that he knows nothing of the facts connected with the execution of the deed, of his own knowledge, but has been informed that it was

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*not delivered to plaintiff, and was improperly obtained out of Thomas G. Jaggars' possession, without his consent; that there was no valuable consideration for it—that its legal effect was a mere testamentary possession, and did not vest the property in the plaintiff; and if it did vest the slaves in her, the possession of Thomas G. Jaggars, for such a length of time, would bar her claim—requires strict proof of all the statements in the bill; relies upon the will of Thomas G. Jaggars, bequeathing the slaves to defendant, and pleads the Statute of Limitations against plaintiff's claim.

The first question this case presents is, whether the instrument, made by Thomas G. Jaggars, on the 12th of April, 1820, to Elizabeth Jaggars, is a deed or a will. Its commencement is in the usual form of a deed: the words "do give and make over," might be correctly used either in a will or deed; but they appear to be more appropriate to the latter. The expression, "in as ample and full a manner as I am capable of bestowing," indicates there was either some obstacle in transferring an absolute estate in the slaves, to the donee, or a reservation inconsistent with the estate's vesting in or being enjoyed

by the donee, immediately on the execution of the instrument. The habendum begins like a deed and ends like a will: the concluding part—"from henceforth and forever, as her lawful right and property, at my death," presents the inconsistency of a present right postponed until and dependent on the testator's death. It is to be observed that the whole instrument is a single sentence, without a period, combining such complexity, contradiction, and confusion that entitles it to pre-eminence as a "chef d'œuvre" of conveyancing of justices of the peace.

The difference between the rules of construing deeds and wills, has often been a subject of regret; and it is evident that the current of decisions is gradually wearing it away; so that, at no very distant day, it is probable they will become almost identical.

The rules, that the first part of a deed and the last part of a will must control, must be adhered to in some degree, although they have been modified by other rules of construction, that are more inflexible: but it is impracticable to apply either of them in this case, before the character of the instrument is ascertained: a premature application of either mode of construction, would be a *petitio principii*, and would decide without discussing the question.

The most liberal, consistent, and reasonable rule is, to take the whole instrument, and to give it that interpretation that arises out of all its parts compared together. The narrow view that separates it into parts, and makes them not only independent of, but antagonistic to each other, without regard to the main object for which it was formed,

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or to the general *qualifications that were intended to pervade and control it, is often making a part greater than a whole, and is violating the rule, that a liberal construction should be put upon written instruments, so as to uphold them, if possible, and to carry into effect the intention of the parties. Mere form ought not to change the legal effect of an instrument; and "in later times," says Mr. Broom, "the Judges have gone further than formerly, and have had more consideration for the substance, to wit: the passing of the estate according to the intent of the parties, than the shadow, to wit: the manner of passing it."²

The general rule in the construction of a deed, when the premises convey an estate, and the habendum is void, is subject to this except: "If the clause be carried on with a connection, so as to make but one sentence till the whole be finished, the law is otherwise: for one part of the sentence may not only abridge, but correct and utterly prostrate and make void the whole grant, and therefore if a lessee for years grant his term after his death, the grant is void; and indeed in one sentence it is in vain to imagine

² Broom's Law Max. 160.

one part before another, for though words can neither be written or spoken at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence."³

The original instrument was not produced on the hearing, either the plaintiff withheld it, or it has been destroyed: a copy of it was offered in evidence; and neither the attestation of the witnesses, nor the affidavit of its execution, contains any evidence of its having been delivered; that word generally, indeed almost invariably, used in deeds, seems to have been studiously omitted. Taking the instrument as an integer, consisting of a single sentence, it clearly comes within the definition of a will, and has nothing but the form of a deed, which cannot change its intrinsic nature. The testator's retaining possession of the slaves, for twenty-five years, claiming them as his own absolutely, and taking counsel what course he should pursue to cancel this instrument, leaves no doubt that he contemplated it inoperative till his death and desired to revoke it. The distinction between a deed and a will is, that the former must convey an immediate interest at its execution, but the latter is quite the reverse; it is ambulatory, and passes no present interest or estate; it can only operate on the contingency and after the death of the testator. An instrument in any form, whether a deed poll, or indenture, articles of agreement, memorandum, letter, indorsement on note, &c., made with a view to the disposition of a man's estate, after his death, will enure, in law, as a devise or will.⁴ In *Vernon v. Inabnet*, 2 B. Rep. 411, where the deed of gift was to the three sons of the donor, on the condition, "that he should keep

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possession of the negroes given, during *his life, and after his death, they should pass to the possession of the donees respectively," it was held, that the deed could not take effect; that the donor could not, by deed, carve out a life estate for himself, and limit over the remainder in the slaves to others, and that the deed of gift passed no property to the donees, as possession did not accompany and follow it: and notwithstanding the decisions in *Tucker v. Executors of Stevens*, 4 Desaus. R. 532, *Powell v. Brown*, 1 Bail. R. 100, and *Hill v. Hill*, *Dudly's E. R.* 71, that a personal chattel may be limited over by deed without a conveyance to uses, the principle established in this case appears to have been approved and adopted in *Pitts v. Mangum*, 2 Bail. 588, and in *Crawford v. McElvy*, [2 Speer, 225,] although the doctrine there laid down, that a man cannot limit a personal chattel to one for life, and the re-

mainder to another, except by will or deed of trust, has been overruled. In *Pitts v. Mangum*, where the father took a slave by the hand, and delivered him into the hands of the plaintiff, saying—"I give you this slave as your own right and property, reserving the use during the joint lives of myself and wife:" the father retained the possession, and some time afterwards sold the slave, it was held that such a parol gift, reserving the present enjoyment, was void. It amounts to no more than a promise to give, and in writing would be testamentary, and revocable. In the case of *McGinney et al. v. Wallace*, administrator, [3 Hill, 254,] where the words of the gift were—"This is no longer my property, but this child's," (the plaintiff,) then addressing the child, the donor added, "daughter, you must let her work for grand father (himself,) while he lives," the Court lays down the rule, as to such gifts, that "they must take effect immediately, or at least the donor must part from the title, at the time of delivery. If he reserve to himself a dominion, beyond the control of the donee, the title still remains in him. In such case delivery does not consummate the gift, because of control reserved by the donor." Since the case of *Brummett v. Barber*, 2 Hill L. R. 543, where it was held that in a gift of personal property, the donor may, by writing, not under seal, or verbally, create a limitation over, by way of trust, or as a direct gift, it seems whatever disposition of such property may be effected by deed, may also be made by parol, accompanied by delivery. In the case of *Ragsdale et al. v. Booker*, MS. Case in Equity, Book C, p. 241, May Term, 1826, [2 Strob. Eq. 348, note,]⁵ the gift was in writing and purports to have been made "in consideration of natural love and affection," and is in these words: "do hereby give to my above named children, at my death, free and clear from all incumbrances, to them and their heirs forever, the following property, to wit: (describing the slaves,) to be equally divided between my above named children, and their heirs: I only reserve my life in said negroes. I do hereby revoke, disallow, and disannul all former gifts, bequests, &c.

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but do give the above named *negroes, with

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⁵ [NOTE.] The three cases of *Ragsdale v. Booker*, *Duke v. Pyches* and *Harris v. Sanders*, so often referred to in the progress of this case, and not heretofore reported, will be found in this note. The two first were decided when the Court of Appeals consisted of three Judges, who were at that time, the Hon. ABRAHAM NOTT, the Hon. CHARLES JONES COLCOCK and the Hon. DAVID JOHNSON.

2 Strob. Eq. 348

S. N. RAGSDALE et al. v. THOMAS BOOKER.

[Wills 88.]

An instrument of writing by which the donor, in consideration of natural love and affec-

³ *Stukely v. Butter*, Hob. 171; 6 Coke, 306, *Doddington's case*.

⁴ *Pow*, on *Devise*s, 9, cases there collected; *Jarman* on *Wills*.

their future increase, to my above named children, and their heirs forever; not by any shadow of fraud or compulsion, but by my own free will and choice." The Court, in delivering the opinion, says—"It does not profess to have been delivered. An essential distinction between a will and a deed is, that one is to take effect at the death, the other immediately—one takes effect upon due execution, without delivery; to the other delivery is indispensable. This paper, therefore, possesses all the essential ingredients of a will; it wants some of the necessary requisites of a deed. The right of property was not changed; it still remained the property of the donor, and was subject to his debts."

In *Welch v. Kinard*, 1 Speer's E. R. 256., the instrument was under seal, and in these words: "Know all men by these presents, that I, John Peter Kinard, for the love and affection which I do bear towards Jesse R. Welch, son of Catharine Wideman, formerly Catharine Welch, after my death, to him and his bodily heirs, four negroes, with their future increase, namely, Fan and her daughter Martha, Rachel and Minty; but in case he should die without bodily heirs, the whole of the said negroes, with their increase, to return to my estate." That, like this, consisted of one sentence, and if the words, "I give" had been supplied, there would have been a striking resemblance, except the latter has the appearance of both premises and habendum distinctly impressed upon it, which

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*the other had not. In this case the Court recognized the authority of *Ragsdale v. Book-*

tion, gives certain slaves to be equally divided among all his children, at his death, but which does not profess to have been delivered—was held to be a will and not a deed.

[Ed. Note.—Cited in *Crawford v. McElvy*, 2 Speers, 227, 230; *Chancellor v. Windham*, 1 Rich. 169, 42 Am. Dec. 411; *Alexander v. Burnet*, 5 Rich. 197; *Welch v. Kinard*, Speers Eq. 262, 263; *Jaggers v. Estes*, 2 Strob. Eq. 371, 372, 373, 49 Am. Dec. 674; *Babb v. Harrison*, 9 Rich. Eq. 116, 70 Am. Dec. 203. For other cases, see *Wills*, Cent. Dig. § 211; Dec. Dig. ¶ 88.]

[*Wills* ¶ 69.]

A testament is the legal declaration of a man's intentions, which he wills to be performed after his death. (2 Blk. Com. 500.)

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 183; Dec. Dig. ¶ 69.]

Before Thompson, Ch. at Union, May Sittings, 1826.

Thompson, Ch.—The bill stated that, on the 23d March, 1816, shortly after the death of the complainants's mother, their father, John H. Ragsdale, in order to make some certain and adequate provision for them and their brother James H. since deceased, and in order to secure to them the property which he had received in

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*marriage, he, at that time, being perfectly free from and clear of debt, and being possessed of considerable other property, in consideration of parental love, good will and affection, by his deed, duly executed, gave to the complainants and their brother James, the following negroes,

er, *Pitts v. Mangum* and *McKinney v. Wallace*, and said: "It is necessary to make the inquiry, whether an interest or estate may be created in chattels, to take effect in futuro; if it be limited to arise in any other event than the death of the grantor, the instrument of course, cannot be of a testamentary character, or even in that event, if it be founded on a valuable consideration, as in the instance of a term limited to arise on the death of the grantor, with a reservation of rent." This paper was considered of a testamentary character: and it was held void for the want of three witnesses. In the case of *Duke v. Dyches*, Dec. Term, 1829, [2 Strob. Eq. 353, note,] the instrument purported to have been signed, sealed and delivered in the presence of two witnesses: it was in the following words: "To all to whom these presents shall come, I, Moses Duke, do send greeting: Know ye, that I, Moses Duke, of Barnwell district, in the State of South Carolina, for and in consideration of the love, good will and affection which I have and do bear towards my loving daughter Esther Benson, of the same place, have given and granted, and by these presents do freely give and grant unto the said Esther Benson, her heirs, executors and administrators, one certain negro boy slave, named Arthur, and one negro girl slave, named Jane, to be and remain as her proper right and property, after the death

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of the said Moses Duke, or at any *time previous thereto, if the said Duke shall think fit to do so; but it is true intent of the said Moses Duke that if the said Esther Benson shall die without lawful issue, then the said

which he received in marriage with their mother, to wit:—a negro woman named Eda and her three children, Malinda, Hannah and Mary, with all their future increase, to be equally divided between them, reserving to himself a life estate in them. Since the execution of the said deed, the said negroes have had increase as follows—Eda has had three children, their names unknown, and the negro woman, Malinda, one child, whose name is also unknown. Some time in the year 1820, the said negroes were levied on and seized in execution as the property of John H. Ragsdale, at the suit of Col. James Moorman, for a debt contracted long subsequent to the execution of the said deed, and sold by the sheriff of Union District, in satisfaction of the said execution, under all incumbrances, and purchased by the defendant, Thomas Booker, at the low price of \$1125, and that the defendant has ever since had the said negroes in his possession. The said Booker, at and before the sale, was apprised, told, and knew of the claim of complainants to the said negroes. The amount of the debt and costs, to satisfy which they were sold, did not amount to more than \$390, and this sum is all the defendant has ever paid. In September, 1822, James H. Ragsdale died intestate, leaving the complainants and

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*their father, John H. Ragsdale, his heirs at law, surviving him; that about the 1st of October following, John H. Ragsdale died intestate, whereby all his estate and interest, as well as that of the defendant, Booker, ceased

negroes, viz: Arthur and Jane, shall go to the lawful heirs of the said Moses Duke, to be and become thereafter, the rightful property of his said heirs, in as full and ample a manner as if the present deed had never been made or given. And the said Esther Benson, the said property shall and may hold upon the terms and conditions above mentioned, as her proper goods and chattels without any sort of reservation whatever." The only question submitted was whether personal property can be limited over. The Court held that the limitation was good, but did not decide whether the instrument was testamentary; that question does not appear to have been made, but as the case occurred since 1824, it was doubtless considered as a deed.⁶

The modes of alienating real and personal property differ as materially as the subjects; the utmost that can be held or enjoyed in the former is an estate, but in the latter there can be an absolute ownership, while it cannot be held for an estate; from this principle followed the rule that there could be no such thing as a life estate (in the strict meaning of the phrase) in personalty—it was considered an indivisible chattel, and therefore incapable of the modification of ownership as is contained in a life estate. At

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common law a freehold *could not be conveyed to commence in futuro, as such estate could not be created without livery of seisin, yet one might covenant under seal that he and his heir would stand seised to uses for the provision or preferment of a wife, child,

and determined, except that part of them which John H. Ragsdale was entitled to as heir at law of James H. Ragsdale. That the defendant had threatened to remove the negroes out of the State to evade the claim of the complainants. The bill prayed that the defendant be decreed to deliver up the negroes and settle for their hire since the death of John H. Ragsdale, and that partition be made of them among the complainants.

It was in proof that John H. Ragsdale had four other negroes, and was entitled to a considerable estate in Virginia, which he subsequently received, besides \$700 in cash at the time of the sale, and that he owed but little. It was further in proof, that Booker knew of the deed from John H. Ragsdale to complainants, and that he contracted with said Ragsdale, to purchase in his life estate for \$600, and was to purchase in the negroes, let them sell as high as they might. It was further in proof, that Booker said he had purchased the negroes to befriend Ragsdale, and that the claim of the complainants was generally known. For the defendants, it was contended that this deed from John H. Ragsdale should be set aside, inasmuch as it was voluntary. Voluntary deeds have always been considered valid between the parties, and all persons claiming under them; and void only as to creditors. In the present

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case, *it does not appear that the donor was in debt, or, if he was, he had an abundance of property to have paid what he owed. That the defendant was well acquainted with all the facts of this case, and purchased with his eyes

brother, sister, or kindred: or for a pecuniary consideration: but this doctrine is only applicable to real estate and has never been extended to personal property. The use arises out of the seisin of the covenantor, which is immediately executed in the cestui que use, who thereby acquires the legal estate and possession: the use may be limited in futuro, but the estate continues in the covenantor until the use arises; it arises out of the seisin which the covenantor has at the time, and one may stand seised to the use of another after the covenantor's death; but the whole doctrine is totally inapplicable to personal property, of which there may be possession but no seisin, of which there may be a promise to assign, but can be no covenant to stand seised, and such a covenant must be with a man and his heirs, for otherwise it is but a personal covenant which does not raise a use; the one is inheritable the other goes to the executor or administrator. Although the Courts of law have adhered to the doctrine of the indivisibility of a chattel, and have held where such property is bequeathed or settled in trust, the trustee is absolutely entitled to the legal interest in it, the Court of Equity will carry out the intention of the parties, and compel the trustee

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to account for the disposition and income of the property. By these means settlements of personal property may be substantially effected in the same way as real estate: and the same rules restrict future interests in personalty, that limit executory devises or

open, at a price exceedingly disproportionate to the value of the negroes.

It is, therefore, ordered and decreed, that the defendant do deliver up to the complainants the negroes in the bill mentioned, and that he do account before the Commissioner for their hire since the death of the said John H. Ragsdale, and pay the costs of this suit. It is further ordered and decreed, that the said negroes be divided among the complainants according to their respective rights.

Defendant appealed:—

1. Because the Chancellor ought to have dismissed the bill with costs, as complainants have a plain and adequate remedy at law.

2. Because the case made by the proof, and on which the decree is predicated, is entirely different from that made by the bill, and, therefore, defendant was surprised; that evidence was objected to.

3. Because the deed, under which complainants claim, was a testamentary paper, and vested no legal interest in the complainants until the death of John H. Ragsdale, the donor.

4. Because the deeds were fraudulent and void against all creditors, as well subsequent as existing, as a party cannot, by deed, give a life estate to one in personal property, with a limitation over to another.

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*5. Because the decree goes too far in favor of complainants, in declaring that they are entitled to the whole of the negroes, as the defendant is, at all events, a joint tenant with complainants, and the decree ought to have ordered a writ of partition.

6. Because the decree makes the defendant pay the costs, when it is manifest that if the

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⁶ Morrow v. Wilking, 3 Des. V. C. R. 263.

shifting uses in lands. Future interests in personal property may also be created through the instrumentality of persons, in the same way and to the same extent as future estates in lands.

Although a chattel interest may be conveyed to commence in futuro, it must not be at an indefinite time, such as the death of the donor, unless founded on a valuable consideration: when the consideration is love and affection, and the event on which the gift is to take effect, is the death of the grantor, these circumstances place the parties and the property exactly in the condition of a will and not of a deed: nothing is actually given or received. It cannot be a gift inter vivos, as neither possession, title, or property, passes, any more than by a will, which the maker may unmake when he pleases.

The introduction of the doctrine of covenants to stand seised to uses in the conveying of slaves or other personalty, would break down all the distinctions that have been so laboriously and strongly built up for ages, and would in effect abolish the Act which requires three witnesses to a will, and would permit a deed without a witness to subserve all the purposes of the best attested will.

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*The second question is, does the Statute of limitations bar the plaintiff's claim, if this instrument is to be considered as composed of several distinct parts? The present gift of the property in the premises is

court has jurisdiction of the case at all, it is only on the ground that there must be a partition between the complainants and defendant, and in such cases the court never orders defendants to pay costs.

Clendinen & Thomson, Defendants' Solicitors.

Curia, per NORT, J.—The court do not deem it necessary to go into a consideration of any of the grounds of appeal taken in this case, except the third, which is in the following words—"Because the deed under which the complainants claim is a testamentary paper, and vested no legal interest in the complainants until the death of John H. Ragsdale, the donor."

Judge Blackstone defines a testament to be "the legal declaration of a man's intentions which he wills to be performed after his death."⁷

Other writers have adopted the same definition.⁸ The paper under which the complainants profess to claim, is precisely of that character. The donor gives the property at his death; it is in consideration of love and affection; he makes an equal division among all his children, and revokes all other gifts and be-

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quests. *It does not profess to have been delivered. An essential distinction between a will and a deed is, that one is to take effect at the death; the other, immediately. One takes effect upon due execution without delivery. To the other, delivery is indispensable. This paper, therefore, possesses all the essential ingredients of a will. It wants some of the necessary requisites of a deed. The right of property was not changed. It still remained the property of

directly repugnant to the reservation of its vesting at the death of the donor in the habendum, and the plaintiff therefore had the right to the possession of the slaves at the delivery of the deed. But the donor retained the possession—disputed her right to the property in anticipation of his death, and took counsel to set aside the instrument. She had notice of opposition to her claim, and if the right to possession vested in her at the execution of the deed, then it would seem that such a long and adverse possession would be sufficient to bar her rights, unless the donor is considered as a covenantor to stand seized for her use. In this view, the case resembles *Ingram and Porter, Harp. 492*, in which the Court, after having held the case under a long consideration, decided that the doctrine of a covenant to stand seised to uses was exclusively applicable to real estate; "that a future interest in a chattel opposed to a present interest in the grantor cannot be created. If given, it passes at once; if not given, of course it cannot pass, but must depend upon the future will of the grantor." In either view the plaintiff is not entitled to the specific delivery of the slaves, and it is ordered and decreed that her bill be dismissed.

The complainant moved the Court of Ap-

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peals to reverse *the Circuit decree, or for a re-hearing, upon the following ground:

Because the instrument of writing in question, after being signed and sealed by the

the donor, and was subject to his debts. The complainants, therefore, can have no right of action.

The decree must be reversed, and the bill dismissed with costs.

COLCOCK, J., and JOHNSON, J., concurred. Decree reversed.

2 Strob. Eq. 353

EXECUTORS OF MOSES DUKE V. SETH DYCHES.

[Deeds ¶5.]

An instrument of writing by which the donor, reserving to himself a life estate, gave certain slaves to his daughter, in the following words: "I have given and granted, and by these presents do freely give and grant," &c., and which was executed with all the requisite formalities of a deed, was sustained as a deed by the Court.

[Ed. Note.—Cited in *Chancellor v. Windham*, 1 Rich. 169, 42 Am. Dec. 411; *Alexander v. Burnet*, 5 Rich. 194; *Welch v. Kinard*, Speers Eq. 262; *Merck v. Merck*, 83 S. C. 333, 65 S. E. 347.

For other cases, see *Deeds*, Cent. Dig. §§ 7-9; *Dec. Dig.* ¶5.]

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[Deeds ¶120.]

*Personal property can be limited over by deed to take effect after the termination of a life estate in the same.

[Ed. Note.—Cited in *Alexander v. Burnet*, 5 Rich. 196, 197; *Jaggers v. Estes*, 2 Strob. Eq. 362, 364, 49 Am. Dec. 674.

For other cases, see *Deeds*, Cent. Dig. § 380; *Dec. Dig.* ¶120.]

Moses Duke, the plaintiff's testator, in his lifetime, made a deed of gift of certain negro slaves to Esther Benson, his illegitimate daughter, now the wife of the defendant, reserving a life estate to himself. After his death the defendant took possession of the negroes. An

⁷ 2 Bl. Com. 500.

⁸ Rich. on Wills, 3.

maker, Thomas G. Jaggars, having been also duly delivered by him to the donee, the complainant, according to the true meaning and construction thereof, a present vested interest in the slaves therein named passed irrevocably to the donee, to be enjoyed in futuro, the same operating as an irrevocable deed, and not as a mere testamentary paper; and the subsequent possession of the slaves by the maker, having been according to the provisions of the deed, the complainant was not barred either by the Statute of limitations, or by length of time.

The questions involved were very ably and lucidly argued by

[For subsequent opinion, see 3 Strob. Eq. 34.]

Gregg, for the motion.

Williams and Wallis Thompson, contra.

DARGAN, Ch., delivered the opinion of the Court.

On the 12th of April, 1820, Thomas G. Jaggars executed in favor of Elizabeth Jaggars, an instrument of which the following is a copy:

"South Carolina. Know all men by these presents, that I, Thomas G. Jaggars, of the District of Chester and State aforesaid, for and in consideration of the love, good will

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and *affection which I have and do bear towards my sister, Elizabeth Jaggars, of the District of Chester and State aforesaid, do give and make over one woman and child,

action was brought for their recovery by the executors, and a nonsuit ordered on circuit, on the ground that the plaintiffs showed no title in themselves. The case was heard, on appeal from this order, at Columbia, December Sittings, 1829, and the following is the opinion of the Court of Appeals:

NOTT, J. Moses Duke, the plaintiff's testator, in his lifetime, made a deed of gift of the negroes in question to Esther Benson, his illegitimate daughter, now the wife of the defendant, reserving a life estate to himself. After his death the defendant took possession of the negroes. The copy of the deed of gift is as follows:—"To all to whom these presents shall come, I, Moses Duke, do send greeting. Know ye that I, the said Moses Duke, of Barnwell District, in the State of South Carolina, for and in consideration of the love, good will and affection which I have and do bear towards my loving daughter, Esther Benson, of the same place, have given and granted, and by these presents do freely give and grant unto the said Esther Benson, her heirs, executors and administrators, one certain negro boy slave, named

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Arthur, and one negro girl slave, *named Jane, to be and remain as her proper right and property after the death of the said Moses Duke, or at any time previous thereto, if the said Duke shall think fit to do so. But it is the true intent and meaning of the said Moses Duke, that if the said Esther Benson shall die without lawful issue, then the said negroes, viz: Arthur and Jane, shall go to the lawful heirs of the said Moses Duke, to be and become thereafter the rightful property of his said heirs, in as full and ample manner as if this present deed had never been made or given. And the said Esther Benson the said property

named Polly and Joe, unto the aforesaid Elizabeth Jaggars, her heirs, executors or administrators or assigns, the above negro woman and child, with her increase, to the said Elizabeth Jaggars, and her heirs of her begotten, forever, in as ample and full a manner as I am capable of bestowing: to have and to hold the said negroes, Polly and Joe, unto the said Elizabeth Jaggars, her heirs and assigns, from henceforth and forever, as her lawful right and property, at my death. In witness whereof, I have hereunto set my hand and seal, this 12th day of April, in the year of our Lord, one thousand eight hundred and twenty, and in the forty-fifth year of the Independence of the United States of America. Signed, sealed and delivered in the presence of us.

(Signed) Thomas G. Jaggars. [L. S.]

"Test witness—John P. Roden,
Caleb Davis."

There was some question raised as to the delivery of this deed, which will be disposed of hereafter. But the first question to be considered and adjudged, is this: assuming that the deed was duly delivered, what estate, if any, does it create in Elizabeth Jaggars? And this will involve the enquiry, whether by the laws of South Carolina, it is

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com*petent for any person, on the consideration of love and affection, by deed or other writing, properly and duly executed and delivered, to create in personal chattels an estate, or future interest, to take effect, or

shall and may hold, upon the terms and conditions above mentioned, as her proper goods and chattels, without any sort of reserve whatever. Witness my hand and seal this 4th day of August, in the year of our Lord, one thousand eight hundred and four, and in the 29th year of American Independence.

Moses Duke. [L. S.]

Signed, sealed and delivered in the presence of J. Hughes and Micajah Hughes."

And the only question now submitted to us, is whether personal property can be limited over by deed to take effect after the termination of a life estate. It was formerly held that no such limitation could be made, either by deed or will; but a gift for life, or even for a day, carried the whole estate. The first deviation from that rule was by way of distinction between the gift of the use of a thing, and a gift of the thing itself. Since those decisions

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the distinction *between the use and the thing itself has been laid aside, and a gift of the chattel itself, for life, is considered as a gift of the use only.⁹ But it is contended that those decisions apply only to executory bequests by will, or to trusts, and not to cases where the property is given immediately by deed. And I do not know that such a limitation by deed has ever been held good in England; neither do I recollect any modern decision where the contrary has been held. And it now remains for this Court to decide whether that distinction, between deeds and wills, is still to be maintained, or whether it is now time to lay aside that distinction also, or rather whether

⁹ 1 Fearn 26; 1 Mad. ch. 223; 1 Pr. Wms. 1 Hyde v. Parrot & Al. do. 500; Tessin v. Tessin, do. 651; Upwal v. Halsey; 1 Fearn 241.

vest in possession, after the termination of a life estate, reserved by the donor to himself in the same deed or writing. The Chancellor who heard this case on the circuit, after a very careful and elaborate examination of the subject, decided the above stated proposition in the negative. As the result of his argument and review of the authorities, in the conclusion of his decree, he expresses himself in the following language: "Although a chattel interest may be created to commence in futuro, it must not be at an indefinite time, such as the death of the donor, unless founded on a valuable consideration: when the consideration is love and affection, and the event on which the gift is to take effect, is the death of the grantor, these circumstances place the parties and the property exactly in the condition of a will, and not of a deed—nothing is actually given or received. It cannot be a gift *inter vivos*, as neither possession, title or property passes any more than by a will, which the maker may make when he pleases." Carrying out this view of the subject, and this construction of the deed, the Chancellor holds that, supposing the deed to have been duly delivered, Elizabeth Jagers could take nothing under it, and dismisses her bill, which had

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been filed against the defendant *for the specific delivery of the negroes. And this is a motion to reverse the decree, on the ground "that the instrument of writing in question, after being signed and sealed by the maker,

any such distinction has ever prevailed in this State. And I would here remark that the invasion of the common law principle, in England, has not been by legislative authority, but by the Courts alone. And if a gift by will for life conveys nothing but the use, why may not the same words in a deed have the same operation? If the Courts have the power in one case to effect such a change, as being more consistent with reason and common sense, and more consistent with the intention of the party, why may they not in the other? I am not, however, friendly to that kind of judicial legislation which authorizes Judges to innovate upon an established rule of law, because they think it is time that it should be changed. And if I found the current of decisions running against the principle which I am advocating, I should feel bound to go with them. But I have already remarked that it is a subject on

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which the late English authorities *are almost silent, and on which I think I shall be able to show that I am well supported by the decisions of our own Courts. I mean, however, to confine my remarks exclusively to the species of property now under consideration. For although, by our law, slaves are considered as personal estate, yet we have, in various respects, made a distinction between that species of property and other personal chattels. The limitation over of a female slave, has been held to carry with it a limitation over of the offspring born during the life estate, which is not the case with any other animal. The conversion of a female slave to the use of a person, renders the party liable for damages, to the amount of the value of the issue, born during the time of the possession, as well as the value

Thomas G. Jagers, having been also duly delivered by him to the donee, the complainant, according to the true meaning and construction thereof, a present vested interest in the slaves therein named, passed irrevocably to the donee, to be enjoyed in futuro, the same operating as an irrevocable deed, and not as a mere testamentary paper; and the subsequent possession of the slaves by the maker, having been according to the provisions of the deed, the complainant was not barred either by the Statute of limitations, or by length of time." The complainant's ground of appeal substantially embraces the same question which I have stated in a more abstract form in the beginning of this opinion.

It has been vehemently urged in support of the opinion which the Chancellor has delivered in his circuit decree upon this interesting question, that it is entirely in accordance with the principles of the common law, and the decisions of our own Courts, and that a different decision by this Court would be a mischievous, if not dangerous violation of the established law of the land. A majority of this Court are of the opinion that the circuit decree must be reversed, on the ground that, upon the question stated, it is not in accordance with the law of South

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Carolina. And as the duty has been *imposed upon me of expressing their judgment, it will be necessary that I should review and examine the course of our own decisions

of the mother, contrary to the rule in case of female brutes.

And in the case of *Geiger v. Brown* [2 Strob. Eq. 359, note,] decided at our last Court, we held that a bequest of a female slave for life, without any limitation over, carried only a life estate, and that the slave and her issue, at the termination of the life estate, were unbequeathed assets in the hands of the legal representatives, for which the administrators might maintain an action. We have thus given to this kind of property attributes of realty which do not belong to other personal chattels. And to hold it not capable of limitation over after a life estate, would be inconsistent with the character which has been ascribed to it by the whole current of our decisions. But the question is not left to inference. It is supported by the express opinions and direct decisions of our

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Courts. In the case of *Dott v. Cuning*ton*, 1 Bay, 453, [1 Am. Dec. 624,] it is said, "It cannot be denied that in many cases personal chattels or terms for years, may be limited over, either by executory devises, or deeds, as effectually as real estate, if it is not attempted to render them unalienable beyond the duration of lives (in being,) or twenty-one years after."¹¹ And although in that case it was held, that the property vested in the first taker, yet it was on the ground that the limitation was too remote, and not that a limitation over after a life estate, was not good. On the contrary throughout the whole argument of the Court it is manifest the limitation over would have been supported, if it had not gone so far as to create a perpetuity. In the case of *Stockton v. Mar-*

¹¹ See p. 456.

on the subject. And as a preliminary to this review, I will remark that it may be conceded, without in the slightest degree invalidating the opinion of the majority of this Court, that their judgment in this case is not in accordance with the ancient principles of the common law.

There are many principles recognized as law in South Carolina, as well as in England, not founded upon Statute, that are diametrically opposed to what was considered the well-established principles of the common law. It is a system of law, resting for its authority upon usages, and these usages are evidenced by judicial interpretations, and the decision of cases brought before the Courts for adjudication.—From such a system, we must naturally look for mutations, and even revolutions, in the judicial exposition of the law.—Upon such a code it would be unreasonable to expect that the changing features of each succeeding age would not be characteristically impressed. The common law has ever been admitted to possess a remarkable flexibility, which renders it capable of being adapted to the ever varying wants of a progressive civilization, in matters too minute or unimportant to call for legislative action. Upon the principle of obsolescence (if I may use the expression) it drops, or throws off by its own inherent

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energy, that which the progress of *society

tin. 2 Bay. 471. similar language is used. And although in that case, also, it was held that the contingency on which the property was to go was too remote, being after an indefinite failure of issue, yet it was on that ground and on that alone that the limitation was not supported. In the case of *Tucker v. the executors of Stevens*, 4 Des. 532. the question was directly decided. That was a deed of gift of a brother to his sister for life, with a limitation over to such issue as should be living at the time of her death, and the Court supported the right of the children under the deed. That was indeed only a Circuit decision, and therefore cannot be relied on as a binding authority. But it was the opinion of a very able and learned Chancellor, whose opinion is always of high authority, and the acquiescence of the counsel is evidence of the prevailing opinion of the bar. We are supported, then, by the opinions of the

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highest tribunals of the *country from the year 1794. And those not expressed as mere speculative and doubtful opinions, but as the settled principles of law. And those successive opinions, from such sources, for such a length of time, though not expressed in the most solemn form, ought now to be considered as conclusive authority upon this Court. I concur therefore in the opinion of the presiding Judge on the effect of this deed. I have not entered into the inquiry whether it may not be supported upon some other construction. For the view which I have taken of it covers the whole ground, and if correct renders it perfectly immaterial whether it is not susceptible of some other construction which would lead to the same conclusion. I am of opinion that the plaintiffs shew no title in themselves, and that the nonsuit

has rendered useless or inexpedient, and by the same vital force it eliminates new principles, and develops extensive branches of jurisprudence, which are found in the ancient system, if there found at all, only in a rudimental state. The common law of early times was the code of a semi-civilized people, in a state of military subjection to feudal chiefs, with little wealth and few wants. It was then as rude as their own manners, or their own early gothic monuments. What is it now? A vast system of jurisprudence, admirably adapted to the necessities of a great, powerful and wealthy people, possessed of a commerce, and boasting a refinement and civilization, which surpasses that of any other people of any other age of the world. Ponderous in its proportions, it is yet perfect and complete in its finish; alike adapted to the greatest exigencies and interests, as well as to the minutest wants of society. How has this vast and complicated system been built up? In the progression of ages, mainly by what is opprobriously termed judicial legislation. Thus it is that the common law of to-day, is not that of fifty years since. Nor that of fifty years since, the common law of the preceding century. Nor is the common law of South Carolina always that of the mother country. It has, in many particulars, received a new impress and a new direction from our peculiar circumstances, habits and institutions; and it would be absurd to say

was properly ordered. The motion must therefore be refused.

COLCOCK, J., and JOHNSON, J., concurred.
Motion refused.

2 Strob. Eq. 359

BARDOLPH GEIGER et al. v. T. J. BROWN.

[Wills ¶614.]

The bequest of a female slave for life, without any limitation over, carries only a life estate, and the slave and her issue, at the termination of the life estate, are unbequeathed assets in the hands of the legal representatives of the testator, for which they can maintain an action.

[Ed. Note.—Cited in *Duke's Ex'rs v. Dyches*, 2 Strob. Eq. 357.

For other cases, see Wills, Cent. Dig. § 1395; Dec. Dig. ¶614.]

[Wills ¶558.]

[A reversionary interest passes to the heirs and not to the residuary legatees.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2179; Dec. Dig. ¶558.]

[Life Estates ¶4.]

[When a tenant for life of a chattel sells an absolute estate therein, his rights are forfeited.]

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 8; Dec. Dig. ¶4.]

[Wills ¶614.]

[Under the following bequest: "I bequeath unto my loving wife one negro boy named Joe, one negro wench named Lucy; item, one sorrel mare; item, all my household furniture, and the increase of the said negroes during her natural life; and my four negroes, Jim, and Negro Tom, with the remainder of my personal estate, shall be kept together for the use and maintaining of my children till any one of them arrives at age or is married, and then my personal estate shall be equally divided among my children"—it was held that a life estate only was given to the wife, and that the

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that we are under any *obligation to follow the decisions of the English Courts with blind submission.

The flexibility of the common law cannot be better illustrated than by a reference to its course upon the very question which we are now considering. It cannot be doubted, that by the early common law, a future estate in chattels could not be created either by deed or by will. The possession and the title went together. The possession drew after it the title, and he who was entitled to the possession, was regarded as the owner of the fee. This rule answered very well for a rude people, possessing but little personal property, and regarding real estate as of paramount importance. But with commerce, manufactures and the arts, came a vast increase of the quantity and value of personal property. And in the wants and refinements of a highly civilized and complex social state, it was felt that this strict rule of the common law was inconvenient in its operation. Then commenced those innovations of which I have spoken. It had been settled in the times of Lord Coke that chattels real might be limited by will. But as yet, the common law allowed of no limitation of a chattel personal, and a gift to one for life, carried the absolute estate, or interest.¹² Then a distinction was taken between the use of a chattel, and the property, and it was held that the use might be given to one for life, and the property afterwards to another; the legal estate being

reversionary interest, after its determination, did not pass by the residuary clause.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1396. Dec. Dig. C-3611.]

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*Before Gantt, J., at Newberry, March Sittings, 1827.

The following is his Honor's report:

Gantt, J. Trover to recover the value of a negro woman, Lucy, and her five children. The plaintiffs claimed under a limitation in the last will and testament of Harmon Geiger, dated in 1778, and the case seemed to depend upon the construction of the first and last clause of the will. The inspection of the will by the Court of Appeals, is necessary to determine on the correctness of the judgment pronounced upon it by the presiding judge. The bequests to the wife in that part of the will intended for her benefit, were considered, (see the first clause) not as so many several independent sentences, whereby an inference might be drawn, that the negro Lucy was given absolutely to the wife, but that the whole was to be considered as one sentence, and subject to the restrictive words in the conclusion, "for her natural life." By the last and residuary clause of the will, it will be seen that there is a specification of certain negroes, &c., not before disposed of; these, together with all the rest, &c., of the testator's personal estate, are given to his four children; the division to be made on their coming of age, or marrying, &c. Whether the reversionary interest in the negro woman Lucy passed by this clause of the will, to the children, be

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*supposed in the mean time to remain in the executor of the testator. The Courts, perceiving the inaptitude of this rule to the wants of society, and still struggling to free themselves from its embarrassment, went further, and held that future interests in chattels might be created by executory devise; and after the introduction of uses into the common law, (itself also an innovation,) they held that limitations of chattels might also be created by way of trusts. And at length Sir William Blackstone, writing in the latter part of the 18th century, informs us that all these distinctions are now disregarded, "and therefore," he observes, "if a man, either by deed or will, limits his books or furniture to A. for life, with remainder to B., the remainder is good."¹³

After this authoritative declaration of the learned and illustrious commentator, as to what was the received rule of the common law acknowledged and administered in Westminster Hall, at the publication of his Commentaries, it is not with a little surprise that we turn to our own reports and find our Courts in 1810, in the case of Cooper v. Cooper, 2 Brev. Rep. 355, still clinging to a doctrine which had long before been repudiated by the English Judges themselves, and holding that a limitation by deed of a chattel, after the termination of a life estate in the same, was not valid; at the same time scoffing at the unreasonableness of the rule that bound them, and deploring the necessity of adhering to it. Four years after

came a question of importance, and I was of opinion, and so decided, that such interest did pass. I will briefly state some of the grounds

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of that opinion. *A paramount rule in the construction of wills is, that the same be made with reference to the whole will, and to be grounded upon a consideration of the reciprocal bearings of all the component parts. Words are to be construed so as to effectuate dispositions, and to avoid intestacy. If therefore the view taken by the presiding Judge be correct, that only a life estate passed to Mrs. Geiger in the chattels bequeathed to her, then there remained an interest which was not disposed of by that clause of the will.

That interest I considered as embraced by the residuary clause, and that it became a vested interest in those who were to take under it. In the case of the Countess of Bridgewater v. The Duke of Bolton, Lord Holt said "suppose a man give some of his personal estate away by will, and in the same will give the residue of his estate, this will pass the rest of his personal estate."

In Roberts on Wills, Vol. 1, 438, it is said "the words rest, residue, and remainder, are not to be considered as mere words of relation, when the question is what is included under them, for it is clearly settled not only that property of the testator not before mentioned by him, will pass under the residuary devise, but property not distinctly in the contemplation of the testator at the time." So in page 440: "where a testator makes a partial disposition of his interest in a thing, whether it

¹² Manning's case, 8 Co. 95. Lambeth's case, 10 Co. 46.

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the decision of **Cooper v. Cooper*, that learned and distinguished jurist Chancellor De Saussure, asserted an entirely different doctrine in *Tucker v. Stephens*, 4 Desaus. R. 532, deciding, by a Circuit decree not appealed from, that a limitation by deed of slaves to one for life, and after her death to issue, was a valid limitation to the issue. And I will here remark that the case of *Cooper v. Cooper* appears to be the earliest case in this State, so far as I have been able to discover, in which a contrary doctrine has been asserted. And it does not appear to have any support in the history of our early jurisprudence. For in the case of *Dott v. Cunningham*, 1 Bay, 453, [1 Am. Dec. 624,] decided in Jan. 1795, and *Stockton v. Martin*, 2 Bay, 471, decided in Jan. 1802, it seems not to have been disputed but that the doctrine which we have seen Sir Wm. Blackstone acknowledging as the rule which prevailed in Westminster Hall in his day, was the law of South Carolina. For, on the implied but strong sanction of these early cases and others, we find Chancellor Johnson, in *Powell v. Brown*, 1 Bail. R. 100, denying the authority of *Cooper v. Cooper*, and on the question whether a remainder in a personal chattel could be created by deed to take effect after a precedent life estate in the same, deciding that such a limitation was valid. The following is his emphatic language: "I take it, therefore, to be well settled, whatever may have been the rule in England, that here a limitation over in a personal chattel may be created by deed, otherwise than by a conveyance to uses." In perfect accordance with this language, is that of Judge Nott, in *Duke v. Dyches*, not reported,

be a chattel or hereditament, and afterwards devises or bequeaths the rest, residue and remainder, then these words may properly be considered as having a specific relation to what

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has gone before, *and standing in this light, they seem to have been always held to carry the whole of the testator's remaining interest."

The defendants made a motion for a non-suit, on the grounds.

1st. That under the will of Harmon Geiger, the widow, Mrs. Geiger, took an absolute estate in the negro Lucy, and that therefore the plaintiffs could not sustain their action.

2d. That if under the will the plaintiffs could claim as remaindermen of the increase of Lucy, yet that was only an equitable estate existing between them and Mrs. Geiger, and was defeated by the sale of Lucy before she had increase.

3d. That the plaintiffs cannot maintain this action, as heirs or legatees of Harmon Geiger deceased, the whole of his personal estate being by operation of law vested in his executors or administrators, and that therefore the plaintiffs could have no right to sue.

4th. That if the plaintiffs claim as legatees they should have shewn the assent of the executors to the legacy, which they failed to do.

5th. The defendant is a tenant in common with the plaintiffs, and therefore they could maintain no action against him.

His Honor overruled the motion for a non-

[2 Strob. Eq. 353, note.] I will hereafter ad-

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vert to this case in another branch *of this discussion. I refer to it in this connexion for the purpose of shewing how perfectly the opinion of that eminent Judge harmonizes with that of Judge Johnson in *Powell v. Brown*. The former asserts, that whatever may be the rule in the English Courts as to limitations of chattels, it was changed in South Carolina as far back as 1794, or rather that it was never recognised in this State at any period, and that from that time such limitations have been supported by the decisions of our Courts.

The next case which I shall notice is that of *Brummet v. Barber*, 2 Hill, 543, decided in 1834. Here the donor undertook by parol to give a life estate to his niece, with a remainder over on her dying without leaving issue. Assuming (as well settled,) the principle that such a limitation by deed would be valid, the Court proceeds to discuss the question whether a valid limitation over, after the determination of a precedent life estate, might not be created by parol; deciding that question in the affirmative. Judge O'Neill, in delivering the opinion of the Court, uses the following language: "there is nothing to prevent a trust in personal property from being created by parol, either written or unwritten, and that, even without resorting to the doctrine in relation to trusts of personal property; as it was clear that any thing that was good and effectual in law to pass personal property, was equally so to limit it." This, in my conception, applied the finishing stroke, in

suit, for the reasons assigned in his report, (which see.)

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*The defendant called no witnesses, and rested his defence before the Court and Jury, upon the grounds,

1st. That the plaintiffs by their demurrer having confessed the defendant's special plea, the defendant was entitled upon that plea to a verdict.

2d. That the tenant for life having at least in 1789, sold an absolute estate in the negro woman Lucy, thereby forfeited the estate for life, and the rights of those in remainder to the possession of the chattel instantly commenced, and that therefore the plea of the statute of limitations ought to protect the defendant.

3d. The rights of plaintiffs (if any they have,) being in remainder, were entirely equitable, and, therefore, the fact that the defendant was a purchaser for valuable consideration, without notice, ought to protect him.

4th. That the identity of the negro was not established.

5th. That the defendant was a tenant in common with the plaintiffs, and therefore the Jury could not give entire damages for the conversion of the chattel.

The case was argued before the jury on the evidence, and a verdict was found for the plaintiffs.

The two first grounds in the notice annexed,

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*the utter demolition of the rigorous principle of the old Common Law, that did not allow limitations of personal property. In the case of *Hill v. Hill*, *Dud. Eq. 71*, (decided in 1837,) the donor, by deed, conveyed slaves to his four children, and in case any of them died without issue, then to the survivors or survivor. The limitation was held valid, and I refer to it here, only for the purpose of completing my analysis of this class of the cases on this subject, which have been decided by our Courts.

But why, it may be asked, introduce in this opinion a notice of the foregoing cases? as they only prove what the Chancellor distinctly admits in his decree, "that a chattel interest may be created to commence in futuro." My object is two fold. First, to present a brief review of the whole course of adjudications on this subject in South Carolina, and secondly, to shew to what a small extent the ancient maxims of the Common Law have prevailed on this question from the earliest times to the present; and how far Judge Nott was supported in the opinion which he expressed in *Duke v. Dyches*, that this principle of the common law has not prevailed in South Carolina since 1794, if it ever was recognised at all.

But the Chancellor, distinctly admitting that "a chattel interest may be created to commence in futuro" proceeds to say "it must not be at an indefinite time, such as the death of the donor, unless founded on a val-

I consider as embraced in the construction which was given to the will. For myself I can draw no discrimination as to legal right between Lucy and her children. If the plaintiffs have a legal right to sue for Lucy, they are entitled under the same clause in the will

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to her children; *the estate conferred was a legal estate, and became vested by the death of the testator, and the right cognizable in a Court of Law.

The 3d and 4th grounds may also be considered as identified. That the executors have a right to the personal estate, &c., and that their assent be necessary to entitle legatees to take possession, &c., there can be no doubt, but the answer to these objections is, that the negro woman Lucy went into the possession of Mrs. Geiger, and remained with her till sold by her husband Slappy. This possession and after disposition is irrefragable proof at this distant day of assent on the part of the executor; what other interpretation can be put after a lapse of 47 years? An implied assent is as effectual in law, as where it is expressed.

On the 5th ground and its accompanying ramifications, I have only to remark that no issue on pleadings which the case furnished was brought to the notice of the Court. I considered the counsel engaged, as trying the case on the plea of the general issue. What my opinion might have been, on particular points, had it been sought after, I am not prepared to say. The special plea said to have been filed, and demurrer thereto, I know nothing about.

Whether the life owner, or those claiming under her, having granted a larger estate than she was entitled to under the will (if such was

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uable consideration. When *the consideration is love and affection, and the event in which the gift is to take effect is the death of the grantor, these circumstances place the parties exactly in the condition of a will, and not of a deed; nothing is actually given or received." From this quotation it appears to be the opinion of the Chancellor, that even where the donor intends to do an irrevocable act, and to make a deed of personal property, couched in proper words to pass the title to the donee presently, but not to take effect in possession until the death of the donor, and although the deed may have been duly delivered, the reservation of a life estate in the donor, or in other words the postponement of the enjoyment of the donee until the death of the donor, constitutes the act as testamentary, and renders it void as a deed. The Chancellor admits that precisely such a deed would be valid, if founded on a valuable consideration. What difference could there be between deeds for love and affection and for valuable consideration, to take effect at the death of the grantor, arising from the objection as to there being no delivery of possession? The possession of the property could not be delivered in either case. And yet in the one case the deed is admitted to be valid, and in the other it is not. Here is a distinction, the foundation of which I am unable to perceive. Again: If it be conceded that a chattel interest can be created to commence in futuro, why may it not be made

the fact) might not thereby have forfeited all right under the will, and entitled those in remainder to immediate possession, and a remedy to that end either in Law or Equity, or both;

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and *whether a failure to prosecute such right on the part of those in remainder, after a right of action accrued, might not enable a bona fide purchaser for valuable consideration to plead in bar the statute of limitations, are matters on which I was not called on to give any opinion. I confess, however, the case ostensibly was a hard one, against the descendant of a fair purchaser, without notice; the claim too had a cast of staleness, from the great lapse of time which had intervened from the sale of Lucy by Slappy, to the time the action was commenced. Something of the kind I suggested to the Jury, and I distinctly told them that the plaintiffs had no right to recover more in this action than for one moiety of the value of the negroes &c., for although they might be entitled to the other moiety, yet that under the residuary clause in the will they had only a vested interest in a moiety. To that extent only could they be considered as holding by purchase.

I will not weary the patience of the Court by further comment, as the case may likely undergo a full development by the counsel engaged in it, and I should feel reluctant to forestall the pleasure which the court will derive to itself, from the enlarged explication which the argument before them will furnish.

COPY OF WILL.

"First, I bequeath unto my loving wife Margaret Geiger one negro boy named Joe, one negro wench named Lucy. Item, I bequeath

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to commence at an indefinite period, or *upon a contingent event. I know of no reason why A. should not for a valuable consideration convey a title in his slave to B. with a condition that the possession should be delivered at a future time; in one, or ten years, or upon some future contingent event; upon the death of some third person, or that of the vendor. And is there, I would ask, any difference between executed conveyances of property founded on valuable consideration, or that of love and affection, except as to the rights of creditors? In both of these classes of cases the title passes under the same forms and ceremonies.

But it is objected that where the donor reserves a life estate in himself, as in the case of Jaggars' deed, there can be no delivery of the possession; which, it is urged, is indispensably necessary to pass the title to personal property. I will not pause here for the purpose of shewing, what has already been hinted at, that the objection applies with equal force to conveyances of future interests in chattels founded on a valuable consideration. But I apprehend that I am well supported by authority in saying that where there is a deed or writing conveying the title, no delivery of possession of the chattel is necessary to the perfection of the title. In such cases the delivery of the deed or writing passes the title, and is a substitute for the delivery of the property. In all other cases, tradition, actual or symbolical, is necessary. Chancellor Kent, after commenting

unto my wife one sorrel mare Lady, with her saddle and bridle. Item, one brown cow and

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one black heifer. Item, all my *household furniture and the increase of the said negroes, during her natural life. And to my son Randolph Geiger, I bequeath all my lands, to him and the heirs of his body, and if he should die without issue, the said land shall be sold and equally divided among my three daughters Elizabeth, Ann Magdalen, Margeret; and my four negroes Jim and negro Tom, with the remainder of my personal estate, shall be kept together for the use and maintaining of my children till any one of them arrives to age, or is married, and then my personal estate shall be equally divided amongst my children."

The defendant appealed and moved the Court of Appeals, first, for a nonsuit, on the grounds.

1st. That under the will of Harmon Geiger, the widow, Mrs. Geiger, took an absolute estate in the negro Lucy, and therefore the plaintiffs could not sustain their action.

2d. That if under the will the plaintiffs could claim as remainder men of the increase of Lucy, yet that was only an equitable estate existing between them and Mrs. Geiger, and was defeated by the sale of Lucy before she had increase.

3d. That the plaintiffs cannot maintain this action as heirs or legatees of Harmon Geiger deceased, the whole of his personal estate being by operation of law vested in his executors or administrators, and that the plaintiffs have no right to sue.

4th. That if the plaintiffs claim as legatees,

2 STROB.EQ.—13

upon this last proposition, remarks, "It is

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*nevertheless assumed in ancient and modern cases, that a gift of a chattel by deed or writing, might do without delivery." In Ross on Vendors, 197, it is said that "the property in goods passes by the delivery of the deed." In Noy's Maxims, 107, "If a deed be made of goods and chattels and delivered to the use of the donee, the property in the goods and chattels is in the donee presently." In Irons v. Smallpiece, Ch. J. Abbott says, "I am of opinion that by the Law of England, in order to transfer property by gift, there must be either a deed or written instrument, or there must be an actual delivery of the thing to the donee."¹⁴ And in Younge v. Mone, 1 Strob. L. R. 52, it is decided that the delivery of a deed of chattels to the donee vests the property in the donee without a delivery of the possession.¹⁵

I will in the next place proceed to discuss another branch of this question, and to consider how far the distinctions taken in the decree of the Circuit Court are sustained by authority, and this discussion will involve the review and analysis of another class of decisions on this subject. And in the first place I will dispose of Pitts v. Mangum, 2 Bailey, 588, and McGinney v. Wallace, [3 Hill, 254,] both of which are quoted in the Circuit decree in support of the views there taken. In my opinion these cases are not pertinent to the question arising under the deed of Thomas G. Jaggars. They are both cases in which the donor attempted by parol

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they should have *shewn the assent of the executors to the legacy, which they failed to do.

5th. That the defendant is a tenant in common with the plaintiffs, and therefore they could maintain no action against him.

And failing in that, for a new trial, on the grounds.

1st. The plaintiffs having confessed, by their demurrer, the defendant's special plea, the defendant was entitled upon that plea to judgment.

2d. The tenant for life having at least in 1789, sold an absolute estate in the negro woman Lucy, thereby forfeited the estate for life, and the rights of those in remainder to the possession of the chattel instantly commenced, and that therefore the plea of the Statute of limitations ought to have protected the defendant.

3d. The rights of the plaintiffs being in remainder were entirely equitable, and therefore the fact that the defendant was a purchaser for a valuable consideration, without notice, ought to have protected him.

4th. The evidence objected to by defendant, on the trial, was inadmissible and ought to have been rejected.

5th. The identity of the negro was not established.

6th. The Jury had no right to give entire damages for the conversion of the chattel, inasmuch as two of Harmon Geiger's children who survived him, were dead, and their rights were not before the Court.

¹⁴ 2 Barn. & Al. 552.

¹⁵ 10 Law Lib. 102.

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to give a slave to the donee, reserving *to himself a life estate. Both these cases (as it will be seen by reference to them) turned upon the question of delivery. It was ruled, with great propriety and with unanswerable logic, that there could be no such thing as a parol gift of a chattel to commence in futuro. In the first of these cases Judge O'Neill remarks, "in order to constitute a gift by parol there must be a delivery of possession with a view to pass a present right of property. There can be no such thing as a parol gift to commence in futuro." It will be observed, that there is no intimation of an opinion here, that the gift of a chattel in writing to commence in futuro might not be valid. And in the case of *McGinney v. Wallace*, Judge Richardson who tried the case says, "the donor transferred no dominion or exclusive control of the slave to the donee, but kept it to himself, and left no room for a constructive delivery by the reservation of his life estate. All parol gifts" he proceeds to observe, "require to be perfected by delivery, or a transfer of the donor's control over the thing given."

These cases have no bearing whatever on the question now before the Court, and serve only to qualify, and they properly qualify the doctrine of parol limitations of chattels, as laid down in *Brummet v. Barber*.

I come now to consider the case which may be regarded as the pivot on which the decree of the Circuit Court was made to turn; the source, I apprehend, of all the difficulty,

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*7th. The verdict is contrary to law and evidence.

CALDWELL and O'NEALL, for the motion.
Bauskett and Butler, contra.

Curia, per COLCOCK, J. In this case the Court indulged the learned counsel in the re-argument of some of the points which had been determined on this very will, and in relation to the same subject; that is, to some of the negroes, the issue of Lucy, the title to which was precisely the same as that of the slaves in the former suit. But as we have not been induced to change our opinions, as formerly expressed, it would be a work of supererogation to go into any further or other reasoning than that which is contained in that opinion. We still think that a life estate only was given, and that the reversionary interest after the determination of the life estate did not pass by the residuary clause, and we also think that the statute of limitations must operate.

But a new point was made, which demands some attention. It is contended that although the property is given for life, that yet as it was a gift of personal property, it was an absolute gift, or must so legally operate. This is a doctrine which, I take it, is as well settled as any which has come before us at this sitting; at least it is so as it regards negroes, which are the subject of the present dispute; that they may be limited over after the determination of a life estate, has been decided a thousand times. And if so, it follows as a matter

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*misconception and error, with which this subject has been invested; the case of *Vernon v. Inabnit*, 2 Brev. 411. I differ with the counsel for the appellant in the opinion which he so emphatically expressed, that what Judge Brevard said on this question was a mere obiter dictum. True that the Statute of limitations was also involved, but on account of the infancy of the plaintiff, the view which the Court took of the law as to the limitation of the chattels became highly important to the issue of the case. One John Vernon, by a deed bearing date in 1788, gave a female slave (the mother of the negroes in dispute) to his minor son James Vernon in fee, reserving to himself a life estate. The case came on for trial in 1810, the same year in which *Cooper v. Cooper* was adjudged, and it is a striking fact, that both cases were decided upon the same general principle, to wit: that the law did not admit of the limitation of a chattel except by will, or deed of trust; a principle which I have already shewn was exploded even in the English Courts long before that period. "It is settled law," says the Judge, "that a man cannot limit a personal chattel to one for life and remainder to another, except by will or deed of trust. In the first case the property passes by way of executory devise; and in the second it vests in the trustees for the uses and purposes declared in the deed. Now if a life estate in a chattel cannot be carved out by deed, without the intervention of trustees, with what pro-

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*of course that a reversionary interest may be created or exist. Once admit the doctrine of creating different estates in a chattel, and it follows, as the shadow follows the substance, that there must be, in some cases and under some circumstances, a reverter to the representative of the donor. If you admit the idea that a gift for life, of a chattel, is good to support a remainder, why not to support a reversion? And there is scarcely a book which treats upon the subject which does not shew that the old distinction between real and personal property, in this respect is done away with, in gradual progress of this doctrine. A distinction was first made between the use of the thing, and the thing itself. But this distinction was soon found to be too ethereal for the practical purposes of life, and as personal property became more valuable, and a description of it introduced among us more durable and continuing in its nature, it was at length abolished, and now it is clear that (at least as regards chattels which are endurable in their nature) any such contingent interest may be created which can be in real estate; and notwithstanding the strong language of the counsel to the contrary, this is supported by even the English authorities. What is a term of years but a chattel, to be sure technically called a chattel real, a chattel endurable in its nature. Now as to these Mr. Fearne expressly says that when granted for life they may on the death of the tenant for life revert to the representatives of the donor; (see page 486, 488;) who puts the case thus. "Where A, possessed

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priety can it be *contended that a man can carve out of a chattel interest, a life estate for himself, and convey the remainder" to another, &c. The postulate being conceded, the reasoning is unanswerable. But the error consists in the fact, (to speak in the language of the school-men,) that the major proposition is untrue, to wit, "that a man cannot limit a personal chattel to one for life, remainder to another, except by will or deed of trust." But suppose the proposition to be reversed, and that it be conceded that a future interest in a chattel may be created by a deed without the intervention of trustees, and to commence at a future and uncertain period, (and this is undeniably the law,) would it not follow from any thing in reason to the contrary, that the grantor might and should be allowed to make that future interest vest as to the period of possession on the termination of his own life, as well as upon any other future event? This decision, then, does not sustain the distinction taken in the Circuit decree, which, admitting that a future interest in a chattel can be created otherwise than by will or deed of trust, denies that the grantor can retain in such chattel a precedent life estate to himself.

The case which approximates nearest to *Vernon v. Inabnit*, [2 Brev. 411,] is *Ingram v. Porter*, Harp. L. R. 492, 4 McC. L. R. 198. This case has always appeared to me to be of an anomalous character. The donor granted to his daughter a slave in words conveying the fee, with a habendum that re-

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of a term for *99 years, devised it to B for life, and then to C, for life, and so on to five others successively for life; after the death of all seven, upon the question, who should have the residue of the term, it was adjudged to revert to the executors of the testator." The motion therefore is dismissed.

NOTT, J., and JOHNSON, J., concurred.
Motion refused.

2 Strob. Eq. 370

JOHN C. HARRIS v. NATHANIEL SAUNDERS.

[Wills ⚡88.]

An instrument of writing, duly executed as a deed, by which a party deceased had, in his lifetime, given a slave to his illegitimate son, reserving to himself a life estate, and which had been exhibited by the deceased, and declared by him to be a deed, although retained in his hands and subsequently lost previous to his death, was held to be a deed of which there was sufficient delivery, and not an instrument which was testamentary and revocable.

[Ed. Note.—Cited in *Welch v. Kinard*, Speers Eq. 262; *Jaggers v. Estes*, 2 Strob. Eq. 375, 49 Am. Dec. 674.

For other cases, see Wills, Cent. Dig. § 211; Dec. Dig. ⚡88.]

[Deeds ⚡56.]

There is no prescribed form for the delivery of a deed; if it appears from all the facts and circumstances that the gift was complete, without any conditions or qualifications annexed, and without any thing more remaining to be done, it is a valid

stricted the commencement of her possession and enjoyment to the period of his death. The final judgment of the Court was, not as

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in *Vernon v. Inabnit*, that the *remainder was void, but that the life estate reserved to the donor was void, and that the donee took the entire estate; on the very technical ground that the habendum was repugnant to the premises of the deed. Apocryphal as is the authority of this case on this point, it is the only one I have been able to find in our reports, that does support the distinctions taken in the decree. I have already shewn that *Pitts v. Mangum*, and *McGinney v. Wallace* do not. I will now proceed to shew that two other cases cited for that purpose fall equally short of furnishing the analogy that they are supposed to present. In the first of these, *Ragsdale v. Booker*, decided in 1826, and which is not reported, no question was made as to whether a future interest in a chattel can be created, or whether the donor could convey a chattel to a donee, reserving to himself a life estate. I write with a copy of the decree of the Court of Appeals before me, and I say, that no such question was considered by the Court. Judge Nott in delivering the opinion says, "the Court do not deem it necessary to go into a consideration of any of the grounds taken except the third, which is the following. Because the deed under which the complainants claim, is a testamentary paper, and vests no legal interest in the complainants until the death of John H. Ragsdale." The form of the deed is the same as given in the Circuit decree.

delivery, and a perfect deed, although left in the hands of the donor.

[Ed. Note.—Cited in *Withers v. Jenkins*, 6 S. C. 124.

For other cases, see Deeds, Cent. Dig. § 120; Dec. Dig. ⚡56.]

[Trover and Conversion ⚡1.]

Any act of the defendant inconsistent with the plaintiff's right of possession, or subversive of his right of property, is a conversion.

[Ed. Note.—Cited in *Ladson v. Mostowitz*, 45 S. C. 391, 23 S. E. 49; *Holliday v. Poston & Son*, 60 S. C. 109, 38 S. E. 449.

For other cases, see Trover and Conversion, Cent. Dig. § 1; Dec. Dig. ⚡1.]

[Trover and Conversion ⚡11.]

[Cited in *Crosland v. Graham*, 83 S. C. 230, 65 S. E. 233; *Bingham v. Harby & Co.*, 91 S. C. 124, 74 S. E. 369, to the point that where a defendant, after the accrual of the plaintiff's title and right of possession, having the property in his own hands by purchase from one who had no title, sold it to another who carried it beyond the plaintiff's reach, and received the purchase money, it was held a sufficient conversion, although the defendant was not aware of the plaintiff's title.]

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 96; Dec. Dig. ⚡11.]

[This case is also cited in *Robert R. Sizer & Co. v. Dopson*, 89 S. C. 537, 72 S. E. 464, without specific application.]

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*Before Earle, J., at Edgefield, Fall Sittings, 1835.

His Honor reports as follows:

Earle, J. Trover for a negro. The plaintiff is the illegitimate son of John Harris, and claimed the negro as a gift from him. It was de-

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The Court proceeds to discuss the question involved in the third ground of appeal, and pronounces the instrument to be testamentary, laying much stress on the fact, that it was not delivered. But nothing in that judgment will be found to support the doctrine, that a man may not by a deed couched in proper and apt words, convey a future interest in a chattel to vest in possession on his own death.

The same remarks apply with peculiar force to the case of *Welch v. Kinard*, 1 Speers' Eq. 256, which has been cited with great confidence in support of the view of the question opposed to the conclusion of the majority of this Court. The form of the instrument is given in the Circuit decree, and need not be here repeated. Chancellor Johnson who tried the case observes, "the case of *Ragsdale v. Booker* is in principle this case." But he goes on to observe that "the same question again came up in *Duke v. Dyches*, on a deed to the same effect, differing something in phraseology." And losing sight of the fact that the instrument in *Ragsdale v. Booker* was held to be testamentary, and that in *Duke v. Dyches*, it was held to be a deed, he proceeds to decree a delivery of the negroes to the complainant, who was the donee.

On appeal the decree was reversed. The whole question discussed and decided by the Court of Appeals, was whether the instrument was testamentary, or a deed. Chancellor

posed by James Carson, that he drew a deed, from John Harris to the plaintiff, for a negro boy named Andrew, about April, 1825, reserving a life estate to himself. He died in 1826, and the witness administered on his estate; Harris having retained this deed in his possession, witness searched diligently among his papers, and not finding it, applied to such of his friends as he supposed likely to have it; not being able to find it, he proceeded to sell the negro, with the rest of the estate. The defendant married the widow of Harris. The plaintiff was then a minor and had been living with Harris. He was not present at the execution of the deed, which was at the house of the witness, and it was carried away by Harris. Thinks the reservation of the life estate was made in the deed itself.

At the sale of the estate, the negro was purchased by one Hora, who sold him to Miller; he to Saunders, and Saunders to Hollingsworth, before the action was brought; and this was the only conversion; Hollingsworth having carried him out of the State. The execution and contents of the deed were further proved by the subscribing witness. To his brother the deceased said, a few days after the execution of the deed, "that he had deeded Andrew to John C. Had he done right or wrong?" His brother

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replied "you have done right;" and he pulled out the deed and read it to him. Plaintiff was living with the deceased at this time; and also at the time of his death. To another witness, he said in the Fall of 1824, he had a mind to do something for John C., and had a mind he would give him a negro. In the Fall of the next year, he said to the same witness that he had made a deed of Andrew to John C. and

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*Harper in delivering the opinion of the Court says, "the case of *Ragsdale v. Booker*, cited by the Chancellor, appears to us, as it did to him, to be in point. It is supposed, however, to be overruled by that of *Duke v. Dyches*, apart from the consideration, that the words in that case import the passing of a present interest or estate; 'I have given and granted and by these presents do give and grant;' and in the present case purport to give nothing till the testator's death." And on this distinction the instrument is adjudged to be a testamentary paper. But it is manifest, and highly pertinent to the present issue, that the authority of *Duke v. Dyches* is fully and distinctly recognised both by the Circuit decree and in the opinion of the Court of Appeals.

Having now disposed of all those cases which have been supposed to support the opinion of the Chancellor, I will, in the next place, present a rapid review of that series of cases which sustain, and in my judgment establish on impregnable grounds, the opposite opinion. The array of cases is strong, and if the doctrine of *Vernon v. Inabnit* ever was the law, they are sufficient to overthrow and overrule it.

Taking these cases in their chronological order, the first is *Duke v. Dyches*, to which I have already, several times, adverted in the preceding remarks. It was decided December term, 1829, and is not reported. It was an action of trover, by the executors of *Duke*,

it was at home in his desk, and he intended in the course of a few days, to go and have it put on record at John Simpkins' (who was the Ordinary.) To another witness, shortly before he died, on the 1st. January 1826, he said, patting the boy Andrew on the head: "This boy I have given to John C., and I had a deed for it, but I believe it is destroyed, for I have looked and can't find it; I believe my wife has destroyed it; but I mean to have another drawn, and put it on record, and when I am dead he may find it in the Ordinary's office at Edgefield."

A motion for non-suit was made, on the ground that there was no conversion. I thought the sale by Saunders before action brought, after the right of the plaintiff accrued, although he had no notice of his claim, a conversion. I considered the existence and loss of the deed sufficiently proved, to admit parol evidence of the contents.

I supposed the main question to be, whether the gift was complete, by the delivery of the property, or what would have been equivalent, a delivery of the deed, and this question was submitted to the jury. I charged the jury that there was no prescribed formula for the delivery of the deed; that if it appeared from all the facts and circumstances, that the gift

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or contract was complete, without any conditions or qualifications annexed, and without any thing more remaining to be done, it was a valid delivery, and a perfect deed, although left in the hands of the donor. In this case, the donee was a minor; there was no guardian, legal or natural, as he was illegitimate. And I recommended the jury to consider whether the donor had subsequently regarded the title transferred to the plaintiff, and whether he had ex-

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for the recovery of certain negroes *that had, by deed, been given and granted by plaintiff's testator to his natural daughter, Esther Benson, "to be and remain as her proper right and property at the death of the said Moses Duke," &c. The remainder to Esther Benson was sustained by the unanimous opinion of the Court. The Chancellor, in his decree, in the present case, with the view to weaken the force of this decision, observes: "the Court held the limitation to be good, but did not decide whether the instrument was testamentary; that question does not appear to have been made, but as the case occurred since 1824, doubtless it was considered as a deed." I refer to this observation for the purpose of saying, that throughout the whole opinion of Judge Nott, the instrument is considered as a deed. In the very statement of the question, it is treated as a deed. "The only question," says he, "now submitted to us, is whether personal property can be limited over by deed to take effect after the termination of a life estate." In *Trotti, executor, v. Dyches* and others, which was a case in equity before Chancellor DeSaussure, and was brought before the Court of Appeals at December term, 1828, the same question on this identical instrument was decided by the Chancellor. On a question made by the widow of Moses Duke, to reduce the provision made for his illegitimate daughter, Esther Benson, under the Act of 1795, it was of importance

hibited the deed, and spoken of it as a perfect instrument. I thought the delivery sufficient, but left the question to the jury.

I did not consider the deed, if duly executed, revocable, nor that there was any proof of revocation; nor could I regard the defendant as an innocent purchaser without notice, entitled to set aside the deed, as voluntary and fraudulent.

On the 5th ground taken, I do not perceive how that question could be made, in this Court and before a jury. There may be merit in it, if it should appear on the settlement of the administration, that the plaintiff has received a gift of more than one fourth of the estate, and he may be enjoined until that settlement is made. The measure of damages, as I understand the evidence, was the value at the time defendant sold him, and interest on it.

The jury found for the plaintiff, and the defendant appealed on the grounds annexed.

Grounds for non-suit. That there was not a wrongful conversion of the negro in question, and that trover will not lie upon the case stated and proved by plaintiff.

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*Failing in this, then for a new trial.

1. Because the loss of the deed was not sufficiently proved to authorize secondary evidence of its contents.

2. Because the deed, though signed and sealed, was retained by John Harris, and never was delivered.

3. Because the deed was revocable, and the loss or destruction of the deed by John Harris, his offer to sell the property within a month of his death, and his death without making any other disposition of the negro, was evidence of

to determine the character of this instru-

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ment.—*It was executed before Duke was married. If it was a deed it escaped the operation of the Act of 1795. But if it was testamentary, the property given to Esther by it was to be taken into the estimate, in reducing her legacy under her father's will, to the one-fourth of the clear value of his estate. The question was distinctly made, and Chancellor DeSaussure says "it was clearly intended to be a deed of gift, and not a testamentary paper; yet the enjoyment of the property was not to take effect until the death of the testator, or sooner if he chose it." He proceeds to decide that the deed having been executed in 1804, when the donor had neither wife or lawful child, he had consequently a clear right to make a gift to his bastard child. The defendants appealed from this decree, among other grounds, on the following: "Because the deed of 1804 is either void, or inoperative as a testamentary paper, and revoked by the subsequent will." This ground appears to have been abandoned by the counsel, as it does not appear to have been discussed in the judgment of the Court of Appeals.

The next case to which I refer is *Harris v. Saunders*, [2 Strob. Eq. 370, note,] decided at Columbia, Spring Term, 1835. The case is not reported. It was trover for a negro, which was alleged to be a gift from the plaintiff's putative father. The deed was lost, but a witness on the trial proved that he had

a revocation, and this question should have been left to the jury by the Court.

4. Because possession not accompanying the gift it was fraudulent as to defendant, an innocent purchaser without notice.

5. Because the negro recovered was worth more than one fourth of donor's estate.

6. Because the measure of damages should have been the value of the slave at the time defendant sold him.

7. Because the presiding judge mistook the law in charging the jury, that the question of delivery of the deed was a question of intention on the part of John Harris, that if John Harris intended that the deed should be complete and effectual, although no delivery had been made or any thing equivalent done, yet the deed should be regarded as complete, and enure to the benefit of plaintiff.

Bauskett, defendant's attorney.

Wardlaw, contra.

Curia per EARLE, J. The first question

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on the motion for non-suit is, whether there was any conversion by the defendant to sustain the action. And I apprehend it will only be necessary to inquire what constitutes a conversion, to afford a satisfactory answer to the question. A conversion may arise either by a wrongful taking of the chattel, or by some other illegal assumption of ownership, by illegally using, or by misusing it; or by a wrongful detention; perhaps more accurately defined by another writer thus; a conversion seems to consist in any tortious act, by which the defendant deprives the plaintiff of his goods, either wholly or but for a time. Any act of the defendant inconsistent with the plaintiff's right

drawn the deed, and that it was a deed from

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John Harris to the plaintiff *for the negro, in which he, John Harris, reserved to himself a life estate. There were various questions made, and among them that of delivery of the deed. But the case did not, as was observed by Chancellor Harper in *Welch v. Kinard*, turn upon the question of delivery. But the question as to the testamentary character of the instrument was distinctly submitted. The fourth ground of appeal was that the instrument was revocable. Judge Earle in delivering the opinion of the Court of Appeals, on this question, observes: "Nor does there appear to be any reason for regarding the paper as testamentary and revocable. All the evidence tends to establish the paper as a deed. It was executed as a deed, published and recited as a deed, and the transaction was always referred to as an actual gift to the plaintiff."

The next case which I will cite is the unreported case of *Sunday v. Boon*, decided by Chancellor Johnston, at Edgefield, June Term, 1836. In this case Mary King, by deed, in consideration of natural love and affection, "granted and sold" to her children,

of possession, or subversive of his right of property, is a conversion.¹⁶ Here the defendant, after the accrual of the plaintiff's title, and right of possession, having the slave in his own hands by purchase from one who had no title, sold him to another who carried him beyond the plaintiff's reach, and put the price in his pocket. If this be not a conversion, and a very effectual one too, it is difficult to imagine what would constitute a conversion. The argument is, that inasmuch as the defendant was not aware of the plaintiff's title, he is not liable after the sale. It is not denied that he would be liable if he had retained the property, and refused to give it up. Can the sale make any difference, when he thereby made property of him, and has the proceeds in his pocket? The sale was an act by which the plaintiff is wholly deprived of his property; and it was not the less his property because the defendant was not aware of his title, and purchased from another. If the defendant is not liable, the

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plaintiff is *without redress, as the former holders stand on the same footing. But there is no weight in the objection. If authority were needed to support the position, it may be found in *Cooper v. Chitty*, 1 Burr. 20, where the sheriff levied on the goods of a bankrupt, after an act of bankruptcy committed, of which he was ignorant; in an action by the assignees, he was held guilty of a conversion. And in *Bloxham v. Hubbard*, 5 Ea. Rep. 407, it was held that a sale of a ship, which was afterwards lost at sea, by the defendant, who claimed under a defective conveyance from a trader, before his bankruptcy, was a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without demand and refusal.

The motion for non-suit cannot prevail. It is hardly necessary to notice all the grounds that are set down for a new trial, as they do not seem to have been much relied on. The loss of the deed was proved as fully and satisfactorily as was necessary to admit parol proof of the contents. The declarations of the donor that he had executed it, (besides the other proof

who were named, all her real and personal estate, to have and to hold the same, &c. "from henceforth and forevermore;" with a provision that the grantees should permit her to use all the property thus conveyed, "during her natural life, without paying or yielding anything for the same." The

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deed goes on to provide that, at her *death, the children should have and enjoy the estate, "and dispose thereof to their own proper use and behoof as they shall see fit." This instrument was held by the Chancellor not to be testamentary, that it was valid, and could not be discharged of the trusts therein created by a subsequent deed inconsistent therewith; which decree was unanimously affirmed by the Court of Appeals. It may be remarked en passant, that this case does not appear to be so directly to the point as some of the others, as the instrument may be regarded as a deed of trust, conveying the whole fee directly to the children, and charging it with an equitable estate in the donor for her life, according to the reservations of the deed.

The next and last in this series of cases is that of *Dawson v. Dawson*, Rice Eq. 243, de-

of execution) that it was lost, that he had searched for it, that his wife had destroyed it, together with the diligent search made by the administrator without success, furnish abundant ground for the admission of the secondary evidence.

The delivery of the deed was supposed on the circuit to present the main question. And this was submitted to the jury under instructions, with which the Court perceives no good reason to be dissatisfied. Those instructions as to what shall be deemed sufficient evidence of delivery, conform to the principles laid down by

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*the most approved authorities, and I think will be supported by the adjudicated cases. And the majority of the Court is not dissatisfied with the finding of the jury on that question.¹⁷

There does not appear to be any pretext for saying, that the defendant was an innocent purchaser, without notice, and that the gift was fraudulent as to him. He was not a creditor of the donor, during his life, and did not purchase from him. He purchased from the administrator after his death, or rather claimed under a purchase from the administrator; and is not entitled to the protection he claims as an innocent purchaser. Nor does there appear to be any reason for regarding the paper as testamentary, and revocable; nor for saying that there was any revocation in fact. All the evidence tends to establish the paper as a deed. It had the form and requisites of a deed; it was executed, published and recited as a deed; and the transaction was always referred to, by the donor, as an actual gift of the negro to the plaintiff. On all the grounds, therefore, the Court is of opinion that the defendant can take nothing by his motion, which is dismissed.

GANTT, J., RICHARDSON, J., HARPER, Ch., BUTLER, J., EVANS, J., JOHNSTON, Ch., JOHNSON, Ch., and DESAUSSEURE, Ch., concurred.

O'NEALL, J., absent at the argument.
Motion refused.

¹⁶ 1 Ch. Pl. 40. Stark Ev. pt. 4, 1491.

¹⁷ Kent, Com.

cided in 1839. It has been asserted that this case has no application to the question, but in my judgment there is no case in the books which has a more important or direct bearing on the subject. Dawson, the elder, made a will which was duly executed on the 2d May, 1820, and was subsequently modified by a codicil. On the 3d June, 1821, he executed a very unique and informal instrument, which was held to be a deed, and to have been duly delivered. By this deed he says, "I give to my named children, in my will, all my real estate and all my personal property and goods and chattels to my named children in my will, and I do acknowledge this day to be them and no others than those

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*that are named in my will, and the use therein mentioned. I appoint Captain Thomas Dawson in trust to the same. I give up all I have." Richard Dawson, senior, lived some 18 years afterwards. The Chancellor, who tried the case, decided that the provisions of the will were incorporated in the deed, and that the joint effect of the two taken together, was to reserve to the donor a life estate, with a remainder to the children, named in the will. Hear the language of the Chancellor on this question: "Can the paper," says he, "operate as a deed? I shall not, after the decisions that have been made in this State, trouble myself by enquiring whether a present vested interest, to be enjoyed in futuro, can be directly conveyed by deed, either as to realty or personalty.—That is a settled question. That is precisely the character of this instrument. The title passes now by the deed, to take effect in enjoyment at Mr. Dawson's death, according to the provisions therein referred to. Himself to stand seized in the mean time." The decree was affirmed by the Court of Appeals.

I have now reviewed the whole course of our adjudications on this subject, and it appears to me that there is a perfect harmony among all of them, from the earliest times to the present, with the exception of the cases of *Cooper v. Cooper*, *Vernon v. Inabnit*, and the somewhat anomalous case of *Ingram v. Porter*, in which three cases the decision was placed, as I have shown, upon the untenable exploded and now confessedly erroneous doctrine that a future interest in a chattel could not be created by deed at all, except by way of trust; for which reason alone those cases are not entitled in any sense to be considered authoritative. The result of all the cases may be summed up in a few general propositions, to wit: That a future interest in a chattel can be created by deed otherwise than by trust, and even by parol; that a person can, by a deed duly delivered as such, give to another a chattel, reserving to himself therein a life estate; provided that by the operation of the deed a present title passes in the chattel, to

the donee, with the right of future enjoyment. But in the case of parol gifts, on account of there being no delivery of dominion over the chattel, or of a deed or title as a substitute therefor, one cannot, by parol, give a chattel to another, reserving to himself a life estate.

In all cases like the present, where the donor by an instrument in writing gives personal property to another, reserving to himself a life estate, or providing that the interest of the donee shall commence at his death, the first enquiry must necessarily be, whether the purpose was to make a deed or a will. If it appears from a construction of the whole instrument, that the donor intended to do an irrevocable act, and to pass a present title to the property, deferring only

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the enjoyment of the donee to the period of his death, then it is to be considered as a deed, and will have an operation as such, and the remainder to the donee will be valid, and take effect in possession according to the provisions of the deed; provided always, that the instrument be duly delivered.

Such, I am authorized to say, is the opinion of the majority of this Court. And the majority of this Court is further of the opinion, that the deed of Thomas G. Jagers, by which he conveys the slaves in question to the complainant, Elizabeth Jagers, reserving to himself a life estate, if the same was duly delivered, is a good and valid deed, and that the effect thereof was to pass a present title to Elizabeth Jagers of a future interest—a life estate being reserved to the donor. It is therefore ordered and decreed, that the decree of the Chancellor, on the construction of the deed of Thomas G. Jagers to Elizabeth Jagers, be reversed. But inasmuch as the evidence, in regard to the due delivery of the said deed, is not entirely satisfactory, the case is remanded to the Circuit Court, for the purpose simply of trying the question as to the due delivery of the said deed.

DUNKIN, Ch., RICHARDSON, J., EVANS, J., and FROST, J., concurred.

JOHNSTON, Ch., being interested in the question, gave no opinion.

Decree reversed.

2 Strob. Eq. 379

In Re—THE ATTORNEY GENERAL et al.
v. JOHN A. JOLLY.

[*Charities* §33; *Wills* §517.]

Testator devised and bequeathed the whole of his estate, both real and personal, to his wife for life, and after her death, "to the Methodist Church of which she may be a member at the time of her death, to be appropriated to the uses and purposes which the conference may deem most advantageous for said church; more especially," &c.—held that the particular con-

gregation, of which the wife was a member at the time of her death, was exclusively entitled to the bounty, and not the Methodist Church in its general connectional character.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 72; Dec. Dig. ¶¶33; Wills, Cent. Dig. § 1112; Dec. Dig. ¶517.]

[Wills ¶456.]

Wills inartificially drawn, should be interpreted according to the common and proper meaning of the terms employed in them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. ¶456.]

[Charities ¶37.]

If a charity fail on account of the mode of appropriation prescribed in the will, being contrary to the laws of the society intended to be benefitted, it by no means follows that the Court will be bound to direct the charity to other kindred objects.

[Ed. Note.—Cited in *Pringle v. Dorsey*, 3 S. C. 509; *Mars v. Gibert*, 93 S. C. 465, 77 S. E. 131.

For other cases, see Charities, Cent. Dig. § 93; Dec. Dig. ¶37.]

On appeal from the decree of Dunkin, Ch., sitting for Marion, June, 1847, overruling the exception taken to the following report of the Master:

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*The Report of Edward R. Laurens, Master in Equity.

This case is sent down to me by the Court of Appeals, under the following "consent order," viz:

This cause came on to be heard on the appeal of the complainants from an order of Chancellor Johnston, dismissing a rule taken out upon the trustee, whereupon, by consent of parties, it is ordered that the case be referred to one of the Masters of this Court, at Charleston, to report to the Chancellor to hold there the ensuing Circuit Court, a scheme for the proper administration of the charitable uses established by decree: all parties interested to have the right to come in and propose a scheme before the Master, and to take such exceptions as they may be advised.

(Signed)

Wm. Harper,
B. F. Dunkin,
J. J. Caldwell.

We consent:—George W. Dargan,
C. G. Memminger,
W. W. Harlee,

per C. C. Memminger.

Under this order I have held several references, and have had two schemes submitted to me—copies of which are herewith filed, and both of which I have attentively and carefully examined. To save the necessity of reference, it may not be amiss to repeat the words of the will here, as they are published in [*Shields v. Jolly*] 1 Richardson's Equity Rep. p. 100 [42 Am. Dec. 349]: "I give, devise and bequeath the whole of my estate, both real and personal, to my wife, Elizabeth Burnet, during the term of her natural life. After her death I give, devise and bequeath

the whole of my said estate, both real and personal, to the Methodist Church of which she may be a member at the time of her death, to be appropriated to the uses and purposes which the conference may deem most advantageous for said church; more especially for the support of Sunday schools, for the purchase of bibles and religious tracts, and the distribution of the same among the destitute, and for the support of Missionaries."

By the terms of the will, this legacy is given "to the Methodist Church" of which the testator's widow might be a member at the time of her death; and it is to be appropriated to such uses and purposes as the conference might deem most advantageous for said church; especially, says the will, for the support of Sunday schools—for the purchase of bibles and religious tracts, and the distribution of the same among the destitute, and for the support of Missionaries.

It is important, then, to inquire, what a well-informed, intelligent methodist, such as Burnet was, means by the word church?

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*Next, what is their usual course of proceeding in the matter of Sunday schools?

Thirdly, their mode of operation in the supply and distribution of bibles and religious tracts?

And fourthly, their general missionary organization?

On all these heads I have taken testimony, and the depositions of the witnesses examined before me, are filed with this report.

Upon the first head the testimony is very clear, that wherever the word church is used, reference is had to the whole body, and that it is improperly applied when used by persons not methodists to designate the particular congregation at any given place; wherever it is intended to speak of such particular congregation the proper and only proper word, in methodist parlance, is society. This will be further apparent from an examination of their book, entitled "The Doctrines and Discipline of the Methodist Episcopal Church, South." I have read this book carefully, and the result of my scrutiny is in accordance with the testimony. Wherever the word church is used, allusion is invariably had to the whole body of that denomination, qualified, of course, by the immediate context, as where speaking of the quarterly conference, church means the members of all the different congregations; or, more technically speaking, of all the different societies, comprised in that quarterly conference; so of the annual Conference, the word church would mean all the members of all the numerous societies in connection with and under the control of such Conference. In no instance have I found the word used as applicable to any one individual society. It

is sometimes so used in conversation, but even then only in cases where an individual society has become so numerous (as sometimes happens in cities and large towns) that it becomes expedient to make it a separate station, in order to the better and more efficient working of their ecclesiastical organization; but here it must be borne in mind, that where a separate station is established, there we have as of course the important feature of a quarterly Conference, and how important a feature that is, the testimony so fully and so clearly shows, that it would be idle supererogation to repeat it here. The book of discipline, referred to above, recognizes the distinction between church and society from beginning to end. The introduction (I quote from the authorized edition,—John Early's, Charleston, 1846) speaking of individual congregations, tells us that one Phillip Embury, an Irishman, began preaching in New-York, in 1766, and formed a society of his own countrymen, and the citizens. Robert Strawbridge, also from Ireland, settled in Maryland about the same time, and formed some societies there. When speaking of the whole body, the same introduction

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says: "we recommend to you, as members of our church, our book of discipline," etc. And again: "you ought, next to the word of God, to procure the articles and canons of the church to which you belong." Sections 1 and 2 of chapter 1, refer to the whole body of the methodists, and here we have used the word church. At page 23 we are told that one of the duties of a class-leader is to meet the ministers and stewards of the society once a week; and so throughout the chapter, where individual localities are spoken of, we have the word society. At page 28 we find that the general conference has full power to make rules and regulations "for our church." At page 34 there is provision that no one shall be licensed to preach, except he be recommended by the society of which he is a member. At page 40 the presiding elder is required to oversee the spiritual and temporal business of the church in his district, and the district of a presiding elder has several circuits within its limits, and each circuit has within it many societies—the circuit of which Liberty is a part has some 20 or more. At page 42 it is made the duty of those in charge of circuits or stations to take care that every society be duly supplied with books—he is to meet the men and women apart, in large societies, &c.—he is to read the rules of the society (here the word is used to signify the whole body; but that does not militate against the view I have taken; it is common enough to call the whole body "the society," it is more common and more proper to call it "the united" or "our united societies;" the position assumed in this report is that in methodist parlance a particular society is never designated as

the church at such or such a place,) once a year in every congregation, and once a quarter in every society.—The congregation differs from the society in this; by the society is meant only the communicants—the congregation includes all who worship at that particular place, and the object of reading the rules, once a quarter to the society, is to remind them of these regulations at stated intervals—the object of reading them once a year, before the congregation at large, is that the public may know and understand what are the rules and regulations of the society with which they are constantly invited to connect themselves. At each quarterly meeting he is to read the names of those admitted into the church, and of those excluded. One of the duties of a travelling preacher, is to meet the societies, (page 48,) classes and general bands. Ministers, properly accredited from the British, Irish or Canada conferences, may be received on satisfying the annual conference of their willingness to conform (page 52) to our church government and usages. Ministers of other evangelical churches, who may desire to unite (page 53) with our church, may be received, &c. Preachers not in orders may be received as licentiates, on condition they agree

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*with the doctrines, discipline, government and usages (page 54) of our church. At page 57 one of the self-examination questions, preachers are to ask themselves, is, "do you meet every society?" At pages 58, 59, we have, as one of the questions for determining the expediency of continuing to preach or not at any given place, "Is it advisable for us to preach in as many places as we can without forming any societies?" At page 61 we read, as to visiting from house to house, &c., "If we could but set this work on foot in all our societies." At page 65 preachers are directed to read the sermon on evil speaking in every society and in the same paragraph they are enjoined to extirpate from the church frauds on the revenue. At page 70 belief in the doctrine and discipline of our church, is made one of the conditions under which a local deacon shall be eligible as an elder; and where an elder, deacon or preacher removes from one circuit to another, he is to procure from the presiding elder or preacher, in charge, a certificate of his standing in the church. At page 71 it is a rule laid down that none be received into the church until among other things, he shall, on examination by the minister in charge, before the church, give satisfactory assurances of willingness to observe and keep the rules of the church. At page 72 the question is asked, "How often shall we permit those who are not of our church to meet in class?" At page 76 we read, "Let no person that is not a member of our church be admitted to the communion without," &c. And again, "No person shall be admitted to the Lord's Supper among us,

who is guilty of any practice for which we would exclude a member of our church." At page 78 there is direction that in every large society the people shall learn to sing. At page 80 we find that marriage with persons not of our church "is admissible;" same page, none are to be received into the church till they have left off superfluous ornaments, and every one in charge of a circuit or station is directed to read Mr. Wesley's thoughts on dress once a year in every society. At page 86 it is provided that those exercising episcopal jurisdiction shall not continue in its exercise in the church when they cease to travel, unless, &c.; and so where an elder, deacon or preacher, is clearly convicted of certain crimes, he is to be suspended from all official services in the church. After final trial before the general conference, in event of expulsion, the expelled is to have no privilege of society or sacraments in (page 89) our church until, &c.; local preachers, for certain offences, shall be (page 91) expelled the church. As to those members of our church, (p. 93) who are guilty of certain omissions, if they do not amend when admonished, he who has charge of the circuit or station is to bring their case before the society, or a select number, (p. 93) &c. So

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at page 94, in case of a *dispute between two or more members of "our church," each party is to select an arbiter, and they select an umpire, but all three must be members of "our church;" if either party is dissatisfied with the award made, the matter is referable to five arbiters, chosen as the first three were, and whoever refuses to abide their judgment is to be excluded "the church." So again, in cases of debt, if any member of "our church" refuses arbitration, &c. At page 95 preachers are cautioned not to allow any to remain in our church guilty of fraud.—Where parties contract debts they are unable to pay, the matter is to be looked into by three judicious members of the church; on the same page are directions as to the necessary proceedings, when complaint is made against any member of our church for not paying his debts. At page 96 we are told that an accused person is to be tried before "the society of which he is a member." For certain offences, (among those enumerated is "disobedience to the order and discipline of the church") after a first and second admonition, the case is to be brought before "the society, or a select number," and at page 97 we read, that if any member of "our church" shall be clearly convicted of endeavoring to sow dissensions in any of our "societies," the offender, if contumacious, shall be "expelled from the church."

At the risk of being tedious I have thus minutely examined the book of discipline, and the instances cited are abundantly sufficient to show, that in methodist parlance the

term church is never applied to an individual congregation. Had the bequest been for the benefit of a particular baptist congregation, there is no doubt the whole legacy would have its proper appropriation, if paid over to the authorized agent or agents of that particular congregation; because, in that communion, each individual congregation is in itself complete, a separate, distinct and independent body. But I have shown from the methodist discipline, and the testimony of several methodist preachers, learned in their discipline and usages, is concurrent, that the case with the methodists is widely different. The whole philosophy of their system is connectional: it looks to one church comprising many congregations, and rejects wholly and unhesitatingly the idea of any independent or congregational organization of individual churches. It is an unit, it is one church, not an association of several. Now with all these authorities from the discipline, and with the depositions of the witnesses examined, is it to be presumed that Burnet, who, it is admitted, was a man of intelligence, and who (it is in evidence) was "an official member" of the Methodist Episcopal Church, could have intended that the one small society at Liberty should be the exclusive recipient of a charity, which, by the express terms of the will, he gives to the Methodist church, of

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which his *wife might be a member at the time of her death; which he limits to such uses and purposes, as the conference should deem most advantageous for said church, and where among the uses he especially favors, is the support of missionaries; a matter which no individual society, as a distinct body, could possibly proceed with under the ecclesiastical polity of the Methodist Episcopal Church—I should think not. Mr. Smith, the pastor of Trinity Society in this city, tells us that not one methodist in a thousand would give this interpretation to the words of Burnet's will; and in all reason we are not to look for the exception to the rule in an "official member," especially too when he was making his last will and testament with the ulterior view of assisting the cause of God and of His church, as he believed and understood it. We must seek then some other reason for his qualifying the legacy to the Methodist church, by insisting on the test "of which she may be a member at the time of her death." We have it at hand. The testimony filed is direct to the point; and shows very plainly why it was fit and proper that Burnet should have thought of some way to prevent his charity being, by possibility, administered through those, into whose hands he least of all would have wished it to go. "In 1831 and 1832," (I quote from the testimony filed,) "a Mr. John Russell was travelling through the Sumter or Santee circuit, endeavoring to establish societies in behalf of the secession

from the Methodist Episcopal Church, known as the Methodist Protestant Church. He did succeed in establishing one of these societies within the circuit in which Mr. Burnet held his church membership. Mr. Russell's traveling about on this business, created a great deal of talk in the matter of the polity of the church, and the distinctive principles between the Methodist Episcopal Church, and that which Russell was endeavoring to establish. The stir in this matter was of such a nature that it must have attracted the attention of a man of Burnet's character." And to this effect many others could have been called to testify, but as the fact of this secession was sufficiently notorious, I thought it unnecessary to delay the case or cumber the record. I understand the proviso in Burnet's will, as intending to ensure that his legacy should not fail of the object he had in view, by reason or on account of the schism then existing. I have perhaps enlarged unnecessarily on this preliminary point, but it seemed to me proper to state the point fully as to the true meaning of the word church, the matter submitted to me necessarily involving this preliminary, and in endeavoring to arrive at this true meaning, I have considered the words not merely in their true philological sense, but I have sought to make them harmonize, as they ought to do in this case, with methodist nomenclature. It will be re-

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membered that the methodist society *had its origin in a secession from the church of England, (Mr. Wesley was a regularly ordained presbyter of the church,) and in some of their rules and regulations they yet adhere to the distinctive features of the church. Only one instance is important to be here cited. There is no such thing known in the church or in the Methodist United Society as A. B., a communicant of the C. D. Church—a communicant anywhere (that is anywhere in one of their several properly organized congregations) is a communicant de jure everywhere; there are many places of worship, there is but one altar; there are many members—there is but one body.

It has been shown above, that if Liberty be made a separate station, it would of consequence be invested with all the rights, privileges and immunities of a Quarterly Conference. The testimony gives us what these privileges are; but it is also shown that there are not men enough at the place for the practical working of such Quarterly Conference; by the time the preacher in charge had appointed his class leaders, exhorters, and stewards, the whole would be head, and there would be no classes to lead; nobody to be exhorted. So again in event of any trial under the discipline, the right of appeal to the quarterly conference would in practice be wholly destroyed; for it would be nothing more than the same men meeting

again in a different capacity, and determining that what had been done before was right.

The testimony and the book of discipline both show that Sunday Schools, the distribution of Bibles and Tracts, and the support of Missionaries, are matters over which the annual conference exerts continued superintendence, and it must be manifest that if a local society were to attempt a separate movement in any of these affairs, there would be at once a collision of authorities. But I will notice these points in order; and first as to the Sunday Schools. The testimony filed clearly shows that it will be very difficult to get up one at Liberty under any circumstances. Mr. Taylor tells us he could not get up one; that it would be difficult to find more than five competent Sunday School teachers, and that there was not one in the neighborhood fit to take charge as superintendent. Mr. Smith tells us that from \$15 to \$20 would be as much as could be profitably used in this place, even if a school were established and set in operation; it further appears that it is one of the rules of the Methodist Episcopal Church to allow the use of no books in their schools other than those issued from their own press, and they take care that these are provided at the cheapest possible rate.

Next as to Bibles and religious tracts. There is no point involved in the case, which is more fully covered by Methodist rule and discipline than this. The distribution of Bibles and religious tracts is a highly favor-

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ed and prominent object *with them, and in their rules they have made ample provision for their supply and distribution. It is manifest that much more could and would be done in this behalf by adopting the usual and regular course of proceeding, than could possibly be effected by any individual action (no matter how well devised and vigorously carried out) of the society at Liberty. The local society has no machinery which could act upon the subject further than making known their wants, while the means at the control of the annual conference are complete for the purpose. It seems to me, therefore, that nothing would be gained by the scheme looking to the separate action of the local society, and I give the preference to the other.

Another favored use of this charity is the support of Missionaries. Now this could not possibly be done by an individual society; it is a matter for the Conference, and it is not to be supposed for an instant that they would allow a local society to interfere or intermeddle with their established plan of operations through those having Episcopal jurisdiction, through the Conference itself, and through the Missionary Society, which last is nothing else than the Annual Conference resolving itself into a Propaganda Society. The same body of men with

a different name, page 181. "Let each annual conference form itself into a missionary society, auxiliary to the Missionary Society of the Methodist Episcopal Church, South," &c. It would breed endless confusion and trouble to allow a local society to originate and support Missions, and insisting upon doing so (if the society at Liberty should be contumacious and disregard the authority of the annual conference,) it would be forced to secede, and seceding it is no longer even a part of that Methodist Church in the communion of which the testator's widow lived and died.

The first proposition in the scheme suggested on behalf of certain members of Liberty society, is to appropriate enough from the annual income to build "a handsome and durable edifice as a place or house of worship." Handsome and costly houses of worship are contrary to Methodist rule and discipline. Hear their own words on this subject: page 158: "Let all," (not when it is expedient to save expense, but in every instance, all.) "Let all our churches be built plain and decent, with free seats: but not more expensive than is absolutely necessary," &c. The conference have already directed an appropriation of five hundred dollars for that purpose, and it is ample, in a locality where other denominations, as the testimony sets forth, meet more favor, and where the congregation proper (also in evidence) never filled the very small building now there.

The next proposition is to build a parsonage, with glebe, &c., so as to secure the

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services of a pastor located among *them. If this contemplates erecting Liberty into a separate station, I have already said enough upon the subject. One of the witnesses expressly says, that the great want of the Conference is men; they have not enough to fill their appointments; they want more, many more; it would be a waste of labor to locate one at Liberty; he would have a sinecure; there are but two societies in the whole circuit where the prospects of usefulness were not more cheering and promising. To suppose that the Conference would allow this Liberty society to be made a separate station, and depart, in that instance, from all their established rules and usages, for the sake of a legacy, could only be because it might be thought their poverty would consent, if not their will. Even this temptation they will not be subjected to, for it is a great mistake to suppose that the Methodist communion is poor; the fact is the other way; it is rich; witness their annual contributions for missions; witness all their other charities, so far exceeding in amount those of other communions who are called rich, and who, in some respects, are so. In this particular, at least, the Methodists conform to primitive Catholic usage. The in-

dividual members of the united societies may be, and many assuredly are, poor in this world's goods, and can give but little; but they are diligent "gladly to give of that little;" and further, their ministers are content to work for little, very little. This it is which makes the whole body rich and efficient in action. The great want with the Methodists (and it is a want every where) is a sufficient number of competent, zealous and devoted men. They have not half enough, and of consequence none such would be sent to labor exclusively in the unfruitful field of Liberty, and it is right and proper that none such should be sent. If the parsonage is to be for the circuit, there again the testimony is that Liberty is about the worst place which could be selected.

The 3d proposition contemplates a settled pastor, with an annual salary, a thing unknown in the Methodist communion, where the compensation of the preachers is all regulated by fixed and established rules. Take for instance, the cases of some large planters, who annually pay a certain stipend for the religious instruction of their slaves. One (and there are others) near Georgetown pays three hundred dollars per annum, but he does not pay it to the missionary; he pays to the Conference in its character of missionary society, by whom it is disbursed as they think proper, and without regard to the amount.

The fourth proposition is to appropriate, annually, a certain amount for the purchase and distribution of Bibles, &c. This, also, I have sufficiently spoken of above. It is unnecessary to repeat my views here.

The 5th relates to missionary enterprise

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in the neighborhood, *and assumes that it presents a large field for missionary labor, a fact which is negated by the testimony filed. It is unnecessary here to repeat what I have already said on this subject.

I think it also unnecessary minutely to notice the scheme suggested by the complainants, as it is entirely in accordance, throughout, with the finding and reasoning of this report. I would suggest, however, a modification in the first proposition. It is essential that the funds be forthwith called in, (as it is highly improper that funds of this character should be invested in the obligations of private individuals,) and re-invested; but I submit that an investment, as suggested in the scheme, in stocks of the General or State Government, or of the city of Charleston, is a bad one. It is true that in England the investment in consols is favored, if not absolutely enjoined by the Chancery, but the circumstances of the two countries are not strictly (if at all) analogous. Great Britain does not look to the payment of her debt. We do. All these stocks are above par. and are certain to be redeemed. Though they may be, and generally are a

safe investment for temporary purposes, yet the Court will at once see that where perpetuity or a long permanency is contemplated, they must always prove investments to loss. As I have said above, these stocks are always above par; that is, they always cost more than will be paid back when redeemed; it follows that each successive investment and consequent redemption operates as an assault on the corpus. I would, therefore, in this matter, allow some further discretion to the Conference, (if any limit be necessary) and authorise the investment of these funds in stocks of the General or State Government, or of the city of Charleston, or in the capital stock of any of the banks of the State of South Carolina.

I have only, in conclusion, to submit, that in my judgment, (not hastily formed, but made up after much scrutiny and with some deliberation) the mode of distributing the funds, recommended in the scheme proposed by the complainants, is suitable, proper, and well adapted to ensure efficiency to the Burnet charity, and in exact conformity with the true meaning of the will by which it has originated. I have endeavored, throughout this report, to show, step by step, the grounds of my reasoning in this behalf. It is only necessary (briefly summing up) to say, that every project, specially favored in the will, is the immediate object of Methodist rule and discipline; (nay, more, studying the discipline of the Methodists, as I have done, they seem to me matters which are exclusively within the jurisdiction of the annual conference, and which cannot be committed to or acted upon by any one individual local society,) and duly weighing the importance of these several objects, I am decidedly of

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opinion *that the scheme proposed by the complainants is the best, as to apportionment, which has been brought to my notice.

It having been decided that the intervention of a trustee is essential to the furtherance of Burnet's charity, inasmuch as the annual Conference is not a body corporate, the investments recommended by this report cannot be made in the name of the Conference, (which is advisable.) I therefore suggest, as the next best plan, that it would be an assurance against waste, and not contrary to or in any way conflicting with previous orders, if the trustee were absolutely prohibited from any change in the investments to be made, except with the expressed assent of the annual Conference. This can easily be done by ordering that it be inserted in any certificates of stock purchased, "not transferable, except with the assent of the So. Ca. Conference of the Methodist Episcopal Church, South."

Edward R. Laurens, Master in Equity.

Scheme for the employment of the Fund bequeathed by John Burnett to the Methodist Church, known as the Liberty Church.

First,—As the building in which the Methodist congregation called the Liberty Church now worship, was originally nothing better than a pine-log structure, which is, at the present time, a ruin; dedicate from the income of the fund a sufficient sum to build a handsome and durable edifice as a place or house of worship, and after its erection an annual sum which may be sufficient for its repairs and preservation.

Second,—After the construction of the Church, and the dedication of a sufficient sum for its annual repair and preservation from the income, build a parsonage or mansion house for a resident clergyman, with glebe land attached, so that the congregation of Liberty Church may always have the services of a pastor located among them.

Third,—From the income of the fund, an annual salary for the said pastor, whose duty it shall be to have charge of Sunday Schools to be conducted in the Liberty Church on the Sabbath day, and to preach to said congregation.

Fourth,—The appropriation of an annual sum for the purchase of Sunday school books, and for the purchase of Bibles and religious tracts, and the distribution of the same, first among the destitute of the Liberty Church congregation, and afterwards among the destitute in its vicinity.

Fifth,—As there is a most ample field for domestic missions in the neighborhood of Liberty Church, among the poor in the surrounding country, and among the negroes on the large neighboring plantations, it is proposed that a portion of the income of the fund be appropriated to the establishment of a station for domestic missions, and for

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preaching the gos*pel among the destitute poor and the slaves in the neighborhood of Liberty Church—the missionary station to be at the parsonage of the Liberty Church, from which, as a centre, the missionary could go out and preach on the neighboring plantations, and in destitute parts of the country near, and also act as a colporteur in the distribution of the Bibles and tracts provided for in the will, in which way the time and talents of one or more missionaries could be constantly and profitably occupied.

The foregoing is a plan which is in accordance with the provisions of the will. It will of course be observed that the estate is given "to the Methodist Church of which she should be a member at the time of her death," "for the uses and purposes most advantageous to said Church," and all that the Methodist Conference have to do in the matter is to designate "the uses and purposes" which in their opinion would be "most advantageous for said Church." There is nothing given to the Conference, which is duly invested with a power of appointment to uses, and when they have made that appointment, their functions are discharged.

The Conference has no right to the possession or disbursement of the fund, or to divert it to any object or purpose which may not be advantageous to the Liberty Church, for even in the matter of missionaries, the establishment of a mission station at the Liberty Church would unquestionably redound to the prosperity of said Church, in the advancement of religion and morality around. It is submitted that the appointor to uses has no power or authority in a case like this to divert the trust fund from the persons whom the testator designated as the objects of his bounty, and when those persons are specifically fixed. It is only the mode in which these persons are to enjoy the estate that is left to the Methodist Conference.

For the provisions of the John Burnett will, see 1 Rich. Equity Rep. 99.

Dargan, on behalf of the members of the Liberty Church.

The complainants proposed the following as a scheme to be reported under the decree of the Court of Appeals.

1. Let the trustee be directed immediately to call in and invest the whole trust fund in Government stock, either of this State or city, or of the United States.

2. Declare that the interest accruing shall be applied by the trustee to the trusts, under the will of John Burnett, as follows, that is to say: one half shall be paid over to the treasurer, for the time being, of the Missionary Society of South Carolina Conference of the Methodist Episcopal Church, South, to be employed for missionary purposes, under the direction of the Board of Managers of said society.

3. One fourth of the said accruing interest shall be paid to the standing committee

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of the South Carolina Conference, *known as the standing committee on the Bible cause, to be applied, under their direction, to the procurement and gratuitous distribution of Bibles and Testaments, preference being given to the wants of Darlington Circuit, in the neighborhood of Liberty Chapel.

4. One fourth of the said accruing interest shall be paid to the assistant book agent, at Charleston, of the Methodist Episcopal Church, South, to be laid out and expended in the procurement and distribution of tracts and Sunday school books, under the direction of the South Carolina Conference, preference being given to the wants of the congregation worshipping at Liberty Chapel.

5. It appearing that the meeting house at Liberty is in a ruinous condition, and the South Carolina Conference having recommended the appropriation of five hundred dollars to rebuild the same, let the sum be paid over to the Rev. Charles Betts, the commissioner appointed for that purpose, and let this sum be applied by him accordingly, the said amount to be first taken from the

interest now due, or first accruing from the said trust fund.

Memminger, on behalf of complainants.

Exception.

The undersigned, in behalf of sundry members of the Liberty Church, excepted to the Master's Report, on the ground that the scheme proposed by them ought to have been reported by the Master, instead of the one which he has recommended.

Dargan, solicitor.

His Honor pronounced the following decree.

Dunkin, Ch. This cause was sent from the Court of Appeals, for the purpose of obtaining a scheme for the proper administration of the charitable uses established by a former decree.

The Master has reported a scheme, and it is the desire of all the parties to submit the scheme to the judgment of the tribunal in the last resort.

It is ordered and decreed that the exception to the report of the Master, Mr. Laurens be overruled, that the report be confirmed, and the scheme as recommended by him be adopted.

The defendants excepted to the report of the Commissioner, and appealed from the decree of the Chancellor, on the following grounds.

1. That parol evidence was admitted to explain the will of the testator, as to whether he meant the bequest and devise to the Liberty Church, or to the Methodist Episcopal Church.

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- *2. That the Master's scheme proceeds upon the doctrine of cy pres. and the doctrine of cy pres. depends upon the 43d. of Elizabeth, which is not of force in this State.

3. That the doctrine of cy pres. does not apply when the objects of testator's bounty are sufficiently expressed, which is the fact in the case of Burnet's will.

4. That the testator gave the estate for the benefit of Liberty Church, or, which is the same thing, to the Methodist Church of which his wife should be a member at the time of her death.

5. That the plan submitted on the part of the Liberty Church, is in conformity with the testator's will, while that on the part of the Methodist Episcopal Church is in violation of it.

Dargan, for the motion.

Memminger and Harlee, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

It might have saved much of the present litigation, if the record had been constantly kept within the view of the parties. "The bill," says the Chancellor who first heard the case, "purports to be filed by certain persons, on behalf of themselves and others, alleging

themselves to be members of the Methodist Church called Liberty, of which it is also alleged that the said Elizabeth Burnet was a member, at the time of her death." It was decreed that the trustee appropriate the profits of the estate, "to the uses and purposes which the Methodist Conference, to which said Liberty Church is attached, may deem most advantageous for said Church, more especially," &c.¹

It appears to the Court that it is not competent for other parties, coming in under this record, to claim adversely to the interests thus declared in favor of the parties litigant; or to take away from them the rights settled in their favor; and that it was an error in the Master, acting on the record before him, to entertain the question whether the beneficiaries under the will were the Methodist Church, in its general connectional character, instead of the congregation belonging to Liberty.

The interpretation put upon the words of the will in the judgment already pronounced, was not contested at the hearing; and therefore, it may be conceded, that it is not, beyond all question, the true construction. In a proper case, and with the proper parties for that purpose, it might be examined. But it is at least one proof of its being the natural construction, that it was that which suggested itself to all parties to the record, and was adopted by the whole Court, without a doubt being suggested or a question raised by any party, or by the Attorney General.

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*We have, again, examined the words of the will, in the light of a very learned and scrutinizing argument; and our opinion still is, that the construction put upon them, in the decree of the Court, was the correct and proper construction.

Wills inartificially drawn, as this will evidently was, should be interpreted according to the common and proper meaning of the terms employed in them; and it may safely be left to men, indiscriminately, whether in the common apprehension, the testator here did not evidently design to confer the benefits, contemplated by him, upon the particular Church, or congregation, with which his wife might happen to be connected at the time of her death; to be appropriated under the direction of the annual conference having jurisdiction over that Church.

It has been suggested that the phraseology employed by the testator may have been intended to prevent his charity from being diverted to the support of the Methodist Protestant Church, which Mr. Russel was endeavoring to build up, at the expense of the Methodist Episcopal Church, with which the testator was connected, and to which he was greatly attached. This is merely conjectural

at best, and forms no sufficient ground for departing from the natural and obvious meaning of his words. There is no evidence that either the testator, or the draftsman of his will, had ever heard of Mr. Russel, or the schism to which his efforts tended. But if his intention was such as is suggested, the means by which he attempted to accomplish it were most unfortunate. They were neither natural nor efficacious. In that case, why did he limit the bounty which he intended for the Methodist Episcopal Church, to the contingency of his wife's dying in connexion with it? Why did he not give the legacy, in express words, to the Methodist Episcopal Church? If he intended to withhold the charity from the Protestant Methodists, why did he put it into the power of his wife to transfer it to them by connecting herself with that body?

If the testator's object was to benefit the Episcopal Methodists, in general, we do not perceive any rational motive for his suspending his legacy upon any contingency, whatever. But we can perceive a motive, and a very sufficient motive, why he should not only annex a condition, but the very condition he has annexed, upon the supposition that he looked to a particular congregation as his beneficiaries. We are to infer from the will, and the evidence, that he had no children. Nothing in the will, or in the circumstances, suggests the probability of future issue from his wife. She was childless and unprotected. He did not wish to confine her residence to any given locality; or to tie her down to connexion with one congregation of the Church to which she belonged. He wished to secure her that kindness which

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might naturally *be expected to arise from pecuniary expectations on the part of those with whom she might happen to be spiritually connected; and to enable her, under any disappointment, to change her connexion, for her greater comfort.

The technical construction suggested by the Master, we have no reason to suppose was within the testator's contemplation. It is not favored by the structure of the will, which is plain and inartificial. To avoid the application of the word Church, to a particular congregation, we cannot but observe that some of the witnesses have been obliged studiously to employ the term Chapel, a term which seems to be rather unusual. Notwithstanding this care, one of the witnesses seems, on one occasion, naturally and unconsciously to have fallen into the use of the word Church in the common sense; thus shewing an example (contrary to what is contended for,) of the use of that word among Methodists, in its common acceptance.

Being fully persuaded that the testator intended to indicate a particular congregation, nothing is to prevent our giving effect to his intention but some invincible necessity,

¹ [Shields v. Jolly] 1 Rich. Eq. 100 [42 Am. Dec. 349].

arising out of the Methodist polity. Under the contingencies which have happened, the legacy, according to our construction, was intended for Liberty Church, as much so as if it had been given to it, eo nomine. Then, the question is whether if the legacy had been to this Church, by name, the government of the denomination to which it is attached is such as to prevent its receiving the benefits intended. If that were the case, it by no means follows that the Court would be bound to divert the legacy to other kindred objects. That is a doctrine which this Court would be very reluctant to adopt without a strong necessity, and very mature reflection. It has never, to our knowledge, been adopted, or recognised, in our Courts, and we are persuaded that it ought not to be adopted. But the evidence shews us that there are various ways in which the interest of the fund bequeathed to Liberty Church, may be expended, from time to time, for her benefit; and so much of it as cannot be thus expended may be suffered to accumulate for her benefit, until contingencies arise for its expenditure for her advantage.

The Master having put a wrong construction on the will, and recommended a scheme for administering the trusts for the benefit of the Church at large, and not for the benefit of Liberty church, the beneficiaries intended, his report must be set aside, and the case sent down, (under the consent decree, which we are bound to respect,) that he may receive proposals according to the latter view, and report them to the Circuit Court in Equity for its consideration and approval.

We do not intend, by any thing we have said, to indicate what description of bene-

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fits, spiritual or temporal, are most *consonant to the will; but simply that, in some

way or other, they should be advantageous to Liberty Church.

It is ordered that the decree be reversed, and the report recommitted to the Master for the purposes aforesaid.

It is also ordered that the case be remanded to the Court of Appeals in Equity, from whence it came, for the purpose of making any further orders that may be deemed proper in the case.

O'NEALL, J., EVANS, J., WARDLAW, J., WITHERS, J., and CALDWELL, Ch., concurred.

DARGAN, Ch., gave no opinion, having been of counsel in the case.

Decree reversed.

The Court of Appeals in Equity ordered as follows:

JOHNSTON, Ch. The Court of Errors having determined certain questions in this case, and recommitted the report of the Master, as in their decree is stated, and having remanded the case to this Court for further orders,

It is ordered, that the trustee, E. Leggit, do account before the Master for the trust fund; and that he do lay before the Master proposals for investing said fund; and that the Master do report what, in his judgment (upon evidence to be heard by him) is the most profitable, safe and suitable mode of investing said fund. The report to be made to the Circuit Court for its consideration.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

DARGAN, Ch., having been of counsel, gave no opinion.

APPENDIX

2 Strob. Eq. *397

*ELIZABETH JAGGERS v. JOHN
ESTES.

CALDWELL, Ch. I dissent from the opinion of the majority of the Court. [See ante, p. 3 '3.]

The instrument under which the plaintiff claims the slaves is of a peculiar character, and certainly demands all the scrutiny we can give it, before it should receive the sanction of being considered a valid deed.

The mode of construction, adopted in the circuit decree, has been admitted to be correct; the whole instrument must be taken together, which will enable us to perceive the intention of the maker, and to comprehend fully the object he had in view, far better than can be obtained from the most minute examination of its several parts, without connecting them together.

It will, therefore, be fair to construe the concluding words, "at my death," in the same way as if they preceded the expression, "do give and make over," as their transposition in the sentence cannot essentially change the idea they are intended to convey; but it is, perhaps, unimportant what place they may occupy, as they constitute the hinge upon which the whole instrument hangs.

The first objection to its being a deed, (independently of the question of its delivery,) arises from the established principles of the law. A few references to the elementary writers, will put this point beyond controversy.

The great commentator, in discussing the two modes, (gift and contract,) of acquiring a title to property in things personal, says: "they are much connected together, and answer in some measure to the conveyances of real estates, being those by gift or grant, and by contract; whereof the former, vests property in possession—the latter, property in action. Grants or gifts of chattels, personal, are the act of transferring the right and possession of them, whereby one man renounces and another man immediately acquires all title and interest therein, which may be done either in writing or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential.—A true and proper gift or grant is always accompanied by delivery of possession, and takes effect immediately, as if A gives to B £100 or a flock of sheep, and puts him in possession of them directly; it is then a gift executed in the

retract it, though he did it without any consideration or recompence. But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform but upon good and sufficient consideration."¹ These principles which have been so accurately and admirably expressed in the commentaries, which have embodied the elements of almost every thing that is excellent in the common law, are not the mere dicta of a theorist, but of a learned professor and a practical jurist, who derived them not only from some of the most ancient authors but from the great masters of the law, such as Perkins, Plowden, Coke and Comyn, and from the reports that are acknowledged as the highest authority.

"Every gift," says Chancellor Kent, "which is rendered perfect by delivery, and every grant, are executed contracts, for they are founded on the mutual consent of the parties in reference to a right or interest passing between them. Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect." After speaking of *parol* gifts, he proceeds: "the necessity of delivery has been maintained in every period of English law; *donatio perficitur possessione accipientis*, was one of its ancient maxims. It is nevertheless hinted or assumed, in ancient and modern cases, that a gift of a chattel, by deed or writing, might do without delivery, for an assignment in writing would be tantamount to delivery." He then cites several cases establishing the contrary, and continues, "delivery in this, as in every other case, must be according to the nature of the thing. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property."²

The same principles have been laid down in the dictionaries of Jacob, Tomlins and Bouvier, and have been recognized in the abridgements of Bacon, Comyn, Viner and Dane, and I know of no elementary work in which they have ever been controverted. The very nature of personal property, which derives its definition from its characteristic of accompanying the person of the owner, demonstrates the necessity and propriety of these principles. The mode of transferring

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donee, *and it is not in the donor's power to

¹ 2 Black. Com. 441.

² Kent. Com.

the title to real and personal property, is very different. A gift of the latter, *inter vivos*, must invariably be evidenced either by possession or by some equivalent act; it must be transferred to the donee either by actual or constructive delivery in *presenti*. The object of conveying a chattel by deed, is to substitute the symbolical for the real

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delivery, and therefore the former is necessarily the mere shadow of the latter, which is the substance.

With what propriety can it be said that there has been either an actual or a constructive delivery to a donee, where a life estate is reserved in the donor, whose dominion over the property has not been interrupted, and whose right to the possession is as perfect and unimpaired as before the execution of the deed? The owner cannot give and keep it by the same act, nor can a deed, *uno flatu*, perform the inconsistent function of transmitting a title at the donor's death, and reserving the title in him for life, unless the same person can combine in himself the opposite characters of grantor and grantee; and there is no point better settled, or more certain in the law, than the proposition that no man can be his own lessor.

The nature of a gift and the effect of delivery, whether actually or by deed, is to pass an interest to the donee in *presenti*, and to render the act irrevocable by the donor.

The doctrine of remainders affords striking illustrations of this view. Where there is an estate or interest in remainder, created by deed, there must always be a particular estate to support it; and every remainder must be a part of one and the same estate, out of which the preceding particular estate is taken. There is another equally inflexible rule, that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate. But this cannot be done where the donor creates no particular estate, and merely undertakes to grant an interest, to take effect and be enjoyed after his death.

The whole estate or interest must be transmitted by deed to the donee at the same time, to give validity to a remainder, otherwise it is void for want of a particular precedent estate to support it. The particular estate is not only essential to a remainder, but in conveyances of personal property, where the limitation over is too remote, it absorbs the whole interest in the first taker, and excludes the remainderman.

The material distinctions between a deed and a will, are as to the time when they are to take effect; the former begins in the present, the latter is to wait for the future: the one transfers the possession or dominion of the property to the donee, in the lifetime of the donor, and is irrevocable; the other

is ambulatory till the death of the testator—the one must begin in life, the other cannot commence till death; the former needs no witness, the latter requires no less than three witnesses: but it is unnecessary to pursue this parallel further, except to remark that the law has thrown extraordinary guards and securities around the property of the deceased, who might, if he were alive,

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by a word explain, or by a witness disprove any unjust claim that might be preferred to his property.

The expression, life estate, from its analogy and aptness, is applied to the interest that one may have in a chattel, although the word estate belongs alone appropriately to the interest that a person has in lands, tenements and hereditaments; and this results from the nature of personal property, which was considered (as it often actually is) consumable in the use, and does not ordinarily endure longer than one's life.

From numerous cases in the reports of Coke, Plowden and Croke, and those of much more modern date, we find the principle has been very clearly established that a termor may grant a lease to commence at a future time, and the deed will be valid; but this depends, first, upon the consideration, which must be valuable—which *contra-distinguishes* it from a gift, which is purely gratuitous; but it has been expressly decided that he cannot make a gift to commence at his death, because it would be making a deed perform the functions of a will; and much more strongly must the rule prevail with us, whose Statute of 1824 requires three witnesses to a will of personalty. There is not a single case that I have been able to find in an English report, in which a life estate has been reserved to the donor, and remainder in a chattel, limited to take effect in another at the death of the donor, but has been held to be null and void. Nay more, when such provision occurs even in the *habendum*, and there has been a grant of the term absolutely in the premises, the former has been invariably held to be repugnant and void; and the same judgment of course would be pronounced where there was no grant in *presenti*, and the estate was to take effect in *futuro*.

In a leading case, twice reported in Salkeld, *Germain and wife v. Orchard*, a lessee for years granted the lands leased, to W. R., his executors, administrators and assigns, *habendum* to him and to his executors, &c. after the death of the grantor and his wife. Lord Chief Justice Holt was of opinion that the grantee was but a tenant at will, "for it did not appear that the grantor meant to pass his whole interest, and this is enough to satisfy the grant; but if a termor devises the land, all his term passes, for a devisee cannot be a tenant at will." This judgment was reversed in the Exchequer Chamber, and the case was subsequently carried to the

House of Lords, where the reversal was sustained: the ground upon which the appellate Court put the question, was that, by the premises, the whole term passed to the grantee, and that the habendum being repugnant to the premises, was null and void. This decision is directly in point, both as to the quantum of interest in the property conveyed, and the time when the title must be transmitted to the donee.

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*That case has not only never been overruled in England, but has not been questioned. The deed in that case is distinguishable from this instrument; that had separate parts, and was not a jumble of premises and habendum in the same sentence; but if the premises had contained the words, "after the death of the grantor and his wife," can there be any doubt as to the construction?

A principle, very analogous to this, prevails in the doctrine of a gift *donatio causa mortis*, where, to give it effect, the donor must part not only with the possession of the property by delivery, but with all dominion over it. In the case of *Ward v. Turner*, 2 Ves. Sr. 431, the subject of such gifts was thoroughly considered by Lord Hardwicke, that great light of the law, and he strongly denounces the doctrine of a symbolical delivery, and demonstrates, by argument and authority, the necessity of adhering to the principle.

We have an apt illustration of the doctrine, in the case of *Hall v. Howard*, 1 Rice L. Rep. 310, [33 Am. Dec. 115,] where the Court lays it down that "to constitute a valid gift, either *inter vivos* or *causa mortis*, the donee must have an immediate right to dominion of the chattel; in the latter case, defeasable at the recovery of the donor. When the corpus of the thing is put in his possession, his dominion is complete, and his title is as good against the donor as any one else. The deed gives him a right to take under his dominion the thing described; the donor cannot dispute his right; when the chattel is a slave, or a horse, or a cow, there can be little difficulty.

"I have no doubt," adds the Judge, delivering the opinion, but money may be the subject of such a gift, when it is in a box or a bag, and has specific identity. I think this may be regarded as a tolerable test, in all cases, where the donee could assert and successfully maintain his title in an action of trover to the thing given—the gift would be good in law: but where the donor has secured any control in himself, or has omitted to give, by valid transfer, the entire dominion to another, the law will not support the transfer as a gift, either *inter vivos* or *causa mortis*."

As to this instrument being a good conveyance to stand seized to the donee's use, it is only necessary to remark that the Statute of

Uses does not embrace personal property, and such a covenant, connected with a chattel, has never been sustained either in England or America as a good conveyance under that Statute. The whole doctrine is restricted to real estate, and to a class of cases within which this case could not under any circumstances come.³

The second objection to this anomalous instrument, is that it is not in conformity with any precedent heretofore established and used as a mode of conveying title to personal property.

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*This proposition cannot be questioned by any one who will compare, or rather contrast it with the approved forms: they bear no resemblance to it; it is janus faced; as you approach it it appears as if it were a deed, but look on the other side and it is a will; to one privilege it is clearly entitled, to stand "alone in the solitude of its own originality." If it be transplanted and engrafted upon the ancient stock of precedents, and if it should be adopted into general use, it will introduce a new era in conveying personal property; the consequences of which cannot now be calculated, except that it will become unintentionally the most ingenious device that has ever been invented, to evade the Act in relation to bequests of personalty, and will supersede the probate of many a paper that might want the number of witnesses requisite for a will. One witness, or even the proof of the donor's hand writing, would be sufficient to establish it as a deed.

From the principles and precedents of the common law, "all and any part" of which, in the language of the Act of 1712, was adopted in South Carolina, except where the same was not altered by enumerated Statutes, or was not inconsistent with the particular constitutions, customs or laws of the province; it is absolutely certain that this instrument could not operate as a deed, and would be adjudged null and void, not only from its testamentary character, but from the inconsistency and repugnancy that is apparent upon its face.

Nothing has given such stability to our system of law, or created such unlimited confidence in its excellence, as the established rules that have been adopted in construing contracts and preserving inviolate the distinction between deeds and wills. It may well be doubted whether any better rules can be applied in the administration of justice, than those that the accumulated wisdom of ages has furnished ready to our use.

Here I approach the only debateable ground in the case; have our own decisions overruled the common law, and established the doctrine that a donor may create a remainder of personalty in a donee, to take

³ 2 Black. Com. 338. 4 Cruise Dig. 115. Saunders on W. & T. Porter ad. Ingram, 4 McCord's L. R. 198. 2 Hill's L. R. 548.

effect after the death of the donor, who reserves a life estate?

I shall not discuss a number of the cases cited, that are either irrelevant, or have a remote bearing upon the question, as nothing is more fallacious than fanciful analogies drawn from remote resemblances; they are like taking the outlines of a shadow as the evidence of the real dimensions of the substance, which can be measured with certainty, and ascertained beyond dispute.

The proposition that a personal chattel may be limited over by deed, after a life estate has been created in it, without a conveyance to uses, has not been questioned since the case of *Powell v. Brown*, 1 Bail. L. Rep. 100, although that was not the most

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*material point on which the case turned. By that deed the slaves were conveyed to Nancy Powell, the wife of the plaintiff, "to have and to hold the same to her and her issue forever; if the said Nancy Powell should die without issue the said slaves should return, at her decease, to the surviving heirs" of the donor; she died without leaving issue at her death, and the defendant (the donor) converted the slaves to his own use, for which her husband brought trover; and the Court held, in addition to the above stated proposition, that the grantor could not take under a limitation over to his own heirs contained in his own deed, and that the marital rights of the husband of the donee attached, and were not divested by the contingency happening when the limitation over was incapable of vesting.

The case precisely in point as to the creation of a remainder, and the reservation of a life estate, is *Vernon v. Inabnit*, 2 Brevard's Reports, 411, there the deed of gift was to the then sons of the donor, on condition that the donor should keep possession of the negroes during his life, and that after his death they should pass into the possession of the donees respectively; and the Court held that the deed could not take effect. "It is settled law," says Judge Brevard, "that a man cannot limit a personal chattel to one for life and remainder to another, except by will or deed of trust: in the first case the property passes by way of executory bequest; and in the second, it vests in the trustee for the uses and purposes in the deed declared. Now if a life estate in a chattel cannot be carved out by deed without the intervention of trustees, in whom the legal estate must vest for the benefit of others, with what propriety can it be contended that a man can carve out of a chattel interest a life estate for himself, and convey the remainder, which, from the nature of the interest, must be uncertain and contingent, to another, to vest in the remainder-man after the death of the donor? To allow such gifts would be mischievous in the consequences that would result to creditors and subsequent purchasers;

and besides, *cui boni*? What necessity for such gifts, when the same effect may be produced and the same object attained by a last will and testament? We are of opinion the deed of gift passed no property to the donee, as possession did not accompany and follow it."

The principle established in *parol* gifts is not only consistent with the doctrine laid down in this case, but strongly illustrates and supports it. In the case of *Pitts v. Mangum*, 2 Bail. Rep. 588, and *McGinney v. Wallace*, [3 Hill, 254,] the gifts would have been good by the delivery of the chattel, if the reservation of possession and dominion had not been incompatible with and repugnant to the nature of a gift. It is in vain to say that the title passed by a deed, (making the same reservation,) which operates only by its being a symbolical and substituted deliv-

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ery, *when an actual delivery of the chattel itself to the donee (with the same reservation expressed in the deed,) would be insufficient to constitute it a gift. There is no law requiring a gift of personality to be made by deed, and it has been expressly held, in *Brummet v. Barber*, 2 Hill's Rep. 543, that one may by writing not under seal, or verbally, create a limitation over by way of trust, or as a direct gift, so that the same disposition may be made by *parol* accompanied with delivery, that can be done by deed.* And why not? The act of delivery carries the title and draws to it the right of possession and dominion, as effectually as can be done by a deed, for there is neither distinction or difference between what is done and what is written, as far as personality is concerned; it does not exist merely by grant in writing, but by possession and the right of dominion; and any other view would be inconsistent with the principles of the law, and would overrule these three cases, that have been too firmly established to be now shaken.

The case of *Duke v. Dyches* [2 Strob. Eq. 353, note] approaches this question; but it must be remarked that the terms of that instrument (which was held a valid deed) were very different from those employed in this instrument.

The learned Judge who delivered the opinion in that case had been counsel in the case of *Vernon v. Inabnit*, and probably had not forgotten what had been adjudged in it, and with a cautious reservation states that the only question submitted, was whether personal property can be limited over. The testamentary character of the instrument was not involved in the discussion or decision. But it has been supposed that question had been considered in the Court of Equity in *Dyches et al. v. Trotti et al*, MSS. Cases D. but on examination of the opinion of the Court of Appeals, it is apparent that although the Circuit Chancellor considered it

* *Welch v. Kinard* [Speer's Eq. 256.]

a deed, the Court of Appeals did not either discuss or decide it. It cannot therefore be considered as a question adjudged by that Court, and their opinion cannot be implied in its favor from their silence on the subject. It is plain the Court were then leaning in favor of putting slaves upon the same footing (as far as could be done by construction) with real estate, and that object may, in a great degree, have controlled the current of cases during that period of our judicial history. As the constitution has provided ample means for making and reforming the law, when the interests of the country require it, it is safer to leave the legislative department to the exercise of its own powers, and to confine judicial functions to their appropriate sphere, the administration of the law as it is, without attempting to amend or make it. The character of that instrument is not left to conjecture, for it calls itself a deed, and there was no doubt raised, either as to the intention of the donor, or its delivery. From all the circumstances under which that case

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*was presented to the Court, it may be distinguished from the present; but if the proper exception had been taken in the argument and considered by the Court, it would have been much more satisfactory and conclusive. The next case which has been relied on is *Dawson v. Dawson*, Rice's E. R. 243. There the grantor first made a will and afterwards executed a deed in absolute terms, in which he appointed a trustee and engrafted his will upon the deed, continued in possession of the property for many years, but represented himself not as the owner of it, but as holding it for his children under these instruments: that case cannot be considered as strictly analogous to this, and the resemblance supposed to exist results more from the circumstance that the donor enjoyed the property during his life, than from the legal effect of the deed upon the interests of the donees.

The next case is that of *Harris v. Saunders*, MSS. Cases, 1826, [2 Strob. Eq. 370, note]; from the statement of it in the manuscript, it is apparent that the evidence was abundantly sufficient to sustain the gift. One of the witnesses testified that he drew a deed with a reservation of a life estate in the donor, but that witness did not see it executed; another testified that he heard the donor acknowledge he had given (which was sufficient to support a parol gift,) to his illegitimate son, the plaintiff, the negro boy Andrew, the subject of the suit, but that he feared that his wife had destroyed the deed; these and other acknowledgments of the donor were testified to, on the trial, which were sufficient, independently of the deed, to establish a gift. The correct view of this case was presented in argument of the case of *Younge v. Moore*, [1 Strob. 52.] and it ought not to be considered a case in point.

The last case that I shall notice on this side is *Sunday v. Boon*, which was not quoted in the argument; there the donor had executed an instrument on her second marriage, making provision for the maintenance and support of her children (by a former husband) after her decease: the property conveyed was both real and personal, and was on certain trusts and conditions, reserving the use of it to herself. She afterwards separated from her husband and they executed another deed, recognizing the former; the Court held that the first was not testamentary, and it is plain from the face of the two deeds that the judgment was correct. The result of all these cases is, that they do not decide the question in the present case.⁵

The cases of *Ragsdale v. Booker*, [2 Strob. Eq. 348, note.] and *Welch v. Kinard*, are, I think, not only analogous to, but identical with this case. The first case is not reported, but it appears from the manuscript records, that the objection that the paper was not delivered is unfounded, and that there was no doubt of that fact, and the case there-

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fore depended upon the construction given to the instrument, which was to take effect at the death of the maker.

The other case was where a paper was prepared at the instance of the maker, and signed, sealed and delivered, and afterwards recorded in the office of Register of Mesne Conveyance; it was, like the former, in the shape of a deed, but to take effect "after the death" of the maker; in both these cases the Court held the papers were testamentary.

These cases have neither been overruled nor questioned, and I cannot perceive how this case can be distinguished in principle from either of them.

If I had time, the views which I have offered could be strengthened and illustrated by numerous cases decided by the Supreme Court of North Carolina, which finally led to the adoption of an Act in 1823, expressly providing that "any limitation, by deed or writing, of a slave or slaves, which limitation if contained in a last will and testament, would be good and effectual as an executory devise or bequest, shall be a good and effectual limitation in remainder of such slave or slaves." Before this Statute such limitation (like the one before us) was held void.

The last case to which I shall refer is one that has recently been decided by the Supreme Court of Georgia, *Hester, ex'r. v. Young*, 2 Kelly Rep. 31. The instrument was as follows: "Know all men by these presents, I, William Womack, in consideration of natural love and affection for my son Frederick Womack, I do give unto him the following property. Three hundred acres of land which I now live on, two negroes, William and Nancy, two horses and the rest of

⁵ *Fowler v. Stuart*, 1 McCord R. 504. *Caldwell v. Wilson*, 2 Speers' R. 75.

my stock of hogs and cattle, together with my household furniture, after my death and the death of my wife, to have and to hold the said property forever. Signed, sealed and delivered," &c. It was recorded in the county, seven days after its execution. The Court, after an elaborate examination of all the authorities, especially of our own cases, came to the unanimous conclusion that this paper was a will, not a deed. In that case, as in this, great reliance was placed upon the form of the instrument, but the Court very properly held that could not control the estate conveyed, and if the intention, gathered from the whole paper, is that the estate is not to pass, or the instrument take effect until the maker's death, it is a will and not a deed. In conclusion, if this paper before us be not a will, it will be difficult to determine the character of such an instrument, either from the definitions in the books, the deduction of argument, or the authority of cases.

O'NEALL, J. concurred.

2 Strob. Eq. *407

*PLEASANT MOON et al. v. NANCY T. MOON.

[Dissenting opinion.¹]

CALDWELL, Ch. It has been supposed that the introductory words to the will of John Moon, which has been recited, indicate that the testator gave Nancy T. Moon a fee simple in the land devised to her.

The entertaining of an intention and the carrying of it into legal effect are materially different, and but little weight is due to mere words of introduction in a will, or inducement in pleading, unless something more substantial and definite shall follow. If such barren generalities were to have a controlling influence in the construction of wills, there would scarcely ever be a case of partial testacy. Whatever effect may be given to the general introductory words of a will in relation to the testator's whole estate, "it is now clearly settled," says Lord Kenyon, in *Doe v. Wright*, 8 Term Rep. 67, "that these words are not of themselves sufficient to carry a fee."

In *Barheydt v. Barheydt*, 20 Wend. R. 576, it was held that "the introductory clause of a will evincing the intention of the testator to dispose of all her worldly estate, has not the effect to enlarge the estate devised, unless the words of disposition in the clause of devise are connected in terms or sense with the introductory clause, and import more than a mere description of the property."

As the whole will must be taken together, it has been argued that as the remainder in the negroes Stephen and Harriet, (bequeath-

ed in the same clause with the devise of the land,) were disposed of by a subsequent clause on the event of Nancy T. Moon's death or marriage, therefore the land must have been devised to her absolutely and in fee simple. Suppose the subsequent clause in the will were struck out, would that give her an absolute estate in the slaves? Certainly not, and can a more stringent construction be given against the heir on a devise of real estate than would be given to a bequest of personalty without a limitation over? This would be in violation of one of the most inflexible rules of construction.

But it has been supposed that the Act of 1824² controls the meaning; that Act provides "that no words of limitation shall hereafter be necessary to convey an estate in fee simple by devise, but every gift of land by devise shall be considered as a gift in fee simple, unless such a construction shall be inconsistent with the will of the testator, expressed or implied."

The object of this Act was to settle the diversity of opinion between the Courts of Law and Equity, but was not intended to extend the construction of an estate given in express and definite terms for life, to an estate in fee simple. That the testator devised the

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land to his wife for her life or widowhood, I think is clear. The words are, "after the payment of my debts and funeral expenses out of my estate, by my executors hereafter to be named, I give to my wife Nancy T. Moon, the tract of land whereon I now live, containing two hundred acres, more or less, also two negroes, to wit: my man Stephen and my girl Harriet, during her natural life or widowhood, and further I give to my wife Nancy T. Moon, and her heirs forever, the following property, after my decease, to wit: one black horse," &c. The parts of the sentence including the land and the two negroes are inseparably connected; and the conclusion of it clearly and definitely prescribed the period during which the devise and bequest are to be enjoyed. It is conclusive of the testator's intention that he did not devise the land in fee simple, as he uses the explicit terms "during her natural life or widowhood," which take the case entirely out of the Statute: when in addition to this, it is perceived another sentence immediately follows (only separated by a comma,) by which he gives "to her and her heirs forever" the horse and other property, it greatly strengthens this conclusion. In other clauses of the will the testator makes absolute bequests in similar terms, showing beyond doubt, that he attached a meaning to the words of his will consistent with the law, which ought to deduce what he meant from what he said, and not to imply that he intended what he has never said. In *Fenny on the demise of Coll-*

¹ [For majority opinion, see ante, p. 327.]

² 6 Stat. of S. C. 237.

ings v. Eustate, the words of the devise were as follows, "I give unto my nephew John Collyer, all that house and premises at Pitston, in the occupation of R. Read: I also give my nephew John Collyer all that my land in the parishes of Pidleston and Aubery, in the occupation of J. Tompkins, to him my said nephew John Collyer, his heirs and assigns forever." In delivering the opinion of the Court Lord Ellenborough said, "undoubtedly if there be nothing in the context to connect the different clauses of a will together, they must be taken separately, but does not the arrangement in this will point out the connexion which the testator intended, namely a numerical order, connexion and division, between the several clauses in the will? In one of the clauses he reserves the main sense in respect of the quantum of interest to the last; he says he gives such lands to the particular devisee, and also such lands, and then at the last, he states what the quantum of interest is that he gives. This is a question for a grammarian rather than a lawyer, on which a schoolmaster might decide as well as a Judge. If there had not been a numerical arrangement there might have been some difficulty, but that removes it. It seems clear from the context that both in the 2nd and 3rd clauses the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within these words all that he had dis-

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*posed of in the preceding parts of the sen-

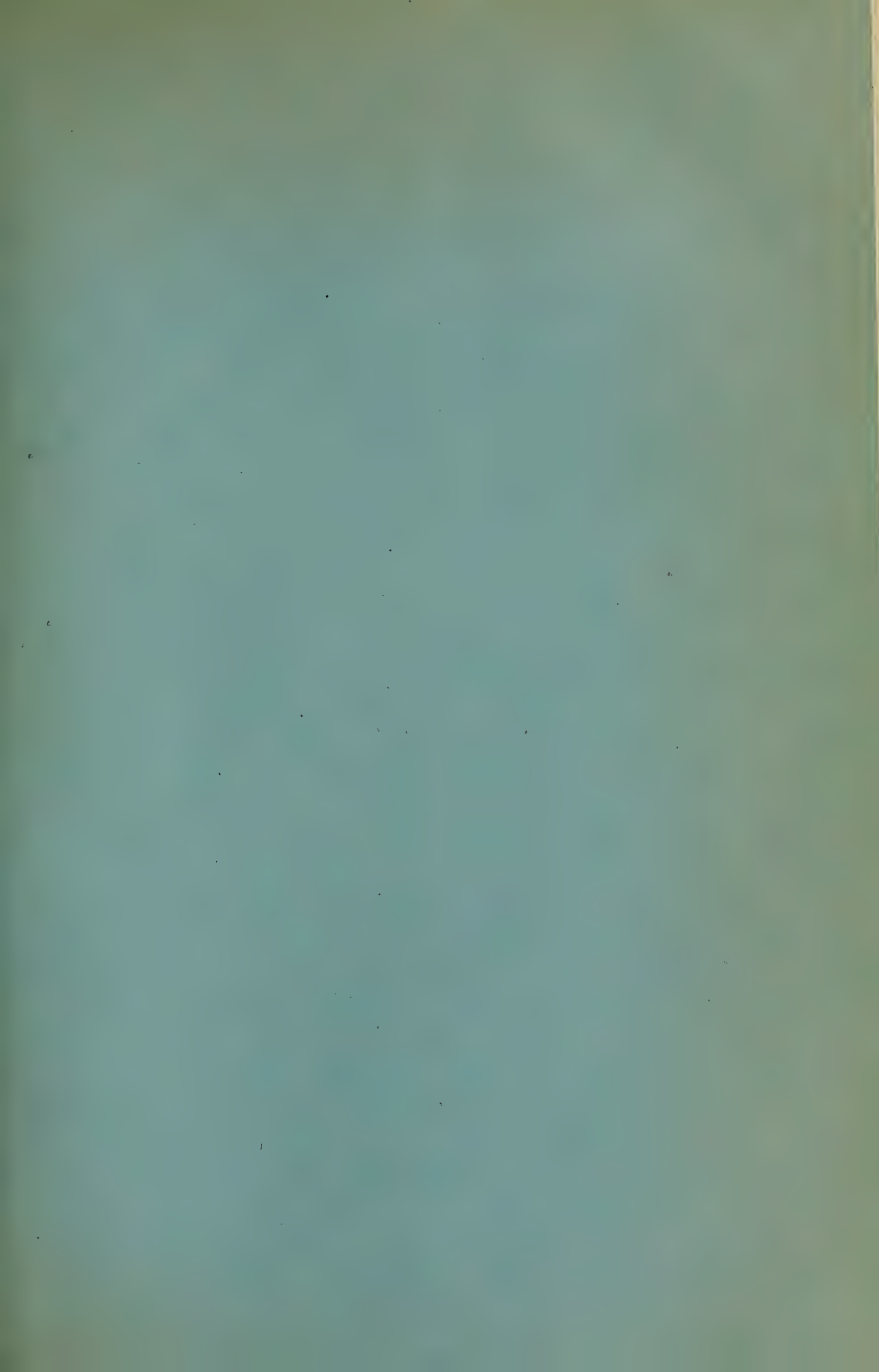
tence." Consequently J. Collyer took an estate in fee.

Where the words were, "I give my wife Sarah Cleessman that estate in Homer in the parish of Trent, and also all that at Wandall in the parish of Mudford, to her and her heirs forever," Lord Hardwick held, that the word "item" ought to be construed as a conjunction in the sense of "and" and "also," and that it has never been construed a disjunctive, but is only made use of to distinguish the clauses of a will.³ The same principle was laid down by Justices Powell, Powis and Gould, against C. J. Holt dissenting, in *Cole v. Rawlinson*, 1 Br. Parl. C. 108, and their judgment on appeal was afterwards affirmed by the House of Lords.

The case of *Doe on the demise of Ellan v. Westly*, quoted and relied on in argument, was where the devise and bequest of a will were in separate, distinct and complete sentences, as independently of each other as language could make them; but here they are so inseparably connected, that it would distract the sentence and destroy the sense to separate them. The effect of such a construction would be to permit an implication to prevail over what has been plainly expressed.

I am therefore of opinion the widow Nancy T. Moon only takes an estate for life, or widowhood, in the land under the will, and that the testator died intestate as to the remainder in the lands. In other respects, I concur in the opinion of this Court.

³ 1 Atkin's 437.



REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE
COURT OF APPEALS AND IN THE COURT OF
ERRORS OF SOUTH CAROLINA

DURING THE YEAR 1849

By JAMES A. STROBHART

STATE REPORTER

VOLUME III

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON
1850

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.

1917

*

CHANCELLORS OF SOUTH CAROLINA¹

DURING THE PERIOD COMPRISED IN THIS
VOLUME

HON. JOB JOHNSTON,

“ B. F. DUNKIN,

“ J. J. CALDWELL,

“ G. W. DARGAN.

¹The Chancellors sitting together form the Court of Appeals in Equity.—Sitting together with the Law Judges, they form the Court of Errors.

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Appended to this Volume will be found certain “Rules for the Court of Errors.” [See *385.]

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1849.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,

“ B. F. DUNKIN,

“ J. J. CALDWELL,

“ G. W. DARGAN.

3 Strob. Eq. *1

*HARRIET WATSON v. JOSEPH KENNEDY et al.

(Columbia. May Term, 1849.)

[*Parent and Child* ⌘9.]

When a father, on the marriage of a son, delivers to him a slave, or permits the slave to go home with him, or sends the slave to him, it is prima facie evidence of a gift; but the presumption may be rebutted by proof of the circumstances under which the parent gave possession to the child; and for this purpose the declarations of the parent when the delivery was made, are admissible to ascertain whether a gift or loan was intended; provided these declarations were made to the child in person, or to another who communicated them to the child in a reasonably short period afterwards.

[Ed. Note.—Cited in *Henson v. Kinard*, 3 Strob. Eq. 377; *Cloud v. Calhoun*, 10 Rich. Eq. 365.

For other cases, see *Parent and Child*, Cent. Dig. § 132; Dec. Dig. ⌘9.]

[*Gifts* ⌘49.]

A son-in-law is a competent witness to prove that slaves delivered to him on his marriage, by the parent of his wife, were intended as a loan and not as a gift; but when his testimony is presented under suspicious circumstances, it will not of itself be sufficient to overthrow the claims of his creditors to the slaves.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 95–100; Dec. Dig. ⌘49.]

[*Parent and Child* ⌘9.]

The resumption by a parent of slaves which she had delivered to her son-in-law on his marriage, and her undisputed assertion of ownership, and continued possession of them for four years, are sufficient to invalidate the claims of

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*those seeking to subject them to the payment

of debts contracted by the son-in-law subsequent to the resumption. Such resumption is sufficient to rebut the presumption of a gift.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. § 134; Dec. Dig. ⌘9.]

[*Fraudulent Conveyances* ⌘66.]

Where one executed a bill of sale of slaves to a connection who was in embarrassed circumstances, but a few days before judgments, which would have subjected them, were entered up against him; and where the circumstances of the transaction were generally of a suspicious character; the Court held that the evidence of the vendor was not sufficient to rebut the presumption that the sale was intended as a fraud upon his creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 169; Dec. Dig. ⌘66.]

[*Fraudulent Conveyances* ⌘182.]

Complainant preferred before the Court a fraudulent title, from her insolvent son-in-law, to a slave who was properly and legally in the hands of the sheriff for sale, and obtained an injunction against the sale. During the time the sheriff was restrained by the writ of injunction, the slave died. The Court ordered that the complainant should account to the execution creditors of her son-in-law for the value of the slave at the time of her death, and the interest thereon from date.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 569; Dec. Dig. ⌘182.]

Before Caldwell, Ch., at Winnsborough, July, 1847.

This was a bill for the specific delivery of four slaves, a negro man Berry, a negro woman Charlotte, and her infant child, and a negro girl Jane; upon whom it is alleged A. W. Young, sheriff of Fairfield District, has

levied executions against Joseph Kennedy, and prays that the sheriff may be restrained from executing the writs of *fi. fa.* against the slaves, the property of the plaintiff. The answer of John Z. Hammond, Esq., one of the defendants, states that Joseph Kennedy, in A. D. 1837, intermarried with Eliza Watson, a daughter of plaintiff, and shortly afterwards received into his possession, as part of the portion of his wife, from the estate of her father, Hardaway Watson, deceased, the negro woman Charlotte, and (as he is informed and believes,) Henry; since which Charlotte has had a number of children, but he does not know with certainty how many. That Ann Robertson, grandmother of Eliza Kennedy, made a will, of which exhibit is a copy, in which Berry was specifically bequeathed to Eliza Kennedy, Sarah Stitt, John D. Watson and James Watson, her four grand-children, and if either of them should die without issue, then the survivor or survivors to take the share of such deceased in the negro man Berry. Sometime after the said marriage, Joseph Kennedy purchased the interest of John D. Watson in Berry, since which, John D. Watson and James Watson have both died, leaving Kennedy entitled to an interest in Berry amounting to about three fourths of his value. That Kennedy retained possession of Henry and Charlotte till sometime in 1842, and they were known and recognized as his property, and in fact he may have been said to have retained possession of them up to the time he left the State for Mexico, (sometime in 1847.) as he and his family resided with plaintiff up to

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that time, with the *exception of a short period, during which he was engaged in business in Winstonsborough and Columbia, with whom the last mentioned negroes also lived. That Kennedy, on 5th November, 1842, made a bill of sale to plaintiff, of a negro woman Jane, whom he had purchased of Isaiah Crankfield, and all his interest in Berry, which took place a few days before the sitting of the Court of Common Pleas for this District, at which Court a number of judgments were obtained against him, and defendant believes that the bill of sale was executed without any valuable consideration, and wholly with a view to defraud his creditors. That plaintiff, on the 24th of February, 1845, voluntarily, and without any, save a nominal consideration, conveyed to Thomas Stitt, her son-in-law, in trust for the use of Eliza Kennedy and her children, four negro slaves, to-wit: Henry, aged about thirteen; Mary, about thirty five years; Caroline, about three years, and Sylvia, about eighteen months; together with her share or interest in a tract of land on Wateree Creek, in the District and State aforesaid,—which property, defendant believes, and in fact has no doubt, was conveyed in trust for the uses aforesaid, because Joseph Kennedy had con-

veyed to plaintiff the said negro woman Jane, and his interest in the negro man Berry, for the purpose of defrauding his creditors. Defendant believes that Joseph Kennedy paid to plaintiff a full consideration for all the property specified in the deed of trust, except what already belonged to him before the execution of the same. That he is largely indebted to defendant, and unless the slaves, Henry, Jane, Charlotte and her children, and the interest of Kennedy in Berry, be held liable to the payment of his debts, the defendant must necessarily sustain losses to a large amount. Defendant prays for a sale of the slaves, and the proceeds to be applied to the payment of the debts and liabilities of Joseph Kennedy.

John Simonton made an affidavit that he heard the answer of Hammond, and although not familiar with all the facts as there stated, he believes them to be true, and adopts the answer as his, according to his belief.

Many witnesses were examined, and all necessary notice of the evidence is taken by the Circuit and Appeal Decrees.

The following is the Circuit Decree.

Caldwell, Ch. Many acts of a parent towards a child are construed as gifts, which between other persons would be mere bailments. When a father on the marriage of his son either delivers him a slave or permits the slave to go home with him, or sends the slave to him, it is *prima facie* evidence of a gift; but the presumption may be rebutted by proof of the circumstances under which the parent give possession to the child: and for this purpose the declarations of the pa-

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*rent when the delivery is made are admissible, to ascertain whether a gift or a loan was intended, although made in the absence of the child. The embarrassment of the plaintiff and her inability to pay her debts—her conversation with her brother about making a gift of slaves to her son-in-law, from which he dissuaded her; her possession of the slave Charlotte from 1839, are corroborating circumstances to support the positive proof of three witnesses, who testify that she delivered the negro woman Charlotte as a loan, and not as a gift, to Joseph Kennedy. The mere opinion of witnesses, drawn from Kennedy's possession of the slave, that she belonged to him, is insufficient to outweigh this proof; and his subsequent insolvency, however it has disappointed his creditors, cannot affect the plaintiff's rights or change a loan into a gift. The question is made as to the competency of the witnesses, Jos. Kennedy and his wife Eliza Kennedy, on the ground that they had an interest in the case, and that plaintiff had made a deed of four negroes, Mary, Henry, Caroline and Sylvia, to Thomas Stitt, in trust for the use of Eliza Kennedy's children; but the objection cannot be sustained on either ground. Joseph Kennedy would not have been a competent

witness to prove that the slaves levied on by the sheriff were his property, as his testimony would have the effect of increasing the means of paying his debts; but he was called to testify against his interest, and although a defendant, he was competent, as it did not appear that he had either any legal or equitable interest involved in this case; the interest of husband and wife is identical, and their testimony was held competent. The next question was as to the slaves, Berry and Jane—it appears that Ann Robertson, the grand-mother of Eliza Kennedy, bequeathed that Berry and other slaves “be loaned to my six sons, Ephraim Watson, Wm. Alex’r. Watson, John Watson, James Watson, Robinson Walker Watson and Hardaway D. Watson, share and share alike, each to hold his equal share of said negroes, for and during the term of his natural life, and upon the decease of any of my said sons, his share shall descend to his heirs lawfully begotten; but should any of my said sons die without lawful issue, then and in that case my will is, that his part or share of the above negroes shall be equally divided among the lawful heirs of my other sons.” Hardaway Watson died intestate, and Col. William Moore administered on his estate, but did not sell Berry, as he thought he belonged to the children of the intestate, and it appears from the evidence, that Joseph Kennedy sold the slave Jane and his wife’s interest in Berry to the plaintiff, on 5th November, 1842, and states that he owed plaintiff \$145, that he received of her \$130, and borrowed \$70 of Dr. Watson, making \$200, which he paid in the

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case of Jackson, *Capers & Co., that plaintiff paid him \$400 in cash, out of which he returned \$70 to Dr. Watson, and paid \$200 on the Bowie case against Kennedy & Hammond; doesn’t remember what he did with the other one hundred and thirty dollars, possibly paid it to some of his debts; and this is corroborated by the fact, that these payments were made by him in the sheriff’s office; but there is some obscurity about this trade with the plaintiff, and great doubt has been cast upon her raising the sums of money (it is alleged) she paid him. His statement is, that he sold her cotton crop, and the money arising from it was what she paid him. She was in debt; had been pressed for money, and couldn’t pay it, and yet she makes purchases of negroes, to the amount of more than seven hundred dollars. When one is on the verge of insolvency, a transfer of his property to a connexion who is also embarrassed, is generally calculated to raise a doubt as to the fairness of the transaction. Joseph Kennedy was called to explain the circumstances under which the credits on the plaintiff’s accounts were entered on the books of Joseph Kennedy & Co.; but his account of the credits and the sale of the negroes, Berry and Jane, although such transactions, when bona

fide, are generally easy to be explained, was far from being satisfactory. His testimony, however, was not contradicted, nor was any witness called to impeach his general character; but it was established that he had made a note in the name of Joseph Kennedy & Co., for twenty-five hundred dollars, payable to Shannon & McGee, after the dissolution of the partnership, for a demand not due by them, nor in any way connected with their partnership business; that suit had been brought on it against the firm, and the verdict of the Jury had been given against it. There were some circumstances that corroborated his statement about his paying money into the sheriff’s office, that he said he had received from the plaintiff, and the testimony of the plaintiff’s daughters went to prove that she raised from thirty to fifty bales of cotton, per annum, and had, therefore, probably the means of paying the amount for which he said he sold the negroes, and it was possible that she might have raised money enough to pay her accounts, although it was not very probable. As to the exchanges of Ephraim and Mariah, by the plaintiff, with him, for Charlotte, the proof appeared to put his possession of them on the same footing as the loan of the latter, and, therefore, they could not be considered a gift. The slave Jane has died since the filing of the bill, and is no longer the subject of suit.

After considering and comparing the circumstances that cast suspicion on the sale of the slaves, I have come to the conclusion, with some hesitation, that they are not strong enough to overthrow his positive statement.

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The plaintiff’s *claim to Berry must, therefore, be sustained against the executions and levies mentioned in the pleadings. It is ordered and decreed, that the defendants be perpetually enjoined from enforcing the executions aforesaid, against the slaves, Berry, Charlotte, and her child, the property of the plaintiff, but without costs.

The defendants appealed from the decision of his Honor, and moved the Court of Appeals to reverse the same, on the following grounds, viz:

1st. Because his Honor erred in receiving the testimony of Joseph Kennedy and wife, as they were evidently interested in the result of the suit.

2nd. Because there was a clear case of fraud made out against defendant, Joseph Kennedy, who had been active in procuring the bill to be filed, and whose answer admitted every material allegation—and whose conduct from beginning to end, was of the most suspicious character, and bore evidences of fraud at every step. His Honor should, therefore, have disregarded the testimony, both of him and his wife, and should have decreed the property in dispute liable to the payment of his debts.

3rd. Because the decree was in other respects contrary to law, and unsupported by any testimony, save that of the family connexion of Joseph Kennedy, which was outweighed by a multitude of suspicious facts and circumstances in the case.

M'Dowell and Rutland, for the motion.
Boyce, contra.

Curia, per DARGAN, Ch.—The Chancellor who heard this case, in defining the law applicable to the subject, holds the following language:

"When a father, on the marriage of a son, delivers to him a slave, or permits the slave to go home with him, or sends the slave to him, it is *prima facie* evidence of a gift; but the presumption may be rebutted by proof of the circumstances under which the parent gave possession to the child: and for this purpose the declarations of the parent, when the delivery is made, are admissible, to ascertain whether a gift or loan was intended, although made in the absence of the child." The whole of the foregoing proposition is, in my opinion, perfectly unexceptionable, save that part which asserts that the declarations of the parent, made in the absence of the child, are admissible to ascertain whether a gift or loan was intended. The language in which the proposition is stated, implies that such declarations would be admissible, to ascertain whether a gift or loan was intended, although the child should not be proved to have known that the declarations were made,

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which qualified his possession into a *loan. It might not be very material whether the qualifying declarations should be made to the child in person, or to another who, in a very short period afterwards, should communicate to the child the qualifying conditions annexed by the declarations of the parent to the transfer of possession. But, in my opinion, the declarations of the parent, made in the absence of the child, though accompanying the transfer, and though competent, as a part of the *res gestæ*, to be offered in evidence, should be utterly unavailable in qualifying the transaction into a loan instead of a gift, unless those qualifying declarations are shewn to have been communicated immediately to the child, or brought home to his knowledge within a reasonably early period afterwards. And this I take to be the settled law of the land.

In *Banks v. Hatton*, 1 N. & McC. 221, it is indeed said that such declarations are competent. There, the father called on his other son and family to witness that he sent the negroes as a loan. But, notwithstanding the accompanying declarations of the father, the gift was established, although it was proved that the son had said he had been offered a great price for the negroes, and if they had been his, he would have taken it; and to another witness, had acknowledged that the negroes

belonged to his father. Thus it appears that the very case from which the objectionable principle here commented on has been deduced, goes far to establish a contrary doctrine.

In *McCluney v. Lockhart*, 4 McC. R. 251, Judge Colcock says, "the long and well established doctrine is, that the presumption of a gift may arise from the circumstance of a parent's sending a slave to a married child, and suffering it to remain in possession of such child, without any express stipulation on the subject."

In *White v. Palmer*, McMul. Eq. 115, the negroes had been suffered to go into the possession of the son-in-law on his marriage, and, shortly afterwards, the father-in-law executed a deed, by which the negroes were intended to be settled upon his daughter. It was held that the deed was void as to creditors, unless its execution had been with the consent and privity of the husband at the time, or accepted by him. The remark of Judge Nott, in *Bradshears v. Blassingame*, 1 N. & McC. 223, note, that conditions annexed to these marriage gifts were not to be encouraged, was quoted with approbation by the Chancellor who delivered the decree of the Court. And in the course of his remarks he says, "I think it should be clearly shewn, that it was the understanding of all parties, and especially of the husband, that it was meant as a loan and not a gift."

In *Edings v. Whaley*, 1 Rich. Eq. 310, Chancellor Dunkin, in his decree, holds the following language on the subject. "The legal effect," says he, "of the possession, under the circumstances, is to confer title. The defend-

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ant must prove that it was a *loan. It is not enough, that he intended in his own mind to reserve a control over the property. If the possession of the plaintiff was such as, *prima facie*, completed his title, no mental reservation on the part of the defendant could defeat this legal consequence. There must have been some express stipulation at the time, distinctly understood by both parties, in order to give effect to such an intention. It is not a question of what he intended, but what he actually did." The decree of the Court of Appeals, by Chancellor Johnson, affirming the circuit decree, is of a corresponding tenor. I quote his concluding remarks—"where nothing but an absolute gift is intended, nothing but delivery is necessary. If it is intended to qualify it, the parent ought to, and I think would, express it. He could not be so unjust to his child as to raise expectations, with the secret intention of mortifying him by defeating them."

It seems to me that the parent's annexing a condition to the delivery of possession, in the absence of the child, in the presence of a third person who may never communicate it to the child, is in no particular more just or reasonable than a mental reservation. The

act of transferring the possession, in legal effect amounts, prima facie, to a gift. In delivering possession of the negro to his son, or son-in-law, as the case may be, in the understanding of the law, he says, "I give you this negro." And, aside, he says to some third person, his own wife perhaps, or some other member of his family, "I do not give but I lend." This is unjust to the child, is calculated to raise illusory expectations, and is breaking the word of promise, both to the ear and the sense. These secret conditions are intended only to be used on certain contingencies. If the daughter dies, or the son or son-in-law becomes a bankrupt, or there is strife and misunderstanding between the parent and child, the gift is reclaimed. Otherwise, the possession of the child is scarcely ever sought to be disturbed.

In the case, however, now before the Court for its judgment, the discussion foregoing may be considered rather in the nature of an abstract inquiry, and is intended only to prevent misconception of what might appear an acquiescence in an erroneous exposition of an important principle of law; an exposition tending to unsettle, in my judgment, former adjudications. This court is unanimously satisfied with the result of the Chancellor's decree in reference to the negroes Charlotte and her children, claimed by the defendants, the creditors of Joseph Kennedy, to have been given as a marriage gift to his wife by her mother, Harriet Watson, the complainant. The claim to these negroes is advanced in behalf of the creditors of the alleged donees, and, as usual in such cases, the alleged do-

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nees are presented as witnesses against *the gift. Accordingly, Mr. and Mrs. Kennedy, and another daughter of the complainant, (Mrs. Stith) making quite a family group, all assail the transaction as being a gift. The two ladies do not testify to circumstances deemed very material, being, mostly, declarations of Mrs. Watson that the negro was loaned, but they do not say particularly that these declarations were made to Kennedy at the time of the transfer of the possession. Kennedy, however, comes forward, and testifies positively to the fact that he received Charlotte from his mother-in-law as a loan and not as a gift. This witness was properly held by the Chancellor to be competent. But the circumstances under which his evidence is presented, subtract largely from the weight of his testimony. His evidence would not have been sufficient of itself to have overthrown the claims of the defendants, his creditors, to Charlotte and her children. But there is a fact—a strong and incontestable fact, which stands out in bold relief, and which speaks in unequivocal language against the claims of the defendants. The fact to which I allude is, the resumption of the possession by Mrs. Watson in 1839, and her continuing in the unquestioned control of the

negroes from that time till 1842. There are no existing debts of Kennedy, incurred by him at the time he was in possession of Charlotte; nor does it appear that he owed any debts at all during the time (two years) that his possession continued. There was a total absence of all motive, save a respect for her known and acknowledged rights, to induce him to acquiesce in her resumption of the property, and her subsequently long continued possession. His acquiescence for four years in her possession and asserted ownership, is sufficient, in the judgment of this court, to rebut the presumption of a gift; particularly when corroborated by the other evidence offered. So much of the Chancellor's decree as adjudged the right and title of Charlotte and her two children to be in the complainant, Mrs. Harriet Watson, is therefore, affirmed.

The facts in reference to the other negroes mentioned in the pleadings, Berry and Jane, present different questions. The title to Berry was devised to Joseph Kennedy, as follows. Mrs. Ann Robertson, by her will, bequeathed Berry to Eliza Kennedy, Sarah Stith, (who was Eliza Kennedy's sister,) and to John D. Watson and James Watson, who were her brothers, and all of whom were testatrix's grand children. Sometime after his marriage, Joseph Kennedy purchased the interest of John Watson in Berry. And James Watson having died without issue, Joseph Kennedy became the owner of an interest in Berry, amounting to about $\frac{5}{8}$ of his value. Mrs. Stith, in her own right under the will of Mrs. Robertson, is the owner of one-fourth, and as survivor of James Watson, to one-half of one-fourth. Jane was

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pur*chased by Kennedy of one Crankfield. Being the owner of Berry and Jane as above stated, he conveyed to his mother-in-law, the complainant, on 5th November, 1842, by a bill of sale bearing that date, the negro woman Jane, and all his interest in Berry, for a consideration, expressed in the deed, of \$675. This was done on the Thursday before Fall Term of the Court of Common Pleas for Fairfield District, in 1842; at which term a number of judgments, amounting, in the aggregate, to a large sum, were entered up against Kennedy. No money is proved to have been paid, except by Kennedy himself. The deputy sheriff does prove that about this time there were payments made in the sheriff's office, to the amount of about four hundred dollars. But it is not shewn, except by the evidence of Kennedy, whence the money was derived. And there was an obvious purpose for which these payments were made. It was to remove the incumbrances of existing executions, which would have disturbed and defeated the title which he had just made, or was about to make, to his mother-in-law. One of the payments was made before and one after the date of the bill of sale.

On the 24th February, 1845, the complainant voluntarily, and without any, save a nominal consideration, conveyed four negroes to her son-in-law, Thomas Stith, for the use of Eliza Kennedy's children. The complainant herself was embarrassed with debt, owing a considerable amount to one Cathcart, which she was unable to pay, or, at all events, did not pay. There was an account against her on the books of Joseph Kennedy & Co. of \$829.42, which the clerk of the firm testified was balanced in an irregular and suspicious manner. And the Chancellor states that Joseph Kennedy was called on to explain the circumstances under which the credits on the plaintiff's accounts were entered on the books of Joseph Kennedy & Co. but his account of the credits, and the sale of the negroes, Berry and Jane, although such transactions, when bona fide, are, generally, easy to be explained, was far from satisfactory.

The evidence of Kennedy, in the opinion of this Court, is not sufficient to resist the presumptions arising under all the facts of the case, as they have been detailed, that his deed to Mrs. Watson, for Berry and Jane, was intended as a fraud against Kennedy's creditors. And such seems to have been almost the conclusion of the presiding Chancellor, and he offers some most cogent reasons for such a conclusion.

The negroes having been levied on, the bill of the complainant was filed in April, 1844, and an injunction then obtained against the sale. The writ of injunction, of course, arrested the sale, and all further proceedings by the sheriff, in behalf of the defendants, as the creditors of Kennedy. In October, of that year, Jane died. The Chan-

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cellor held that the controversy between the complainant and the defendants, as to Jane, was put at rest by her death. This Court is of a different opinion, and considers the case as analogous, in this particular, to that of *Fraser v. McClenaghan*, 2 Strob. Eq. R. 227. In the latter case, the complainants filed their bill against the defendant for the recovery of specific negroes. After the bill was filed, and during the pendency of the suit, two of the negroes died. The Chancellor who heard the case decided that there could be no recovery in that proceeding for the deceased negroes, and dismissed the bill as to them. But, on appeal, this decision was reversed, and it was held that Equity, having jurisdiction of the case at the institution of the suit, did not lose its jurisdiction by this dispensation of Providence; and the decree was, that the defendant should account for the value of the negroes that had died. The principle applies with still greater force of reason to the case in hand. The complainant has preferred before this Court a false and fraudulent title to a negro that was properly and legally in the hands of the sheriff for sale, and for the

satisfaction of the just claims of the defendants against her son-in-law, Joseph Kennedy. She has, by the order and the process of this Court, arrested the sale, and during the continuance of the restraint which she has caused to be imposed upon the defendants in seeking their rights, Jane has died. If the complainant had not interfered, Jane would have been sold, and the proceeds of the sale have been applied, pro tanto, to the satisfaction of the defendants' executions. The death of one who does not die from the effects of old age, depends so much upon accident and locality, that Jane, who was young, and, so far as appears, healthy, would, probably, now be living, or, at all events, have been sold before her death, and the defendants have enjoyed the benefit of her sale, but for the interposition of the complainant. Her unjust interference, based upon a fraudulent title, has occasioned this loss to the creditors of Kennedy. And every principle of justice requires that she should be made to place them in statu ante bellum. And this cannot be done without she accounts for the value of Jane, at the time of her death, and the interest thereon from that date.

It is ordered and decreed, that so much of the Circuit decree as perpetually enjoins the sheriff from proceeding to sell the right and title of Joseph Kennedy in the negro Berry, under and by virtue of the executions in his hands in favor of his co-defendants, be reversed. It is also ordered and decreed, that the injunction heretofore ordered against the sale of Berry, be dissolved, and that the said sheriff do proceed to sell all the right, title, and interest of the said Joseph Kennedy in the negro Berry, under the executions in his hands, and that he apply the proceeds of the sale to the said executions, according to their legal priority.

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*It is also further ordered, that the complainant do account to the defendants, who are the execution creditors of Jos. Kennedy, for the value of Jane, and interest thereon from the time of her death. It is also ordered, that it be referred to the Commissioner in Equity of Fairfield District to inquire and report as to the value of Jane and the interest as aforesaid. It is also ordered, that when the report of the Commissioner shall have been made and confirmed, that the complainant pay the amount thus found due to the Commissioner of this Court, and that the Commissioner pay the same to the execution creditors of Joseph Kennedy, parties defendants to this suit, according to their legal priorities.

DUNKIN, Ch., concurred.

JOHNSTON, Ch. I concur, except as to so much of the opinion of Chancellor Dargan as suggests that declarations of a donor cannot affect the donee, unless brought to

his knowledge. I doubt whether such declarations, if made in good faith, may not very properly qualify the character of the gift.

CALDWELL, Ch., dissenting. I dissent from the attempted qualification of the rule, that the declarations made by a father when he sent negroes to a child, are admissible to ascertain whether a gift or a loan was intended, though made in the absence of the child; this was expressly ruled in *Hatton v. Banks*, 1 N. & McC. 223, note, which was decided upwards of thirty years ago, and I know of no case in the Court of Law that has, since that time, in the slightest degree, modified the principle. In that case the presiding Judge charged the jury, that the declarations of the father, when he sent the negroes to the plaintiff (his son-in-law) should have no weight in their determination, because the plaintiff was not present; and that they should not regard the declarations of the plaintiff (who had said he had been offered a great price for them, and that if they had been his he would have taken it) because he might be ignorant of his right. The Court of Appeals, held, that as the case turned on the question, was this a gift or a loan, these circumstances were entitled to consideration, and were strictly within the rules of law.

Independently of this decision and the recognition of the rule in subsequent cases, it is clear that such a declaration, as a part of the *res gestæ*, was competent. *Booth v. Dunning*, MSS. Ca. Col. May, 1849. What is said in doing an act, is often such an important and inseparable incident, that it alone can shew the motive of the action and characterize the act. The case of *Parris v. Jenkins*, 2 Rich. L. Rep. 106, is a striking illustration: that was an action of trover, by the father-in-law against his son-in-law, for a negro woman, Emily, and her three children, who had gone, in some way unexplained, into defendant's possession in 1838, the year after he married plaintiff's

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daughter, where *they had remained till the spring of 1841, when they were brought in a wagon by the driver, a negro of the plaintiff, to the plaintiff's; the negro told the defendant that his master had sent for Emily to help a little while about his crop, as he was backward. They remained at the plaintiff's about two months, and then returned to defendant's. The declaration of the negro was held competent as a part of the *res gestæ*. "It is just," says Justice Wardlaw, delivering the opinion of the Law Court of Appeals, "as if Jenkins, adopting the words of the negro, had said when he sent the woman, 'I send her to help a little while, because my father-in-law is backward,' and so the words are a part of the *res gestæ*—an explanation, by cotemporaneous acts or declarations, of the motives or objects of the

principal act, which would otherwise be of ambiguous or contrary import."

The principle that declarations cotemporaneously made with doing an act are competent, is recognized and illustrated by every elementary writer on evidence. Phillips says, "hearsay is often admitted in evidence, as constituting a part of the transaction which is the subject of inquiry; the meaning of which seems to be, that when it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it, is admissible in evidence, for the purpose of showing its true character."¹ Starkie, speaking of the same subject, says, "to this head, also, the admissibility by tenants has sometimes been referred, and it seems that such declarations are clearly referable to this principle, in all cases where the nature and quality of an act of ownership or dominion, or of the possession, is questioned, and requires explanation, or when the nature and quality of the possession, are questioned, and the cotemporary declaration of the party doing the act, or of the party in possession, serves to elucidate and explain the nature and quality of such act or possession."²

"There are other declarations," says professor Greenleaf, "which are admitted as original evidence, being distinguished from hearsay by their connexion with the principle fact under investigation.—The principal points of attention are whether the circumstances and declarations offered in proof were cotemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." After giving the instance of the cry of the mob accompanying Lord George Gordon (who was tried for treason) as forming a part of the *res gestæ*, he says—"So also where a person enters into land, in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin, or the like, or changes his actual residence or domicile, or is upon a journey, or leaves his home, or returns thither, or remains

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*abroad, or secrets himself, or in fine does any other act material to be understood, his declarations made at the time of the transaction and expressive of its character, motive or object, are regarded as verbal acts indicating a present purpose and intention,"³ and are therefore admitted in proof, like any other material facts.

The declarations accompanying the act constitute its character, and to exclude them would be permitting presumptions to prevail over facts, and would be substituting the

¹ 1st Phill. Ev. 231, note 444, p. 585. Vide cases cited in margin.

² 1 Starkie on Ev. x 302, 268.

³ 1 Green. Ev. sec. 108.

least satisfactory for the most conclusive proof—conjecture for certainty. To reject them as incompetent would introduce all the evil consequences that are avoided by excluding a garbled statement. The rights of parents would be put in the most imminent peril if any other rule were adopted: the loan of a slave or other personal property to a child for a month, a week, or for a day, might have the effect of transferring the title, by raising the presumption of a gift, if the declarations at the time of the delivery were inadmissible, as they are often the only evidence of the intention of the parent, and the reservation of his rights. The danger apprehended from such evidence operating as a surprise or fraud upon the child, or his creditors, or purchasers from him, is imaginary; the question of fraud would not depend merely upon the declarations, but upon the proofs of what were the motives and circumstances of the parties, and especially whether the transaction was bona fide or colorable. To exclude such evidence would amount to passing an Act prohibiting parol loans, unless the child was present, of which the injurious effects cannot be adequately estimated.

The effect of such a rule would be, not only to destroy in many instances the confidence and kindness that subsist between parent and child, but would convert their dealings into the most formal and mercenary transactions of life; the parent who was not able to give would be reluctant to lend, when he knew he ran the risk of losing the property, and selfish considerations of his own interest would soon chill the current of kindness towards the child. The law, as far as possible, should aid the affections, and encourage honesty and fair dealing; but abolish this rule, and children will have another inducement to ingratitude, and their cormorant creditors, who have, during their nonage, seduced them into dissipation, and swindled them into debt, will be seen pouncing down upon the property the parent has lent to alleviate the wants or to administer to the necessities of his child.—Suppose a common case, a daughter marries a worthless husband involved in debt, she is taken sick and has no one to attend to her, shall the servant that her father sends to wait upon her during her illness, be levied upon by the executions against her insolvent hus-

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band, to whom it would be the height of folly and madness to make a gift, and which every reasonable mind knows the father-in-law never intended? Yet unless the insol-

vent son-in-law be present when the servant is sent, although a dozen witnesses testify to the fact of the father's declaring that it was a loan, the marital rights attach, and the creditors, often the guilty abettors of his vices, receive the perverted benefit of a parent's affection.

As to the second branch of the case, it depends upon evidence, and my opinion has undergone no change.

Whether the insinuations made against Kennedy be true or not, the defendants declined to make an attack upon his general character; and whatever may have been his motives in selling the negroes to the plaintiff, she cannot be made responsible for them, unless she knew his intention was fraudulent, and co-operated to carry it into effect. The indisputable fact that she paid him \$400, which he applied in extinguishing executions in the sheriff's office against him, rebuts the presumption that the sale was merely a colorable transaction.

The plaintiff's son, who is dead, drew the bill of sale of the negroes—she swore to her bill for injunction—and Kennedy testified that his sale of the negroes to her was bona fide, and the corroborating circumstance of his payment of the \$400 in the sheriff's office at the time, is evidence enough to neutralize a mere presumption, for it cannot be contended that there is any thing in the transaction that makes it a fraud per se, and I think it is carrying the doctrine of presuming fraud entirely too far, to come to the conclusion that all this evidence is false, and the sale fraudulent.

Notwithstanding what was said about the plaintiff's indebtedness, the proof was sufficient to show her adequacy of means to raise the money to pay for the negroes, and Kennedy's unsatisfactory account of his closing the balance of her account on his books, ought not to impair her title as a bona fide purchaser, unless the amount had been so great as to warrant the conclusion that that settlement was a part of this transaction and contaminated it with fraud. Her payment of \$400, which has been applied to his debts, shews a valuable if not an adequate consideration; and if the most stringent construction be put on the transaction, she ought at least to be subrogated to the rights of those creditors whose debts she has extinguished. But in the material point the defendants failed in their proof to bring home the scienter of fraud to the plaintiff; without strong evidence to sustain this point, her purchase ought to be supported.

Decree modified.

3 Strob. Eq. *16

*JOSEPH PALMER v. W. H. B. RICHARDSON.

(Columbia, May Term, 1849.)

[*Specific Performance* ⇨95.]

As a general rule, the purchaser of land would not be coerced by a decree of this Court, to perform his contract, without an investigation as to the title. But cases not unfrequently occur, in which the vendee will be considered as having waived his objections to the title, and will be decreed to perform and to accept such title as the vendor is able to give.

[Ed. Note.—Cited in *Prothro v. Smith*, 6 Rich. Eq. 334.]

For other cases, see *Specific Performance*, Cent. Dig. §§ 257-277; Dec. Dig. ⇨95.]

[*Vendor and Purchaser* ⇨143.]

Where complainant's deviser sold the land to defendant in 1841; and the defendant, the same year, went into possession, and retained possession until 1846, clearing and cultivating the land; and the land, in 1842, had been surveyed in the presence of defendant's agent, who made no objection either as to quantity, location or title; and in 1844, defendant had written to complainant excusing himself for not having paid the purchase money, and expressing a strong desire to do so at an early day; and where no objection had ever been made to the title until after filing the bill—the Court held that, by his conduct, the defendant had waived his right to object to the title; or that to take the most favorable view of the case possible as to him, the onus had fallen on him to show that the complainant had no title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 267; Dec. Dig. ⇨143.]

[*Specific Performance* ⇨61.]

Where one entered into the possession of land under a contract to purchase, and had failed to comply with the terms of the contract, notice by the vendor that until he did comply, he must suspend all further use of the land, is not a rescission of the contract, but rather a demand for its fulfilment: neither does it debar the vendor of his right to interest on the purchase money from the time of the notice until its final payment.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 183; Dec. Dig. ⇨61.]

[*Equity* ⇨377.]

Where there was no original necessity for an order of reference, as to a title, to have been made, the order is merely administrative, and as such is liable to be recalled by the Chancellor who made it, or by any succeeding Chancellor.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 788-793; Dec. Dig. ⇨377.]

Before Dunkin, Ch., at Sumter, June, 1848.

The bill was filed for the specific performance of a contract for the purchase of land.

After hearing the case, his Honor decreed as follows.

Dunkin, Ch. The bill alleges that in 1841 the defendant agreed to purchase from Joseph Palmer, senior, a tract of land, on Santee river, for which he was to pay six hundred dollars provided that the tract should be found, on survey, to contain one hundred acres of upland. That the title was to be made on payment of the purchase money.

The answer admits the agreement to pur-

chase, and the price, but insists that the contract did not depend alone upon the fact that the tract was to contain one hundred acres of upland, but also that one of the boundaries of the tract should be the centre of Rock's Creek, and Santee river another boundary.

The contract was altogether in parol.

The defendant went into possession of the land in 1841, and continued in possession

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until the spring of 1846. Very soon after the contract was made Joseph Palmer, senior, departed this life, having, by his will, devised this land to the complainant, his son.

On the part of complainant, G. D. Gayle was sworn. He testified that he was the manager of the defendant (W. H. B. Richardson) in 1842; that the defendant informed him of his purchase of this tract of land from Mr. Palmer; told him to have it cleared and planted; which witness did, that fall and spring following. On one occasion defendant told witness that Dr. Palmer had sent word that he wanted to have a settlement for the land, and the defendant requested witness to say to Dr. Palmer, that as soon as the title and plat was made out he was ready for a settlement. Afterwards Dr. Peter Palmer came with a surveyor, (Samuel Joyner,) and witness went with them, as the agent of the defendant; they went round the lines. Defendant had told him that he was to give six hundred dollars, if there were one hundred acres of upland. Supposes there were one hundred acres, as he planted seventy five acres or near about that, for Mr. Richardson. The line was run on the margin of the branch. He had understood from the defendant that he was to have the upland, and no part of the swamp, and it was so surveyed. Santee river runs on the north of the land. Gayle afterwards said, that the defendant told him, if there were one hundred acres of upland, he was to pay six hundred dollars. That he did not want the Rock Creek swamp. And the witness added that the defendant would be as well off without the swamp, or if it were owned by another, as the swamp was open and free to all. It seems that prior to 7th February, 1844, the complainant had, more than once, applied to the defendant for a settlement, for on that day the defendant addressed him a letter in the following language, viz:

"Dear Sir:—Your letter under date the 16th ult. has just been received. I assure you it has always been my disposition and wish to be prompt and punctual in all my transactions in life. The money for the land purchased of your father has been kept for some time waiting to hear from you on the subject, but not hearing I have been compelled to use it in the purchase of other property, which I regret to say, puts it out of my power, just at this time, to comply,

but assure you I will, as early as practicable, pay it to you, and if it should not be possible, from the sad disaster that befell my crops last year, to meet the payment, will give my note with security (if required) to meet it the next year,—when the note is given the titles can be executed, and retained by you till the note is paid, which I trust will subject you to no inconvenience. Be assured I feel greatly grieved it has so happened. You were correct in your letter in

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stating that you believed the *other letter had not reached me, as it should have been duly attended to. I am, Dear Sir, with respect,
William H. B. Richardson.
To Dr. Joseph Palmer, Pineville, S. C."

Taking this letter in connection with the testimony of G. D. Gayle, it appears that the complainant, soon after his father's death, in 1842, applied to the defendant for a settlement. A reply was sent by the witness, Gayle, that he was ready to settle, as soon as the titles and plat were made out. Accordingly Dr. Peter Palmer, the brother of the complainant, attended on the ground with a surveyor, and in company with the witness, as the agent of the defendant, the tract was surveyed, and the lines were run, with the approbation of the witness, and, as he supposed, according to the views of the defendant, as communicated to him by the defendant himself. The line was run on the margin of the branch. The defendant says the centre was the line, according to the contract. But the court can perceive no evidence that this was any part of the contract. On the contrary, Gayle says the defendant told him he was to pay six hundred dollars if there were one hundred acres of upland, and that he did not want the Rock creek swamp, "he was to have the upland and no part of the swamp." But when the defendant wrote the letter of the 7th February, 1844, he had been, for two years, at least, in possession, under his purchase. He had cleared and planted the land. A survey had been made in 1842, as he had desired, in his reply, to the complainant, and his agent attended at his request. If he was ignorant of the manner in which the line was run, certainly it was his own fault. If he was not ignorant and was dissatisfied it was his duty to have complained. It seems that after the complainant had complied with the requisites of the defendant, in making the survey, he again applied to him, but his letter miscarried. On the 16th January, 1844, he reiterates the request, and the reply of 7th February, 1844, is received. Why the money was not paid, or the note given, the Court has no evidence. Nor is there any evidence as to the time when the defendant's objection arose, or was communicated to the complainant.

Mr. Minns was called for the defence. He has been the overseer for the defendant since January, 1844. He said that in the early

part of 1846 he received a note from the complainant, written to him as the agent of the defendant.—The Solicitor of the complainant insisted that the note should be produced.—This was not done. The witness proceeded to say that since February, 1846, the defendant had not occupied or intermeddled with the land. He said defendant wanted the land for planting. If the line were put where Joyner put it, he could not use it for swamp privileges. There would not be so much difficulty, if the line were put

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where *defendant contends. The run of the branch was considered the Rogers line. X examined. The defendant's object in the purchase was the upland; that was his main object. Witness would consider the range of great use. Defendant has between three and four hundred acres of swamp, besides this. There are not more than five or six acres of swamp in the land agreed to be purchased, if the agreement covered the Rogers tract. It was all open uninclosed, and could not be safely inclosed. X X examined. Complainant objected to defendant's cattle ranging on the swamp land.

The evidence of Gayle and of Minns, with the letter of the defendant, constituted the whole of the testimony. From that evidence the Court can perceive no satisfactory reason why the defendant should not comply with his contract, as established, and especially as so fully recognized in his letter of the 7th February, 1844.

It was suggested that the complainant had rescinded the contract by the letter to the defendant's overseer in February, 1846. But there was no evidence of the contents of that letter, and the defendant declined to produce it. It is very certain, however, that if a purchaser is in possession of land, and has not paid the purchase money, this court would restrain him by injunction from committing waste or doing any act to the injury of the vendor.¹ But there is no other proof than that the defendant, after cutting, clearing and planting the land for five or six years under a contract of purchase, abandoned the possession in the spring of 1846. The bill was filed 10th April, 1847.

It is ordered and decreed that the complainant deposit with the Commissioner of this Court, for the defendant, a conveyance of the premises; and that the defendant pay to the complainant the sum of six hundred dollars, with the interest from the 1st January, 1842, together with the costs of these proceedings.

The defendant moved the Court of Appeals to reverse the decree of the chancellor, on the following grounds.

1st. Because the contract, as alleged in the bill, was not proved by two witnesses, and was denied in the answer.

2d. Because there was no proof in the

¹ Sugd. 217.

case to justify the chancellor in stating in the decree that Joseph Palmer, senior, devised this land to complainant, his son.

3d. That the notice of the complainant in February, 1846, as set out in the bill, was a rescission by him of the contract to purchase.

4th. That his Honor decreed full interest, although from February, 1846, defendant, by order of complainant, was not in possession of any of the said land.

5th. That there was no proof that the witness, Gayle, was the agent of defendant in the transaction, or acted for him in any other capacity than overseer.

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*6th. That there was nothing in the proof to overrule the defendant's plea of Statute of Frauds.

7th. That the chancellor erred in requiring defendant to receive the title of complainant, without any proof that the title to the said land was in him, more especially as an order had been made in the case, by chancellor Harper, at June Term, 1847, as follows:—

"On motion of F. J. & M. Moses, defendant's Solicitors, it is ordered that it be referred to the commissioner to enquire and report whether the title to the land referred to in the said bill is vested in fee in the complainant, and if so vested, whether the said complainant can make an unencumbered title for the same."

And although timely notice was given to complainant's Solicitor, that under the said order, defendant would require complainant to submit his title, on reference, before the commissioner.

8th. Because the said decree was, in other respects, against equity and justice.

F. J. & M. Moses, for the motion.
Miller, contra.

Curia, per DARGAN, Ch. The defendant has moved to reverse the decree of the Circuit, on a variety of grounds: the first of which is, "that the contract, as alleged in the bill, was not proved by two witnesses, and was denied in the answer." The contract, as alleged in the bill, was substantially proved by G. D. Gayle, who represented himself as the defendant's agent, when the land was surveyed. The defendant himself, in his answer, admitted a parol contract, not differing materially from that charged in the bill. In the opinion of this Court, the Chancellor was well warranted, on the evidence, to decree a specific performance of the agreement.

The second ground of appeal is that, "there was no proof in the case to justify the Chancellor in stating in the decree, that Joseph Palmer, sr. devised this land to the complainant, his son." There was, in fact, no proof on the trial, that the complainant was the devisee of the vendor, Joseph Palmer. As a general rule, the purchaser of land

would not be coerced by a decree of this Court, to perform his contract, without an investigation as to the title. But cases not unfrequently occur, in which the vendee will be considered as having waived his objections to the title, and will be decreed to perform, and to accept such title as the vendor is able to give. *Burroughs v. Oakly*, 2 Swanst. 168; *Fleetwood v. Green*, 15 Ves. 594; *Van Lew v. Parr*, 2 Rich. Eq. 321. The case of the Margravine of Anspach v. Noel, 1 Madd. R. 316, is very similar in its circumstances to the present case. In the case cited, the purchaser took possession of the premises, in pursuance of the terms of

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the agreement, within a short time after its execution, and very soon afterwards received an abstract of title, to which he made no objection, until about two years after it was delivered to him. In the mean time, he made alterations in the premises, and let them; and had written a letter, offering excuses for delaying payment of the purchase money. An inquiry into the title was refused, and a specific performance was decreed. The Vice Chancellor, Sir Thomas Plumer, says, "the alterations of the premises, and the letting of them, were acts strongly indicating an approval of the title." The letter of the 4th January, in which the defendant expresses his vexation at being obliged to delay payment of the purchase money, seems founded on his approval of the title; for if the title was objectionable, he could not accuse himself of delaying payment of the purchase money. Until the title was completed, he was not bound to pay, &c. It would be difficult to conceive a case more parallel with the one now before us. In the latter, the complainant's deviser sold the land to the defendant in 1841. In the same year, the defendant went into possession of the land, and continued in possession until 1846. In 1842 the land was surveyed, in the presence of the defendant's own agent, and the lines run, without any objection being made, either as to the quantity set off to him, or the sufficiency of the title. In the mean time, the defendant, with a knowledge on the part of his agent, and, therefore, of himself, of the lines which had been run, and the quantity embraced within those lines, continued to occupy the land, to treat it as his own, and to make extensive alterations, by clearing and cultivating large portions of it. And during the continuance of his possession, as in the case of the Margravine of Anspach v. Noel, we find him addressing a letter to the complainant, offering apologies for the nonpayment of the purchase money, and expressing a strong desire to pay at an early day, and as soon as his finances, (which had been deranged by disasters to his crop) would admit. In this letter, not a syllable of suspicion is breathed upon the title. No objection of this character is made, until after the bill is filed.

There is now no specific objection made as to the title. Nor does it appear that it is actually defective in the slightest particular. Under these circumstances, this Court is of the opinion, that the defendant has waived his right to object to the sufficiency of the complainant's title; or, to take the most favorable view of the case possible, as to him, he has placed himself in a position in which the onus would be shifted from the complainant's shoulders to his own, and in which it would be for him to shew that the complainant had no title.

The third ground of appeal is that "the notice of the complainant, in February, 1846,

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as set out in the bill, was a *rescission of the contract." It must be remembered that the defendant, without paying the purchase money, or in any way complying with the conditions of the contract, was in possession, had extensively cleared, and was cultivating the land. Under these circumstances, the complainant addressed the defendant a note, to the effect that he must cease all further use and cultivation of the land, until he had complied with the conditions of the purchase. This, the defendant says, was a rescission of the contract. It is certainly a fanciful view of the subject, to construe an act into a rescission of the contract, which was, in fact, a direct claim and demand for its fulfilment, according to its terms. The complainant, in that notice, did nothing more than he was entitled to do; to call upon the defendant to suspend his alterations, and his acts of waste, until he had complied with the conditions of the sale. In doing this, he did only what this Court would have enjoined and enforced, if its interposition had been sought.

The fourth ground of appeal is that "his Honor decreed full interest, although, from February, 1846, defendant, by order of the complainant, was not in possession of any of the said land." The view taken of the last ground, applies with full force to this. The defendant was the party in default. He had been inducted into the possession, soon after the execution of the contract; at which time he should have paid the purchase money. The complainant was ready to make him titles, and had, several times, called on him to consummate the purchase. The delay was entirely on the part of the defendant, until at length the complainant, weary at the delay, required him to suspend the use of the land until he had complied with the terms of the contract. If he has not, from 1846, enjoyed the use of the land, as an equivalent for the interest, it is his own default.

The fifth ground of appeal is that "there was no proof that the witness, Gayle, was the agent of the defendant in the transaction, or acted for him in any other capacity than that of overseer." On this ground it is sufficient to say, that the Chancellor, in his decree, reports this witness as saying that

when Dr. Peter Palmer came with a surveyor to survey the land, the witness "went with them, as the agent of the defendant, and they went round the lines."

The sixth ground of appeal is that "there was nothing in the proof to overrule the defendant's plea of the statute of frauds." The provisions of the statute of frauds have no application to a case like the present. The doctrine is too familiar to call for extended comment. The case is relieved from the operation of the statute, by the contract having been fully performed on the part of the complainant, so far as he was able to per-

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form. The contract was, of course, *null in its inception. But the complainant had let the defendant into the most full and complete possession, and was ready and insisted to give him titles, and to receive the purchase money. It is almost supererogation to say, that the statute of frauds has no application to such a case.

The defendant's seventh and last ground of appeal is, "that the Chancellor erred in requiring the defendant to receive the title of the complainant, without any proof that the title to the land was in him; more especially as an order had been made in the case by Chancellor Harper, at June Term, 1847, as follows:—On motion of F. J. & M. Moses, it is ordered that it be referred to the commissioner to inquire and report whether the title to the land referred to in the said bill, is vested in the complainant, and if so vested, whether the said complainant can make an unincumbered title for the same." The objection contained in the first part of this ground of appeal,—(that in reference to the complainant's ability to give a good legal title) has been considered and disposed of, in the remarks which I have made upon the second ground of appeal. That part of the seventh ground of appeal which relates to the order of reference as to the title, is also unavailing. An order of reference as to the title, in a case like the present, is administrative. It was not, in any sense, a judgment upon any of the rights of the parties involved in the pleadings; but was intended, merely to facilitate the investigation, and enable the Court to adjudge. As such, it was liable to be recalled by the Chancellor who made it, or by any succeeding Chancellor. This order of reference to the commissioner, as to a preliminary inquiry, related to a question which the Chancellor was competent to examine. The Commissioner not being ready with his report, the Chancellor had a right, himself, to examine into the matters referred to the Commissioner—or, in other words, there was no original necessity for the order of reference to have been made. It is a rule of practice founded on convenience. If the report of the Master had been submitted, and he had found against the title of the com-

plainant, it by no means follows but that the defendant would still have been decreed specifically to perform his agreement, and to have rested for his security on the warranties of the defendant; because he had done acts by which he had waived his right to object to a defective title as a ground of non-performance. The existence of the order of reference as to the title, might possibly have been a good ground for a motion to continue on the part of the defendant. He might have alleged surprise. But if I am not wrongly impressed, the defendant himself insisted that the trial should go on, notwithstanding the report had not come in, and the reference had not been held.

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*It is ordered and decreed, that the appeal be dismissed, and the decree of the Circuit Court be affirmed.

The whole court concurred.

Decree affirmed.

3 Strob. Eq. 24

W. W. BROWN et al. v. W. E. JAMES et al.

(Columbia. May Term, 1849.)

[Wills \hookrightarrow 832.]

Testator, after directing that his just debts should be paid, made specific bequests of all his personal property; subsequent to the execution of the will, he entered into an agreement for the purchase of land, took possession and died before the purchase money became due—*held*, that if the agreement should be carried into specific execution, the land must be applied to the payment of the purchase money, before resort could be had to property specifically bequeathed.

[Ed. Note.—Cited in *Henry v. Graham*, 9 Rich. Eq. 108; *McFadden v. Hedley*, 28 S. C. 323, 5 S. E. 812, 13 Am. St. Rep. 675.

For other cases, see Wills, Cent. Dig. §§ 2139–2155; Dec. Dig. \hookrightarrow 832.]

[Wills \hookrightarrow 830.]

In South Carolina, the whole estate is charged with the payment of debts, but a testator has the right to prescribe a law for the disposition of his estate, which is obligatory upon all claiming as volunteers; and the inquiry always is, has the testator expressed an intention to have his assets marshalled in a different manner from that prescribed by law?

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2139, 2150; Dec. Dig. \hookrightarrow 830.]

[Wills \hookrightarrow 836.]

In the absence of any special direction by the testator, certain rules have been adopted in the marshalling of assets; one of which is, that descended real estate shall be applied to the payment of debts, before a resort is had to personalty specifically bequeathed.

[Ed. Note.—Cited in *Henry v. Graham*, 9 Rich. Eq. 108; *Laurens v. Read*, 14 Rich. Eq. 267.

For other cases, see Wills, Cent. Dig. § 2151; Dec. Dig. \hookrightarrow 836.]

Before Dunkin, Ch., at Sumter, June Term, 1848.

The facts of the case appear fully in his Honor's decree.

Dunkin, Ch. By the will of James M. Brown, he directs that all his just debts and funeral expenses should be paid, and after payment of his just debts and funeral expenses, he bequeaths two inconsiderable pecuniary legacies to charitable uses, an annuity of \$70 to his father, and \$1.70 cents to each of his brothers and sisters. All his personal property, consisting of negroes therein named, stock of cattle, horses, &c. he bequeaths absolutely to James McBride, son of Samuel and Martha McBride. The will was executed 10th May, 1844. Some months afterwards, to wit, on the 15th August, 1844, the testator contracted, in writing, with Wm. E. James, as the agent of Niel McCoy, for the purchase of two adjoining tracts of land on Black River, containing thirteen hundred acres, for \$3,000, the price to be paid on the 1st of January, 1845, at which time titles were to be delivered, and in the meantime, the testator entered into possession of, occupied, and made improvements on the premises.—About the 1st of December, 1844, the testator departed this life. Samuel McBride, who had been

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appointed executor of his will, declined to qualify, and the defendant, William Lewis, Ordinary of Sumter District, took possession of the estate, under the provisions of the Acts of Assembly in such cases made and provided. The complainants are the heirs at law of the testator, and the bill is filed for a specific performance of the written contract by the vendors, and for payment of the purchase money out of the personal estate of the testator. The contract, as has been said, was in writing, under the hands and seals of the respective parties, and after stating the terms, it was provided that, "if either party should refuse to perform the agreement, then he was to pay the other \$1,000, as the liquidated damages agreed upon between the said parties for the said breach of contract."

The answers of James and McCoy express their readiness to comply with the contract and execute titles, provided the purchase money be paid within a reasonable time. The complainants aver that they are prepared to supply any deficiency, if the personal estate of the testator should prove insufficient to discharge the debt.

The Ordinary rather interposes a plea to the jurisdiction, on the ground that, being in possession of the estate under an Act of the Legislature, parties had no right to call him to account for the same, "or for any application of it whatsoever."

The Ordinary also submits, that by the terms of the agreement, either party was at liberty to refuse to comply, by paying the liquidated damages, and that he is ready to do. The rights of the legatees are also insisted on in their respective answers.

It may be as well first, to consider the case

without reference to the Acts of the Legislature on the subject of the Ordinary's duties.

When a contract is made for the purchase of an estate, Equity considers things agreed to be done as actually performed. "The death of the vendor or vendee before the conveyance, or even before the time agreed upon for completing the contract, is, in Equity, immaterial."¹ The vendee may devise the estate before a conveyance, and that although the estate is contracted for at a future day. Estates contracted for after the will, do not pass by it.² But in such cases, the heir at law will be entitled to the estate for his own benefit, and if not paid for, the purchase money must be paid out of the personal estate of his ancestor.³ In regard to this latter point, the subject is very fully discussed by Lord Eldon, in *Broom v. Monck*, 10 Ves. 597. The only inquiry is, whether at the death of either party the contract was such as would have been enforced. "Whatever," says he, "is the state of liability of the party himself, to take at his death, must be the state of liability to be considered upon ques-

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tions *between those representing him after his death. When he died, all questions between the real and personal representatives were closed by his death without rescinding the contract."⁴ If the title of the vendor was such as he could require the vendee to accept, the heir is entitled to a specific performance, and to have the purchase money paid from the personal estate of the ancestor. In other words, the relative rights of the parties before the Court (supposing McCoy's title valid,) are to be considered as if the testator had not only possession of the premises, but a valid conveyance, the purchase money not being payable until a month after his decease.

But there are other principles, which it is also necessary to consider. The complainants, as heirs at law of the testator, do not propose absolutely to take upon themselves the performance of the contract made by their ancestor, and pay the purchase money, but they require the personal estate of the testator to be exhausted, and express their readiness to make up the deficiency; in other words, unless the Court should give to the heirs the advantage of first applying the personal estate to the payment of the consideration money, they do not insist on a specific performance. This renders it important to examine the relative rights of the heirs and legatees in marshalling the assets. The complainants can desire no more than that the premises should be regarded as real estate descended, as if the testator had received a conveyance before his death, but died leaving the purchase money unpaid. If

this were a case of intestacy, and the matter were for adjudication in Westminster Hall, the principles to which the Court has heretofore adverted, would be strictly applicable. But even in England, legatees are entitled to an equity which is well recognized, and on which mere distributees cannot insist. The rule there is, that if the personal estate, which is the only fund for pecuniary legatees, has been appropriated to the satisfaction of creditors, the legatees have an equity to stand in the place of the creditor, and be recompensed, to that extent, from the real estate descended. *Pell v. Ball*, Speers Eq. R. 48. "In the case of legatees," said Lord Eldon in *Aldrich v. Cooper*, 8 Ves. 396, "against assets descended, a legatee has not so strong a claim to this species of equity as a creditor; but the mere bounty of the testator enables the legatee to call for this species of marshalling, that if those creditors having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not;" nor do these principles seem to be in any manner impugned, but rather sustained, by *Warley v. Warley*, Bail. Eq. R. 397, cited for the complainants. It is there ruled that the real estate descended,

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is applicable to the payment of debts *in preference to personal estate specifically bequeathed. It was further held that a bequest of the testator's whole personal estate, or of the residue after specific legacies out of it, must, for this purpose, be regarded as specific in this State. "I conclude," says the Chancellor, "that where a testator bequeaths his whole personal estate, and suffers his land to descend, or where, after giving specific legacies, he gives the residue, this is to be considered specific, and the lands descended, are first liable to debts." If the bequest be, however, "of the residue of his personal estate, after payment of his debts," that is equivalent to a charge on the personal estate, or a declaration of the intention on the part of the testator, that his debts should be paid from that source, and only the surplus pass to the residuary legatee. But the bequest to James McBride is not of "a residue." The language is, "I give and bequeath to James McBride all my personal property, consisting of the following negroes, viz: Jinney, Robert, Milly, Henry, and Louisa, together with their future issue and increase; also, my stock of cattle, horses, &c. to him and his heirs forever. I desire that the several legacies above mentioned be delivered immediately after my decease, or as soon thereafter as my executor, hereafter named, shall think proper." The only other legacies besides that to James McBride, were \$100 to the Theological Seminary at Columbia, and a similar sum to the Brick Church at Salem.

If the bequest to James McBride had been simply "all his personal property," it would

¹ Sugd. Vend. 451.

² Ibid.

³ Ibid.

⁴ P. 606.

have fallen precisely within that class which Chancellor Harper says must in this State be regarded for this purpose as specific. But if the language had been, "I bequeath to James McBride the following negroes; Jinney, &c., with their future issue, also my stock of cattle, horses, &c., comprising all my personal property," could there be any doubt that the legacy, at least quoad the enumerated objects, would be specific?

It is almost the universal practice of testators, from an instinctive regard to justice, first to provide that their debts shall be paid, and then to dispose of their effects to the different objects of their bounty. Without any such proviso, the property bequeathed would of course be liable for debts, and the legacy might be defeated by the action of the creditors; but this liability does not affect the character of the bequest.

Mr. Roper says that a bequest of general personal estate, may or may not be specific.—In order to ascertain its character, he says, the same rule must be applied in ascertaining whether a money legacy be specific. It must be so described by the testator as to empower the legatee to say to the executor, deliver to me this or that article, for I am

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entitled to receive it in specie. In *Pell v. Ball* it is suggested that a bequest of general personal estate may be partly specific and partly general, or pecuniary, according to the intention of the testator. In the case before the Court, however, there could be surely no difficulty on the part of James McBride in calling on the executor, and requiring him to deliver the negroes named, the stock of cattle and horses, for he was entitled to receive them in specie, and the testator had added an expression of his desire that they should be delivered immediately after his decease.⁵

Having adopted the conclusion, that if the contract be carried into specific execution, the descended real estate must be applied to the payment of the purchase money, before resorting to the property specifically bequeathed, and also that the legacy to James McBride of the negroes, stock of cattle and horses, is for this purpose specific, it may not be for the advantage of the complainants to assume the contract, and the bill is not framed in that aspect. It would be entirely unsafe for the Court, upon the pleadings and proofs submitted, to pronounce a decree between the co-defendants, nor was such decree asked at the hearing.

It is ordered and decreed, that the bill be dismissed without prejudice—that the complainants pay their own costs and those of the defendants, James and McCoy—the costs of the other defendants to be paid out of the estate of the testator.

The complainants moved the Court of Ap-

⁵ 1 Rop. Leg. 184.

peals to reverse or modify the decree of the circuit Court, on the following grounds.

1st. That the Chancellor, in the said decree, declares that the land mentioned in the bill is subject to the payment of debts before the personal estate bequeathed; when the will, in fact, makes all its bequests subject to the payment of debts, and to take effect "after the payment of debts." And the contract for the purchase of the said land, being a debt, the personal estate given in the said will should be resorted to for payment, before real estate descended.

2d. That the said decree is contrary to equity.

Miller, for the motion.

Moses, contra.

Will of James M. Brown.

In the name of God, amen. I, James M. Brown, of Sumter District, and State of South-Carolina, being in health of body, and of sound and disposing mind, memory, and understanding—praise be to God for the same—do make this my last will and testament, in manner and form following, to wit:

Imprimis. I will and desire that all my

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just debts and funeral expenses be paid. Secondly. After the payment of my just debts and funeral expenses, it is my will and desire that the worldly goods which it hath pleased God to bless me with, shall be disposed of in the following manner, viz: I give unto the Theological Seminary of South-Carolina, in Columbia, one hundred dollars. I give to the Trustees of the Brick Church, in Salem, for the use of said Church, one hundred dollars. I give to my father, William Brown, seventy dollars per year during his natural life. I give to each of my brothers and sisters one dollar and seventy cents in full of my said estate. I give and bequeath unto James McBride, son of Samuel and Martha McBride, all my personal property, consisting of the following negroes, viz: Jinney, Robert, Milly, Henry, and Louisa, together with their further issue and increase; also, my stock of cattle, horses, &c., to him and his heirs forever. I desire that the several legacies above mentioned be delivered immediately upon my decease, or as soon thereafter as my executor hereafter shall think proper. Lastly. I do hereby nominate, constitute and appoint Samuel McBride sole executor of this my last will and testament, hereby revoking all others heretofore made by me.

In witness whereof, I have hereunto set my hand and seal, this tenth day of May, in the year of our Lord one thousand eight hundred and forty-four. James M. Brown. [L. S.]

Signed, sealed, and delivered, and published, by the above named James M. Brown, as and for his last will and testament, in the

presence of us, who, at his request, and in his presence, have subscribed our names as witnesses thereto.

Hardy Wilks.

William E. Smith.

W. H. Smith.

Curia, per DUNKIN, Ch. In England, where lands are not liable for simple contract debts, the Courts have been sometimes astute in giving such construction to a will as would charge the real estate and do justice to the creditor. In South Carolina, the whole estate is charged, by law, with the payment of debts; but, in the absence of any special direction by the testator, certain rules have been adopted in the marshalling of assets. One of these is, that descended real estate shall be applied before a resort is had to personalty specifically bequeathed. But, as has been elsewhere intimated, a testator has the right to prescribe a law for the disposition of his estate, which is obligatory upon all claiming as volunteers. The inquiry always is, has the testator expressed an intention to have his assets marshalled in a different manner from that prescribed by law?

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"Does there *appear, from the whole testamentary disposition taken together, an intention on the part of the testator, so expressed as to convince a judicial mind, that it was meant not merely to charge the estate secondarily liable, but so to charge it as to exempt the estate primarily liable?" If lands are specially devised for the payment of debts—if, as in *Pell v. Ball*, the testator directs his debts to be paid out of the proceeds of the crops of his estate, or, as in *Pinckney v. Pinckney*, 2 Rich. Eq. 218, where he directed them to be paid from the income of a certain plantation and slaves, in all such cases the testator's intention, being clearly manifested, is respected and enforced by the Court. He has set apart or indicated a fund for the payment of his debts, which must be first exhausted before the Court will permit an inquiry as to any other fund.

Can this be said of Brown's will? Is there any expression to satisfy a judicial mind that he had indicated any part of his estate for the payment of his debts in exoneration of any other part? If he had said, "Imprimis, I direct all my debts to be paid.—Secondly, after payment of my debts, I leave my Congaree plantation to A—and one hundred negroes, by name, to B," and then had left a large real and personal estate of which he made no disposition—would it be said that the debts must be paid, not out of the intestate estate, but out of the plantation devised to A, or the negroes specifically bequeathed to B? The language of the will is no more than this—"Imprimis, I desire that all my debts and funeral expenses be paid.—Secondly, that being done, I give," &c. The testator desired, in common parlance, to be just before he was generous; and this is the

only intention which the Court can collect from the expressions used.

It is ordered and decreed that the appeal be dismissed.

The whole court concurred.

Decree affirmed.

3 Strob. Eq. *31

*WM. HOLMES, Administrator of Elnathan Davis, v. WILLIAM LOGAN.

(Columbia. May Term, 1849.)

[*Guardian and Ward* 58.]

The general rule is that a guardian shall not exceed the annual income of his ward's estate in expenditures.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 264–282; Dec. Dig. 58.]

[*Guardian and Ward* 157.]

When the charges in the accounts of a guardian exceed the annual income of his ward's estate, he must make out, at least, as clear a case before the Court for the subsequent sanction of his expenditures, as he would have been required to do on an application for its authority to make them.

[Ed. Note.—Cited in *Anderson v. Silcox*, 82 S. C. 115, 63 S. E. 128.

For other cases, see *Guardian and Ward*, Cent. Dig. § 511; Dec. Dig. 157.]

Before Johnston, Ch., at York, June, 1848.

Johnston, Ch.—This case comes up again on report and exceptions. Amos Davis was the guardian of Elnathan Davis, the plaintiff's intestate, and the defendant Logan was one of the sureties to his bond.

The guardian and ward having died, the bill was brought by the administrator of the latter against the guardian's surety, for an account of the guardianship. The sureties pleaded in bar to the account, that there had been a settlement between the guardian and ward, and that the former paid over what he owed the latter. At the hearing in June, 1846, it was proved to Chancellor Johnson's satisfaction that the settlement, &c. which had been repeatedly admitted by the ward in his lifetime, took place shortly before he attained majority. The Chancellor, therefore, overruled the plea, and ordered an account.

The Commissioner filed a report the 27th of June, 1846, in which he stated that the payments purporting to have been made by the guardian, as shown by his settlement, were all admitted to have been made as stated in the guardian's returns, and strict proof of payment or production of vouchers, was not insisted on by the Solicitors for complainants.

The Commissioner in his report, however, had allowed the payments by the guardian, thus charged in his returns, so far as they exceeded the income of the ward's estate. To this report the defendant put in several exceptions, most of them, in substance, insisting that the breaking in upon the capital of the ward was occasioned by his education

and necessary maintenance. Chancellor Johnson observed in his decree upon the exceptions, July, 1846, "the principal charges against the ward in his account, are for board, tuition, and merchant's accounts, (no doubt for clothing.) The admission of complainant's intestate, that he had settled with his guardian and received his share of the estate, had reference no doubt to his accounts returned to the Commissioner, and furnish, I think, satisfactory evidence of the bulk of

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the *charges, and the facts of the disbursement, but they are not evidence of their necessity and propriety, because he was an infant when they were made." He proceeds to say, "That boarding, clothing and education, to a limited extent, was necessary, does not admit of a question—but the reasonableness of the sums expended on this account, can only be ascertained by proof of what they would cost on an economical scale. The report is, therefore, recommended to the Commissioner—and in restating the accounts he will charge the guardian with the sum in his hands, to which the ward is entitled, with interest on it, annually, from the time at which it was payable; and at the end of each year, deduct from the aggregate amount what he shall find to be reasonable allowance for board and clothing, as also any sum he may ascertain to have been paid for the tuition. Carrying the computation down to the time when the settlement is said to have been made between them, which is ascertained to have been at the time the guardian sold his property, with the view of removing to Alabama."

On the reference which subsequently took place, the Commissioner, instead of confining himself to an inquiry what was a reasonable allowance for board, tuition, &c. in the years charged in the guardian's returns, which had been admitted in the settlement, and also on the previous references, received evidence controverting the fact that the guardian had paid the sums, or furnished the board thus previously admitted, and which the Chancellor had ruled to be established by satisfactory evidence.

And he has reported in the alternative, one of which alternatives is, that the account be reduced according to the evidence thus admitted by him.

The plaintiff has excepted, because he should have reported absolutely that the account should be thus reduced, and not in the alternative.

I hold that the evidence was not competent, under the Chancellor's previous decree, and that the plaintiff, after admitting the fact of the expenditures, &c. could not offer evidence to controvert it at a future stage of the case. The necessary rule of proceeding is, that whatever is once established or adjudicated, either in law or fact, is conclusive ever afterwards in the same suit.

The decree of July, 1846, establishes the fact that the disbursements stated in the guardian's returns were made; leaving open the question whether the expenditures were reasonable or unreasonable in amount, and this adjudication was not to be disregarded. It is ordered that the exceptions be overruled, and that the report in the alternative excepted to be confirmed, and that the defend-

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ant do pay the plaintiff *the sum of one hundred and forty-eight dollars and seventy-six cents, reported to be due the 19th inst.

The complainant appealed, on various grounds, from both decrees.

Williams, for the motion.

Witherspoon, contra.

The following is the decree of the Appeal Court:

Curia, per CALDWELL, Ch.—The only question which this Court considers material to decide at present, arises out of the circuit decree of 1846: were the expenditures made by the guardian for the ward necessary and expedient?

The general rule is, that a guardian shall not exceed the annual income of the ward's estate in expenditures. When he ventures to encroach upon the capital, there must be some emergency to justify it: he ought to make a clear case of its being necessary and expedient to the ward. He is an agent and trustee appointed by the law in loco parentis, to discharge important duties to the child, and is generally informed of his powers and liabilities; there is scarcely any guardian but knows that when he is infringing upon the corpus of his ward's estate, he is acting in direct derogation of an established rule: the whole burden is, then, thrown upon him to show the emergency of the circumstances and the expediency of his expenditures, before the Court can approve of his conduct. Guardians are not to be encouraged in pursuing this irregular and often arbitrary and improper course, which almost invariably leads to litigation, and rarely bestows a benefit upon the ward.¹

Access to the Court is easy as it is always open, but when its authority is invoked to encroach upon the capital, its powers are exercised with extraordinary caution, and never without the clearest and most satisfactory proof—a doubt would defeat the application. When the guardian takes this high responsibility upon himself, he cannot complain that he must make out, at least, as clear a case for the subsequent sanction of his expenditures, as he would have been required to do on an application for its authority to make them.

The guardian's accounts extend through a

¹ Villard v. Roberts & Chovin, 2 Strob. Eq. 40, [49 Am. Dec. 654]; Prince & wife v. Logan, Speer's Eq. 29; Boggs et al. v. Reid, Car. Law J. 327.

period of more than four years, and the principal items are for board and merchants' accounts—the last item in the account is for board, \$245. Such lumping charges cannot be permitted to pass without scrutiny, and as the evidence does not show under what circumstances the greater part of the expenditures were made, it is impossible to say whether they were reasonable or not; before they can be allowed the proof must establish that they were necessary or expedient for the ward; his peculiar situation, his pursuits, age, ability, and even his expectancies, are circumstances that may have weight to

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show the reasonableness of extraordinary expenditures. But the evidence here is insufficient and unsatisfactory, and the case must be sent back for further proof as to the necessity and propriety of the guardian's charges in his accounts: neither the acknowledgments of the ward, or the admissions of the plaintiff's counsel, have dispensed with this proof.

The defendant has insisted on the statute of limitations, but he has not pleaded it. Generally parties are permitted to pursue their own course, without directions as to the form in which they should present their claim or defence, where the case is finally disposed of on the pleadings and proof; but as this case is to go back to the Circuit Court, the defendant ought to be permitted to put in such plea, if he sees fit to do so.

It is further ordered and decreed that the circuit decree of 1846 be modified, and the case be remanded to the Circuit Court for further proof of the necessity and expediency of the guardian's expenditures for his ward, and that the defendant have leave to plead the statute of limitations.

JOHNSTON and DUNKIN, CC., concurred.
Decree of 1846 modified.

3 Strob. Eq. 34

ELIZABETH JAGGERS v. JOHN ESTES.

(Columbia. May Term, 1849.)

[*Appeal and Error* 966.]

Motions for the continuance of a cause are addressed entirely to the discretion of the presiding Chancellor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3837; Dec. Dig. 966.]

[*Appeal and Error* 87.]

Granting an issue at law, except in cases where practice has made it a matter of right, is a discretionary act; but a mistake in the exercise of that discretion is a just ground of appeal.

[Ed. Note.—Cited in *Ex parte Trustees of Greenville Academies*, 7 Rich. Eq. 476; *DuPont v. DuBos*, 33 S. C. 398, 11 S. E. 1073.

For other cases, see *Appeal and Error*, Cent. Dig. § 586; Dec. Dig. 87.]

[This case is also cited in *Miller v. Anderson*, 4 Rich. Eq. 6; *Busby v. Byrd*, Id. 13, as to the question of delivery.]

Before Johnston, Ch., at Chester, July, 1848.

The Court of Errors having decided that the instrument of writing which was the subject of litigation in this case, was not testamentary, but if duly delivered, might operate as a deed, remanded the case to the Circuit, and directed a further inquiry as to its delivery.¹ On the case being called, the defendant applied for a continuance on cause shown, which motion was refused. He then moved for an issue at law, which was also refused. His Honor, after hearing the case, considered the delivery of the deed established, and pronounced a decree sustaining the complainant's claims under it. The defendant appealed, on various grounds, of which those which object to his Honor's rul-

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ing on the motions for a continuance and for an issue, were alone considered.

The following is the decree of the Court.

Curia, per DUNKIN, Ch. Thomas G. Jagers died in 1844. Certain slaves, which he held during his lifetime, and of which he died in possession, were bequeathed to the defendant. After the testator's death, the complainant filed a bill, claiming these slaves under an instrument executed by Thomas G. Jagers, on the 12th April, 1820. The claim was resisted by the defendant on two grounds, viz:—first, that the instrument of 1820 was testamentary in its character; and, secondly, that if intended as a deed, it had never been delivered. Chancellor Caldwell, who heard the cause in July, 1847, was dissatisfied with the evidence on the subject of the delivery. He says, "neither the attestation of the witnesses, nor the affidavit of its execution, contain any evidence of its having been delivered; that word generally, indeed almost invariably, used in deeds, seems to have been studiously omitted." He concluded, however, that the paper was testamentary, and, on that ground, dismissed the bill. On this point, his judgment was reversed by the Court of Errors, and the cause remanded, for the purpose of trying "the question as to the due delivery of the deed."

At the sittings for Chester, in July, 1848, the defendant applied for a continuance on cause shewn, which motion was refused. He then moved for an issue at law, which was also refused. The witnesses were then examined, (about ten in number.) The presiding Chancellor says, in his decree, that the only question was whether the deed was delivered. "The testimony," says he, "does not materially differ from that which was offered before Chancellor Caldwell." After reviewing the evidence, and weighing the degree of credit to be attached to the witnesses, the Chancellor considered the delivery of the deed established, and pronounced a decree

¹ 2 Strob. Eq. 343, [49 Am. Dec. 674.]

sustaining the complainant's claims. The principal grounds of appeal are, first, that the Chancellor should have granted the motion for a continuance, and, secondly, that there was error in refusing to order an issue at law to try the question of the delivery of the deed. On the first ground it is only necessary to remark, that motions for the continuance of a cause are addressed purely to the discretion of the presiding Chancellor, and it is difficult to conceive a case in which this Court could, with propriety, control or regulate the exercise of that discretion. It is impossible for an appellate tribunal to estimate all the circumstances so well as the magistrate who presided on the Circuit. He feels this responsibility, and the general tendency is to postpone a cause, rather than

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hazard what may seem an *irremediable injury. But this frequently works great injustice to the vigilant suitor who has used every diligence to obtain an adjudication of his rights, by a court which is held but once in a year.

Under the second ground, the defendant has insisted that he was entitled to a trial by jury under the constitution, inasmuch as, until the decision of *Young v. Burton*, 1 McM. Eq. 255, the Court of Equity had never assumed jurisdiction of causes for the specific delivery of slaves. But this is a misapprehension. In *Young v. Burton* the Court do not assume to exercise any new jurisdiction, but rather to apply the familiar principles of the Court to another class of cases. According to that decision, the Court of Equity had always the same authority which it then exercised. It was offered as a practical objection to that decision that it would withdraw the determination of questions of fact from the appropriate tribunal, but it was never doubted that, if the Court had jurisdiction, it might proceed with its ordinary machinery. But, without reference to any constitutional right, it was insisted that the question presented in this case was peculiarly proper for the consideration of the jury, and that the defendant's application for an issue should have been granted.

There are cases in which an issue at law is matter of absolute right, as in the case of an heir at law, contesting the validity of a will, who is always entitled to an issue *devisavit vel non*. "But there are many other cases," says Mr. Daniel, "in which issues will be directed; thus, if there is contradictory evidence between persons who are of equal credit, and have had equal opportunities of information, and the evidence is so equally balanced on both sides, that it becomes doubtful which scale preponderates, the Court will, in general, direct an issue, in order to relieve its own conscience, and to be satisfied by the verdict of a jury, of the truth or falsehood of the facts controverted, lest, taking upon itself to pronounce decidedly a

matter of such uncertainty, it might do injustice to one of the parties, by determining against the truth of the fact."² The Chancellor who last heard this cause, reports that, discarding, as unworthy of credit, the defendant's witness, Nancy Ward, "the issue of fact (to wit, the delivery of the deed) depends mainly upon the testimony of Roden and Rosborough." "There is no doubt whatever," says he, "of the veracity of these witnesses." The Chancellor has endeavored to reconcile the testimony of these witnesses; and this Court will not undertake to say that he has been unsuccessful. But it is not too much to affirm that the same testimony produced a different impression on the preceding Chancellor. This Court desires to intimate no opinion whatever on the effect of the testimony, and, therefore, abstains from any further remarks on the evidence, lest any intimation might be erroneously inferred.

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*Undoubtedly, granting an issue, except in cases where practice has made it a matter of right, is a discretionary act; but a mistake in the exercise of that discretion is a just ground of appeal. "I agree," says Lord Eldon, in *Hampson v. Hampson*, 3 Ves. & Bea. 41, "that a mistake in refusing to send the cause to a jury is a just ground of appeal, if the Court of Appeal should think that the contrary decision would have been a sounder exercise of discretion." In *Drayton v. Logan*,³ misreported in *Harper's Equity Rep.* p. 67,

² 2 Daniel Ch. Pr. 1285.

³ The following is the opinion of the Appeal Court in the case of *DRAYTON v. LOGAN*, delivered at its Sitting in March, 1824.

[This case is also cited in *Ivy v. Clawson*, 14 S. C. 273, as to the authority of a court of Equity to direct issues in a court of law.]

The bill in this case was brought for two objects: 1st. To set up and foreclose a mortgage from Dr. Isaac Chandler, deceased, (of whom defendants are legatees,) to Charles, Thomas and Glen Drayton. Or 2nd, If not succeeding in that object, to disaffirm the title of Doctor Chandler, and set up the title of complainants. At the hearing below the Chancellor directed an issue to the Court of Common Pleas, to ascertain whether there be any thing due on the bonds of Dr. Chandler; and the present motion is to rescind that order.

Much of the merits of the case have been gone into in the argument in this Court, but I shall not follow the counsel, as I deem it unnecessary where the question relates only to an order which embraces the merits no further than as it might affect them before a jury, and their verdict would come before the Court for a revision. The points, then, which have been pressed upon the Court, of adverse possession, length of time, and the effect of new discovered testimony, are all for the consideration of the Circuit Court, with whose province it would be wrong to interfere. Let us examine what would be the effect of this issue. We are told, and it is not denied, that issues are placed at the foot of the docket in the Court of Common Pleas, where they must await their turn for trial two, three or four years; then they are returned here and take their place upon our docket, where they must wait their call one or

the Court of Appeals recognized the decision in *Hampson v. Hampson* as the law of the Court, and reversed the order of Chancellor Gaillard, who had granted an order for an issue at law, under circumstances in which the Appeal Court thought it would have been a sounder exercise of discretion to have refused an issue. So we are of opinion that

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*this was a proper case for a jury, and that

two years longer. Under these circumstances I know of no calamity which can befall a suitor, more grievous than to have his cause sent down to a Court of Law. A delay of justice is an evil often as serious as a denial of justice. But further, to ascertain what is due upon the bonds of Doctor Chandler, the jury must go into the examination of various payments and make a long calculation before they can find a verdict, but for all this the Commissioner is far more competent. He can take more time than a jury. He can summon the parties before him and take up the evidence from day to day until he ascertains the amount due accurately. It need hardly be remarked at the present day that this Court, aided by the Com-

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missioner, entertains a peculiar *jurisdiction over long and intricate matters of account; where a jury would be involved in doubt and difficulty.

It has been objected that the question would depend upon the opinion of the Commissioner, which ought to direct the Court. But I apprehend not. He will state only matters of fact, and upon exceptions the Court will decide the legal point; and this is done every day. It is further objected that this is an interlocutory order, from which there cannot be an appeal. But it is laid down by Lord Chancellor Eldon, in the case of *Hampson v. Hampson*, 3 Ves. & Beames, that "a mistake in refusing to send a cause to a jury is a just ground of appeal, if the Court of Appeal should think that a contrary decision would have been a sounder exercise of discretion, but it is a competent exercise of the authority and duty of the Court in every case, and throughout every case, and in every stage, to determine according to its discretion whether it does or does not want that assistance." Then the rule laid down by his lordship must work both ways, and if an appeal will lie for refusing an issue, it will also lie for directing one, where it will operate as a hardship upon the complainant. It depends, to be sure, upon the discretion of the Court, but that ought to be a sound discretion, and not productive of an injury to the party. Besides, the Act of Assembly giving power to the Judges to hear witnesses in open Court, has in a great measure constituted them jurors, and where there is a doubt of the credibility of a witness, the counsel can easily, and do constantly, bring the matter before the Court. So that it appears a refusal to direct an issue would have been a sounder act of discretion.

For these reasons the order of the Circuit Court directing an issue must be rescinded; and the cause reinstated at its place upon the docket.

We concur in the decretal order.

WM. D. JAMES,
HENRY W. DESAUSSEURE,
THOMAS WATIES.⁴

⁴ The Reporter supposes that this opinion was delivered by Chancellor James, and was not concurred in by Chancellor Gaillard. The Court of Appeals in Equity, then, as now, consisted of four Chancellors.

the motion of the defendant for an issue at law should have been granted.

It is ordered and decreed that the decree of the Circuit Court be reversed, and that an issue at law be made up to try the question of the due delivery of the deed set forth in the pleadings.

CALDWELL, Ch., concurred.

DARGAN, Ch. In this case I have concurred in the order for an issue before a jury, for the trial of the question as to the delivery of the deed, not because I do not think that the refusal of the presiding Chancellor was a sound exercise of his admitted discretion in determining such a motion. On the trial before the Court of Errors, I

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was perfectly satisfied *that the delivery of the deed was sufficiently made out. On the second trial, I am again satisfied that the evidence fully warranted the Chancellor in the conclusion at which he arrived. I concur in the opinion expressed in the decree of this Court, that a motion for an issue is a matter of discretion for the presiding Chancellor. I also concur that an appeal lies to this Court, on the ground that the granting of a motion for an issue would have been a sounder exercise of that discretion, as it is said by Lord Eldon in *Hampson v. Hampson*. On determining the appeal, it is still a matter of pure discretion with this Court, whether the issue will be ordered or not.

I concur in the order for an issue, because a portion of this Court is not satisfied with the result of the trial on the question of the delivery of the deed.

Mathew Williams, A. W. Thomson, Defendant's Solicitors.

Decree reversed.

3 Strob. Eq. 39

BANYAN PAYNE et ux. et al. v. J. M. HARRIS et al.

(Columbia. May Term, 1849.)

[*Descent and Distribution* ⚡43.]

Under the Act of 1791 great grand children are per stirpes, entitled to take their distributive shares.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 122; Dec. Dig. ⚡43.]

[*Executors and Administrators* ⚡39.]

Leasehold estates go to the executor or administrator; and are distributable under the Act of 1791.

[Ed. Note.—Cited in *Poag v. Sandifer*, 5 Rich. Eq. 173, 174, 184; *Charles v. Byrd*, 29 S. C. 552, 8 S. E. 1.

For other cases, see *Executors and Administrators*, Cent. Dig. § 288; Dec. Dig. ⚡39.]

[*Limitation of Actions* ⚡73.]

The administrators having bona fide divided the estate according to his advice, and accounted before the Ordinary, held that the statute

of limitations obtained currency against the parties from the date of the division.

[Ed. Note.—Cited in *Long v. Cason*, 4 Rich. Eq. 63; *Pettus v. Clawson*, Id. 101; *Motes v. Madden*, 14 S. C. 492; *Fricks v. Lewis*, 26 S. C. 239, 240, 1 S. E. 884; *Ariail v. Ariail*, 29 S. C. 93, 7 S. E. 35; *Boyd v. Munro*, 32 S. C. 253, 10 S. E. 963; *Robertson v. Blair & Co.*, 56 S. C. 110, 34 S. E. 11, 76 Am. St. Rep. 543; *Kilgore v. Kirkland*, 69 S. C. 86, 48 S. E. 44.

For other cases, see *Limitation of Actions*, Cent. Dig. § 399; Dec. Dig. ¶73.]

[*Executors and Administrators* ¶313.]

The distributees of an estate which had been settled by the administrators, under the direction of the Ordinary, and who are subsequently let into a share thereof, are not entitled to interest upon their distributive shares previous to the filing of their bill.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1271; Dec. Dig. ¶313.]

Before Johnston, Ch., at York, June, 1848.

Johnston, Ch.—This was a bill to reform a division which had been made of the estate of Robert Harris, the intestate of the defendants McKee and James M. Harris.

The intestate died on the 27th September, 1841, leaving several children, &c. surviving him.

One of his daughters, Nancy, died in his lifetime, leaving two daughters, who also died in his lifetime, leaving each of them two children, one of which children became the wife of Banyan Payne during the life of the intestate. These parties live in Tennessee.

On the 13th of February, 1844, the ad-

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ministrators of the intestate came to an account, before the Ordinary of York district, touching the estate; and a division was made thereof among the children and grand children, excluding the issue of Nancy, who were great grand children of the intestate.

In this division were included the proceeds of certain leasehold estates, lying within the Indian boundary.

In making the division, the parties to it accounted for their advancements; and it appears that Josiah Harris, one of them, was indebted beyond his distributive share, and was, at the intestate's death, and still continues, insolvent.

The bill was filed 17th of May, 1848; it is admitted that Mrs. Payne was at that time 26 years of age, and her husband about 40. The other plaintiffs are minors.

The plaintiffs who are the grand children of Nancy, and great grand children of the intestate, have ever been, and are, as has been stated, citizens resident in Tennessee. Their bill seeks to reform the division of 1844, and to be let into a share of the estate; and states that they have been kept in ignorance of the division until lately.

The answer denies all concealment; and there is no doubt of the bona fides of the transaction.

Several questions have been made:

1st. Can great grand children take under the circumstances of this case? And how?

2nd. If so, can they claim a share of the leasehold estate?

3rd. Are not Payne and wife concluded by the division of 1844?

4th. If the settlement is to be opened, are the plaintiffs entitled to interest before the filing of the bill?

5th. How are costs to be decreed?

1st. I cannot hesitate upon the first question.

The first canon of the Statute of 1791, declares that the children of the intestate shall take among them equally.¹

Then the second canon is in these words: "The lineal descendants of the intestate shall represent their respective parents, and be entitled to receive and divide, equally among them, the shares to which their parents would, respectively, have been entitled had they survived the ancestor."² The next four sections are employed in declaring who shall take where "the intestate shall leave no lineal descendant," implying that wherever there is a lineal descendant he shall take, and the estate shall not go over.

Again, in laying down the law of advancements, the Statute speaks of the right of a child, "or the issue of a child," to take a distributive share alternatively; and "issue" is a word that extends to the remotest posterity.³

If one of the daughters of Nancy had sur-

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vived the intestate, the other being dead and leaving children, a question might have been made whether the surviving daughter could take in exclusion of her sister's children, or whether the surviving daughter and the children of the deceased daughter would not take "equally among them, per capita, as all coming within the description of lineal descendants of the intestate." Even in that case I think there is enough in the context and spirit of the Statute to show that the proper rule of distribution would have been per stirpes, and not per capita. But in the present case, where the daughters of Nancy left an equal number of children, all standing upon equal footing, and as "lineal descendants," entitled to "represent their respective parents," and to "receive and divide equally among them the shares to which their parents would, respectively, have been entitled had they survived the ancestor," there does not appear to be any room to doubt. They are entitled to come in for an equal share of the child's (Nancy's) part.

It is alleged, however, in the answer, that advancements have been made to this family. If so, this matter must be looked to. By the

¹ 1 Brev. 422, sec. 3.

² 1 Brev. 425, sec. 4.

³ 1 Brev. 424, sec. 15 and 16.

Statute already referred to, it is enacted that "nothing therein contained shall be construed to give any child or its issue a share of the intestate's estate, where such child or issue shall have been advanced by the intestate in his lifetime, by portion or portions equal to the share which shall be allowed to the other children." But where the advancement to "any child or the issue of any child," estimated at the death of the intestate, as explained in *McCaw v. Blewit*, 2 M'C. Eq. 90, falls short of a child's share, "then as much of the intestate's estate shall be distributed to such child or issue as shall" (correspond with the other children's shares,) and "make the estate of all the children to be equal."

I take it to be a sound exposition of these provisions, that in the division of an intestate's estate, it must be thrown into shares corresponding in number to the number of children who survived him, and of pre-deceased children who have left issue living at his death. The issue of a pre-deceased child to come in for a child's share, which is to be sub-divided among them, ratably per stirpes. But this share, in the first instance, and before sub-division, is to be regarded as an unit, (or child's share,) and to be chargeable with all advancements made either to the original stock child, or any of the child's descendants, standing at the time of the advancement in the character of heir apparent, and who, if the intestate had died at the time of the gift, would have taken the share or a part thereof. An advancement of Nancy, beyond a child's part, would exclude her issue entirely. A similar advancement to her daughters, or to either of them, if they sur-

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vived *her, and stood at the time of the advancement as heirs apparent, would have a similar effect. If neither Nancy nor her daughters were advanced, but a full child's share was advanced to their issue, (the present plaintiffs,) or either of them, after they became heirs apparent, the same result would follow. If the aggregate of all the advancements to Nancy, her daughters, and their children, made successively when the respective donees stood in a condition to inherit, provided the donor had then died—if the aggregate of all these exceed a child's share, the plaintiffs are not entitled to any part of the intestate's estate. If the aggregate falls short, they are entitled to so much as, with the advancements, will make up a child's portion of the estate. In the sub-division of whatever may be coming to this family, a similar principle of equality should be observed, for the parties must take per stirpes or representation. If one of the daughters received, by advancement, more than one half of a child's part, she would not have been compelled to relinquish it, nor will her children. But the residue must be distributed to her sister's children; and

so, if the advancement was less than a half, the residue must be so distributed as to produce equality.—The same rule must be observed as to advancements, if any made to the plaintiffs.

Such, it appears to me, must be the rule of distribution, if the plaintiffs are entitled to maintain this bill.

There is another point which must be attended to in the same event. In re-casting the accounts the administrators must not be charged with any part of Josiah Harris's debts to the intestate, except so far as, by the account, the same may be set off against his distributive share of the estate.—The administrators must not be sufferers in regard to this debt, which was not lost through their neglect.

2. The second question might have been more difficult but for the uniform practical construction of the Act of 1791.

Leasehold estates go to the executor, and all personal estate within the meaning of the Act; which intended to include, under that term, whatever was to be administered by the personal representative of the deceased.

3. Under the third question it was contended that the plaintiffs, Payne and wife, are barred by the statute of limitations; which is admitted to be pleaded.

The division was made, in the records of the Ordinary's office, the 13th of February, 1844, and this bill was filed the 17th of May, 1848.

It was ruled in *Moore v. Porcher*, Bail. Eq. 195, that if an executor or other express trustee does an act purporting to be a full execution of his trust, the statute will be applied from that time, as in cases of implied trusts.

I take it, that an act done in a public office,

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open for the *information of parties interested, must be taken notice of by them; and that the statute obtained currency against the parties mentioned, from the date of the division.

But Mrs. Payne, whose right is in question, was a femme covert, and resident beyond the limits of the State: and by the Act of 1712, (which, so far as has been intimated, has not been altered in this respect,) it is provided that, "if any person or persons entitled to any action, &c." "actions of accounts, debts," &c. "at the time of any such cause of action given or accrued, shall be beyond seas or femme covert, &c. shall be at liberty to bring the action," at any time within five years after such cause of action given or accrued, &c.

The bill appears to have been filed within the time thus limited, and the objection must be overruled.⁴

4th. Upon the fourth question I am of

⁴ [*Forbes' Adm'r v. Foot's Adm'r*] 2 M'C. R. 331 [13 Am. Dec. 732.]

opinion that, under the circumstances, the plaintiffs are not entitled to interest, between the division and filing of the bill.

The result is, that the plaintiffs are entitled to have the division reformed to the extent and upon the principles indicated in the foregoing observations, and that the parties to that division, who are all parties to this suit, must account accordingly in respect to what they severally received in the division.

It is ordered that an account be taken and reported accordingly.

Each party to pay costs, according to his interest in the estate; meaning thereby, not what may actually result to each party, but the interest claimed by him or her.

The complainants appealed from this decree, and moved the Court of Appeals to modify the same, on the following ground:

Because his Honor held that the defendants, McKee and Harris, the administrators of Robert Harris, were not accountable for interest on the distributive shares of the estate of said Robert Harris, due to the complainants, until the filing of their bill: whereas it is respectfully submitted there are no circumstances, in this case, to excuse the administrators from the payment of the usual interest, and that at all events they should account to the two minors, complainants, for interest on their share from the time the estate became distributable.

Williams, Complainants's Solicitor.

The defendants also appealed, on the following grounds:

1st. Because his Honor erred in deciding that the great grand children were entitled to take.

2nd. Because his Honor erred in deciding that Banyan Payne and wife were not barred by the statute of limitations.

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*3rd. Because leasehold estates are not distributable under the Act of 1791.

Witherspoon, Defendants's Solicitor.

Curia, per DUNKIN, Ch.—This Court concurs generally in the views presented by the Chancellor. It is deemed necessary only to add a word in explanation of the reason for restricting the claim of interest.

The intestate died in 1841. In February, 1844, a settlement was made with the distributees, under the advice and direction of the Ordinary. "There is no doubt," says the Chancellor, "of the bona fides of the transaction." If the complainants had been sui juris, and had been parties to this settlement, they would probably have been barred from impeaching it after an acquiescence of more than four years. But they were not bound, and are not precluded by the erroneous view taken by the Ordinary. It does not follow, however, that they are entitled to

recover interest. After distribution of an estate, an unsatisfied creditor may recover his demand from the distributees or legatees who have received their proportions. But in such case the refunding party is never charged with interest. Such is declared to be "the rule of the Court" by Lord Eldon in *Gittins v. Steele*, 1 Swanst. 199.

In this case the administrators are also among the distributees. They are made responsible for interest, until the settlement in 1844. After that time they may very well have treated the shares allotted to them as their own. No demand was made until 17th May, 1848, and we think that, in any view, they fall within the equity of the rule declared in *Gittins v. Steele*.

The decree of the Circuit Court is affirmed, and the appeal is dismissed.

The whole court concurred.

Decree affirmed.

3 Strob. Eq. 44

JOHN LEONARD v. JAMES A. M'COOL.

(Columbia. May Term, 1849.)

[*Landlord and Tenant* ⚡302.]

The Court of Magistrates and Freeholders created by the Acts of Assembly to try cases between landlord and tenant holding over, is invested with the ultimate and exclusive jurisdiction over the matters submitted to it under the provisions of the law by which it is created; and there is no right of appeal from its judgments.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1298; Dec. Dig. ⚡302.]

[*Landlord and Tenant* ⚡315.]

The judgment of this Court of Magistrates and Freeholders, is binding and conclusive upon the parties in three particulars; first, as to

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the question of the *tenancy; secondly, as to the identity of the premises demised; and thirdly, as to whether the lease has expired, and the tenant is holding over.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1328; Dec. Dig. ⚡315.]

[*Judgment* ⚡619.]

If a matter, which legitimately might have been, was not made a ground of defence before a Court of exclusive jurisdiction, or if made was overruled, the judgment of the Court is conclusive upon the parties.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1132, 1667; Dec. Dig. ⚡619.]

[*Judgment* ⚡564.]

Whether a Court have concurrent jurisdiction merely, or whether the law creating it give the right of appeal, and an appeal be not formally prosecuted, its judgment will be final and conclusive between the parties.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1015–1017; Dec. Dig. ⚡564.]

[*Landlord and Tenant* ⚡311.]

[The failure of the tenant to make a valid defense gives him no ground on which to ask an injunction to restrain the execution of a judgment in summary proceedings.]

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1324; Dec. Dig. ⚡311.]

Before Johnston, Ch., at Chester, July, 1848.

Johnston, Ch. It is seldom that we meet with a case of greater apparent hardship than this; or one in which, if there be no remedy, the results of the law appear to be more at variance with the dictates of natural justice.

It sometimes does happen that the equity of a specific case conflicts with the rules of law. Under such circumstances, a still higher justice than that of the particular case requires that it be sacrificed to general principles.

The general good indispensably requires that those comprehensive rules of conduct, without which social order or government cannot exist, should be firmly upheld, and never relaxed, nor suffered to be shaken, for the benefit of an individual. This unhappy alternative is, however, very seldom presented.

In many cases, where the rules of law appear, at first, to be opposed to the justice of the particular case, more thorough investigation and more mature reflection discover that there is no real or essential conflict between them. Those systematic principles which the human judgment has originated and instituted for regulating social conduct and protecting social interests, must necessarily partake of the imperfection and infirmity inherent in the fountain from which they flow.

But it should be remembered that these principles are the best results of the attentive observation, the profound reflection, and the experience of ages. They are the conclusions of sound and upright minds, cautiously attained and gradually accumulated and modified.

They have been drawn from a careful and patient consideration of actual cases, under almost every imaginable variety of circumstances; in which the bearing of each case was practically developed, and its relation to the wide range of social interests, suggested in energetic and sifting arguments, by parties contending under the stimulus of adverse claims.

A system of law thus built up, rarely defeats any right founded in morals; and, therefore, feeling in my conscience that the justice of this case is with the plaintiff, I have bestowed unusual and long continued

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attention upon it, with a most anxious desire to discover some means of relief for him, consistent with established principle.

This is substantially the case reported under the style of the State ex relatione John Leonard, 3 Rich. Rep. 111.

The defendant, McCool, has obtained the judgment of a Court of Magistrates and Freeholders, ousting the plaintiff, Leonard, from certain premises described in the pleadings, which he alleged he demised to him, and the possession of which he held over

after the lease expired. The bill is brought to enjoin this judgment, and for general relief.

The land originally belonged to Jane McCool. On the 29th of August, 1837, she conveyed it, in fee, to her daughter, Letitia Hardin, and her three children, Mary J. Hardin, James L. Hardin, and Elizabeth L. M. Hardin, (who were living with her on the land, at the time, or came thither shortly afterwards,) reserving to herself, in the deed, "a sufficient and plentiful support from the above mentioned land, during the time of her natural life."

Some time in 1843, Letitia Hardin, one of the grantees, died intestate; and Mrs. McCool and the three children of her deceased daughter remained the exclusive occupants of the premises. It is in evidence that these children were then minors; Mary, the oldest of them, having been born the 12th of August, 1821; James, the 3rd of June, 1823; and Elizabeth, the youngest, the 29th of January, 1825.

In this condition, Mrs. McCool continued in the possession until the close of 1843, endeavoring to support herself on the land, with the aid of her grand children's labor; but finding it difficult to do so, she removed to the residence of her son, the defendant, McCool, taking the youngest grandchild with her. She died there in January, 1845.

McCool, by what authority does not appear, undertook to let the premises. He does not appear to have ever been in the actual possession of any part of them at any time.

He sets forth, in his answer, the copy of a deed, by way of quit claim, bearing date the 22nd of December, 1843, purporting to have been subscribed by James L. Hardin, and attested by Benjamin Alverson's mark; and another also by way of quit claim, bearing date the 29th of November, 1845, purporting to have been subscribed by Elizabeth L. M. Hardin, and attested by David Bryan. The consideration stated in the first deed is \$70, and in the last \$50. Both these grantors were minors, at the time these alleged deeds respectively bear date. But this is not the only objection to them. Neither of the deeds was attempted to be proved.

He states in his answer, moreover, that when Mrs. Hardin, his sister, died, she was indebted to him, and that these deeds were executed with a view to enable him to raise the amount of his debt, by renting the land.

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But there is no proof of any such debt, nor of any such understanding, or agreement; if, indeed, the infant children could have made any such.

He began to rent the land by letting it to the plaintiff, Leonard, for the year 1844. The supposed deed of Elizabeth could have been no authority for that, for it did not then exist.

There was no formal lease. The rent was

secured by Leonard's note, which McCool has passed off.

The premises were again let for the year 1845, by the following note:

"\$40. On or before the 1st January, 1846, I promise to pay James A. McCool, or bearer, forty dollars, it being for the hire of the plantation whereon he now lives. In witness whereof I now affix my hand and seal, this 31st of December, 1844.

"John Leonard, [L. S.]

"J. C. Kirkpatrick."

Leonard remained in possession until the beginning of 1846. On the 4th of February of that year, Mary J. Hardin, being then of full age, and being entitled by the conveyance of her grandmother, and by the death of her mother, to one undivided third part of the premises, in consideration of one hundred and fifty dollars, paid her by Leonard, conveyed the same to him by deed of that date, duly executed and proved.

On the ninth of the same month, he was brought before the Magistrates and Freeholders, at the instance of McCool, complaining of his retention of the possession from him, McCool. At the trial, Leonard submitted a paper, in writing, by way of plea, to the effect—1st, That if McCool ever had any authority to let the premises to him, it was as agent of his mother, Jane McCool, who was alive at the time of the letting, and that his authority over the premises necessarily expired with his agency, which determined by his mother's death; and, 2nd, That he, Leonard, was, by his purchase of Mary J. Hardin's share, constituted part owner of the premises, and therefore should not be ousted from his own freehold. These matters he offered to prove. The Magistrates, construing the note of Leonard in effect a written acknowledgment of tenancy of these premises under McCool, rejected the proof tendered, and the case was submitted to the Freeholders, as a jury. They could not agree on a verdict, and the Magistrates made an entry of mistrial, and discharged them. A trial *de novo* was ordered before another jury, to take place the 28th of the same month, (February, 1846.)

The same defence and evidence which had been offered at the former trial, were tendered at this; but were again overruled by the Magistrates, and the jury found a verdict in favor of McCool.

On the 12th of the succeeding month,

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(March, 1846.) Leo*nard procured deeds from James L. Hardin and Elizabeth L. M. Hardin for their respective undivided shares of the land; which, with the deed already executed by Mary J. Hardin, completed his title to the entire premises in his possession. This deed was duly proved, and recited a consideration of \$100 paid to each of the grantors. Shortly after this latter deed was procured, a suggestion for a prohibition was filed by Leonard, which was brought before Mr. Justice

Frost, at Chester, Spring Term, 1846. The prohibition was refused, and the case carried to the Court of Appeals, where the Circuit decision was affirmed in August following, upon which the Magistrates issued their warrant for passing the possession from Leonard to McCool, the warrant bearing date August 25th, 1846, and thereupon this bill was filed.

It is a peculiar disadvantage to this plaintiff, that the larger part of his case has been determined against him by Courts of competent jurisdiction. As I have argued in *Maxwell v. Connor*, 1 Hill. Eq. 14, all points adjudicated against a party by a tribunal having cognizance of the case and of the questions, are conclusive against him in every other Court, not possessing an appellate jurisdiction over the tribunals thus deciding; and even where this appellate jurisdiction exists, the prior decision is still conclusive on the Court possessed of it, unless it is brought before it by direct appeal. It cannot be examined incidentally or collaterally.

The Statute under which the Magistrates acted gives the exclusive and final jurisdiction in the case submitted to them, and whatever errors they may have committed within that jurisdiction, are beyond the supervision or correction of this Court. I have no right to re-examine any question determined either in the suit before the Magistrates, or on the application for a prohibition.

There is no doubt that the general doctrine is, as was laid down by the Magistrates, that a tenant is not permitted to dispute his landlord's title to the premises demised to him, and that he cannot, by parol, contradict, or vary the recitals or terms of a written instrument operating as a lease under which he was let into possession.

There appears to have been no formal lease in this case. The note of the tenant was taken to have that operation, and undoubtedly a note, or any other instrument, may so operate, provided it sufficiently identifies the premises, and sets forth the relations of the parties and the terms of the letting. It is true, I think, that the primary function of so much of this note as declares that it was given "for the hire of the land," was to disclose the consideration of the note. But if it shows that the land was "hired" by McCool, that it was the tract of land now in question, and the duration of the letting, it may fulfil the additional office of a written lease.

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*I should have entertained doubts upon each of these particulars. Land may belong to one who may for convenience allow the rent note to be given to another, as if he, the landlord, happens to be indebted to that other. I doubt, therefore, whether the note's being given to McCool was conclusive that he was the landlord. Again, the premises leased are described as "the plantation whereon he,"

(McCool) "now," (at the date of the note,) "lives." I do not understand that Leonard, at the trial, admitted, at least in writing, that he leased the premises now in question from McCool. The only evidence of the fact was the note. I should have thought that it was competent to show, by parol, (and it could hardly have been shown by any other kind of evidence,) that McCool never did live on these premises, but that, at the date of the note, he lived on another tract of land. This proof was necessary to identify the premises leased. Indeed, I doubt whether McCool was not bound to prove that he lived, at that time, on these premises, before he was entitled to call on the Court to treat them as the leased premises, or to order restitution of them as such. But again, what was the duration of the term? Was it for six months or for two years? When did it begin, and especially when did it end? How could it be known that Leonard was holding over? Does the note answer either of these questions? It seems to me that too much energy was given to this imperfect instrument, when it was made the ground of excluding all explanatory evidence.

But still, all these matters, if I had a more confident opinion upon them than I have, would not authorize me to reverse or arrest the judgment of the Magistrates. If error was committed in excluding proper testimony, or in giving a loose construction to the lease, this Court has no appellate power to correct it. It was held by the Law Court that errors of this description were not grounds for a prohibition. Neither are they grounds for an injunction.

I may safely apply to the one mode of relief what was said by the Court of Appeals in relation to the other, that "inferior tribunals cannot be made amenable, in this way, for mere errors of judgment committed within their conceded jurisdiction." The same view may be taken in relation to the Magistrates's rejection of the title acquired from Mrs. Hardin. Surely the construction of the lease was within their province, and therefore it was their duty to construe it according to their best judgment. Their construction of it was that McCool was the real landlord under the contract. Certainly, taking this view, it was their duty to put down any attempt of the tenant to procure or show a better title, in whole or in part. The relation of landlord and tenant is one of confidence, and what frauds would ensue if tenants were allowed,

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insidiously, *to obtain possession by professions of fealty, and then to pick flaws in their landlord's title, and transfer the advantages of occupancy to an adverse claim, either held by other persons or purchased in by themselves?

This relation stands upon analogous grounds of principle with that of vendor and purchaser let into possession; and the case of *Parr v. Van Lew*, 2 Rich. Eq. 321, and es-

pecially the case of *Whitworth v. Stuckey*, 1 Rich. Eq. 404, may serve to set forth the unanswerable objections against allowing the party intrusted with the premises to defeat the right which he holds.

But suppose the magistrates had adopted the construction to which I incline: to wit, that the lease did not necessarily import that McCool was himself the landlord, and had allowed the proof offered by Leonard; that he acted as the agent of his mother. And suppose that had been conclusively established; and, moreover, that by her death McCool's agency had been re-called, and the title had passed over to the grand children, and among them to Mary, from whom Leonard took a conveyance. And after all this, the Magistrates were of opinion that, by the law of landlord and tenant, Leonard must yield the possession to McCool, at whose hands he received it. There is certainly room for such an opinion. But admitting the better opinion to be the other way: what principle of law authorizes this Court to correct the error?

The assumption of such an authority involves a principle that would draw every case from every inferior, if not from every superior tribunal, where diversity of judgment might exist, into this Court; and under the guise of injunctions, clothe it with supreme appellate power. Peculiarly absurd would it be to lay the foundations of such a jurisdiction, in a case like the present; where not only this Court had confessedly no appellate power, but the case comes from a Court from which there is no appeal.

In any judgment that I may give in this case, I cannot, therefore, venture to touch or examine any point which came before the Magistrates and Freeholders.

If, however, a discovery of any facts which did not come before them, and varying the rights of the parties, has been obtained here, I think these may be used by this Court, by way of original jurisdiction, and a decree grounded in equity may be drawn from them. My anxiety to grant the relief which justice manifestly requires, may mislead me; but I think the answer of the defendant discloses one ground on which redress may be afforded. Putting together parts of the answer, I understand the defendant to admit that he leased to the plaintiff only the shares of the two younger children, (James and Elizabeth,) and that he lays no claim to Mary's share, which he admits has been conveyed to the plaintiff. I take it then that he is not entitled to oust

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the de*fendant; whom he virtually admits to be his co-tenant. I shall not labor this point, because it must be very plain, one way or the other, and I hope the defendant will appeal, if he does not concur in my view of the matter.

If satisfied, and he has a better right to the shares of James and Elizabeth than the plaintiff, partition is his remedy.

It is ordered and decreed, that an injunc-

tion do issue to restrain the defendant from enforcing the process he has obtained for ousting the plaintiff from the premises described in the pleadings.

The defendant appealed and moved for a new trial:

1st. Because his Honor the Chancellor erred in entertaining jurisdiction in this case, inasmuch as, under the Act of the Legislature, "the Court of magistrates and freeholders had exclusive jurisdiction in cases of landlord and tenant," and their verdict was final and conclusive.

2nd. Because his Honor the Chancellor erred in supposing that the defendant admitted, in his answer, that he leased to complainant only the shares of the two younger children, (James and Elizabeth,) when in fact, defendant stated in his answer, that he had rented the lands to complainant, and put him in possession, and had full power to do so.

3rd. Because the decree of the Chancellor is contrary to law and the evidence.

Matthew Williams, for the motion.

Curia, per DARGAN, Ch. I can add nothing to the force with which the Chancellor, in his Circuit Decree, has so eloquently indicated the necessity of adhering to general and established principles, in the administration of justice. Under all systems or codes there must necessarily arise cases of peculiar hardship, in which individuals must be the victims, and which admit of no remedy or relief, without unsettling the rights of property and shaking the deep foundations of social order. The same inexorable character is impressed, by the divine hand, upon the laws which govern the moral and physical universe. While we may deplore the calamity of him who tumbles from a precipice, or is crushed by the weight of a falling body, none will dare to question the wisdom and benignity of that stupendous law which, while it controls the smallest atom that floats in the atmosphere, extends its influence to the remotest confines of creation, and binds all worlds and beings together in one grand and harmonious system.

There is another topic, felicitously touched by the Chancellor in his decree, and reasoned more elaborately by him in the case of Maxwell v. Connor; and which is of the greatest importance to the well being of society. It

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is essential that *there should be rules by which tribunals charged with the administration of the law, may enforce a termination of legal controversies. It is beneficial to the parties themselves, that they should not be permitted to wage an interminable and wasting contest. Hence the judgment of a Court, having jurisdiction of the subject matter, is conclusive upon the parties, in reference to all questions of law or fact that were or might have been discussed and adjudged. The only qualification of the rule is, where superior and appellate Courts take cognizance of

and review the judgments of inferior tribunals, by way of direct appeal, according to the forms prescribed by law. I know of no other exception.

By the principles of the common law, a landlord had no remedy against his tenant holding over after the expiration of the lease, but an action of ejectment; in South Carolina an action to try the title. This, (for a too common and a flagrant wrong,) was a tardy and inadequate remedy. It was provided for, by the Act of 1812, and again by the Act of 1839, which affords a more perfect relief. The Court of Magistrates and Freeholders, created by these Acts, to try such cases between landlord and tenant, is invested with the ultimate and exclusive jurisdiction over the matters submitted to it, under the provisions of law by which it is created. There is no right of appeal from its judgments. The Court of Sessions, under its general supervisory power over inferior tribunals, might, by a writ of prohibition, interpose its authority, to prevent the Court of Magistrates from transcending its jurisdiction. But as long as the proceedings of the latter Court are within the powers with which it is invested, there is no tribunal in the State authorized to reverse or review its decisions, however erroneous they may be.

Upon these principles, and according to the provisions of the Act, the judgment of the Court of Magistrates and Freeholders is binding and conclusive upon the parties, in three particulars; first, as to the question of the tenancy; secondly, as to the identity of the premises demised; and thirdly, whether the lease has expired and the tenant is holding over. If these questions are all adjudged against the party alleged to be the tenant, it is made the imperative duty of the Court to grant the landlord a writ of habere facias possessionem. And the sheriff is required to enforce this writ against the tenant, or any other person who may be in possession of the leased premises. In the case we are now considering, all these questions have been adjudged, or must be presumed to have been adjudged, against the complainant, by a Court of competent and exclusive jurisdiction. And his bill has been filed for the purpose of enjoining the defendant, his landlord, (according to the judgment of the Court) from enforcing that judgment against him. The

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Chancellor, in a misapprehension of the facts, supposed that the defendant had admitted in his answer that he had leased only two-thirds of the premises to the complainant, and that he set up no claim to the remaining third, (Mary Hardin's share,) which he admitted to have been conveyed to the complainant. Considering the complainant as not being the lessee of the defendant as regards this third, and as being a tenant in common with him, to the extent of Mary Hardin's share of the premises, the Chancellor thought him entitled to the relief which he

sought, and decreed accordingly. If the fact had existed, and if it had been shewn that he had leased only two-thirds of the premises, and that he was legally in possession of the remaining third as tenant in common with the defendant, I incline to the opinion that if available here, it would also have been available as a legitimate ground of defence before the inferior Court. That Court, after finding that the complainant had only leased two-thirds of the premises of the defendant, and was the legal owner of the other third as tenant in common with him, might have forbore to exercise its power, in disturbing the legal relations of tenants in common; all of whom, by familiar principles of law, are equally entitled to the possession. And according to the doctrine which I have heretofore advanced, if by the constitution of the Court that tried the cause, such a matter as a tenancy in common was a legitimate ground of defence, then, if it was not made, or having been made, it was overruled, the judgment of the Court is conclusive upon the parties.

But it was conceded by the complainant's counsel, on the hearing before this Court, that the defendant's answer conceded no such state of facts as that upon which the Chancellor's decree was predicated. It was broadly admitted, that the defendant did not concede that he had only leased the complainant two-thirds of the premises, or the shares of James L. Hardin, and of Elizabeth Hardin only. This admission, in the unanimous opinion of this Court, strips the complainant's case of every semblance of equity. I mean, of course, that technical equity upon which Chancery bases its measure of relief. In the case thus presented, the complainant, not seeking a partition, as one tenant in common against another, nor stating or suggesting any equitable ground upon which the interposition of this Court may rest, asks this Court to reverse, or at all events to render null and inoperative, the deliberate judgment of a Court of inferior but exclusive jurisdiction, upon matters of law and fact, clearly within its powers. In the foregoing remarks I have, perhaps, laid too much stress upon the fact, that the Court that tried the cause was possessed of exclusive jurisdiction, without the right of ap-

peal. If it had possessed concurrent jurisdiction merely, or if the act had given the

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right of appeal, and *an appeal had not been formally prosecuted, the same legal consequences would follow, and its judgment have been equally final and conclusive between the parties.

The inferior Court did not affect to try the title. And if it had, its judgment would have been inoperative; for it had no power to adjudicate such questions. If the complainant is a tenant in common with the defendant, he may file his bill in this Court for a partition. If he is the owner of the whole premises, he may institute an action before the proper legal forum, to try the title. This Court will not entertain, and has not the jurisdiction to entertain, a suit to try titles as to real estate. The complainant's case seems to be one entirely of that character. He admits that he leased the premises from the defendant; and that he held over after the expiration of the lease; or, which is the same thing, that a Court of competent jurisdiction has adjudged those questions against him. And he files his bill, perpetually to enjoin the judgment, because, as he says, during the continuance of his possession, acquired as a tenant from the defendant, he has obtained, by purchase from others, the paramount legal title. What is this, but an action to try the title? He has attorned to the defendant. He has acknowledged him as his landlord. He has undertaken to hold the land from him, and under him. At least, these facts must now be assumed to be true. And the plainest principles of law, applicable to the relations of landlord and tenant, require that he should re-deliver to him the possession. Without fraud on the part of the lessor, if one, under a misapprehension of his rights, were to lease his own lands from a stranger, there would be no relaxation of this important legal principle, either in a Court of Law or Equity.

It is ordered and decreed, that the decree of the Circuit Court be reversed, and that the complainant's bill be dismissed.

The whole Court concurred.

Decree reversed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—NOVEMBER AND
DECEMBER TERM, 1849.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN,
" J. J. CALDWELL,
" G. W. DARGAN.

3 Strob. Eq. *55

*J. I. GRACEY et al. v. B. F. DAVIS et al.

(Columbia. Nov. and Dec. Term, 1849.)

[*Assignments for Benefit of Creditors* ⚡356.]

Where a deed is set aside as interfering with the rights of creditors, it is as to those creditors as if it had never existed.

[Ed. Note.—Cited in *Curlee v. Rembert*, 37 S. C. 222, 15 S. E. 954; *Ryttenberg v. Keels*, 39 S. C. 213, 17 S. E. 441; *Ex parte Spragins*, *Buck & Co.*, 44 S. C. 75, 21 S. E. 543; *Belknap & Co. v. Greene Bros.*, 56 S. C. 125, 34 S. E. 26.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 1079; Dec. Dig. ⚡356.]

[*Assignments for Benefit of Creditors* ⚡356.]

The effect of setting aside a deed which interferes with the rights of creditors, is to leave the creditors to enforce their claims and obtain satisfaction according to their legal priorities, or for the Court, if it take charge of the fund, to direct them to be paid according to their legal rank.

[Ed. Note.—Cited in *Ex parte Spragins*, *Buck & Co.*, 44 S. C. 76, 77, 21 S. E. 543.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 1079; Dec. Dig. ⚡356.]

[*Assignments for Benefit of Creditors* ⚡356.]

The Court will not disturb legal liens.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 1079; Dec. Dig. ⚡356.]

[This case is also cited in *Wagener & Co. v. Mars*, 27 S. C. 106, 2 S. E. 844, as an illustration of the custom of ordering sales of property where deeds are set aside as fraudulent.]

Before Johnston, Ch., at Columbia, June, 1849.

The facts of this case will be sufficiently understood from the following decree of

Chancellor Dunkin, pronounced at Columbia, June sittings, 1848.

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*Bill for Relief, &c.

Dunkin, Ch.—This case having been heard upon the bill and answer, and it appearing to the satisfaction of the Court that, although in executing the deeds mentioned in the pleadings, the defendants intended no fraud whatever against the creditors of the defendant, B. F. Davis; but, on the contrary, made in said deeds what they supposed at the time ample provision for the payment of all his debts; and that the leading object in executing said deeds was to make an equitable division of the property between the defendants, B. F. Davis and Mrs. Gracey W. Davis; yet as it has turned out that the debts against the defendant, B. F. Davis, were much greater than was estimated, and to an amount exceeding in all probability the entire value of the property, it would effect injustice to said creditors to allow said deeds to remain in force; nor do the defendants resist the sale of said property for the purpose of paying said debts—the defendant and trustee, Dr. Joel R. Adams, contends that out of the sales thereof, he should be first indemnified for the amounts heretofore paid by him, according to the provisions of said deeds, and intended to be more fully secured by the said confession of judgment to him by the defendant, B. F. Davis; which appears to be altogether just and equitable.

It is, therefore, ordered and decreed that the said deeds of trust be set aside in favor of the creditors of the defendant, B. F. Davis, existing at the date of the last mentioned

deed: that the interest of the defendant, B. F. Davis, in the said tract of land, containing sixteen hundred and ninety-eight and a half acres, allotted to him in right of his wife, the defendant, Mrs. Gracey W. Davis, out of the landed estate of her father, James Adams, deceased, described in the said first mentioned deed, and the slaves named in said deeds of trust, together with the other personal property, therein mentioned, and in the name of the defendant, Dr. Joel R. Adams, as trustee of the defendant, Mrs. Gracey W. Davis, (except her piano,) be sold for cash by the Commissioner of this Court, at public auction, upon the usual and legal notice of sale—the land and slaves before the Court House in Columbia, on the first Monday in February next, or on some public sateday thereafter, and the remaining personal property on the premises, on the day after the sale of the land and slaves; that said Commissioner do pay out of the proceeds of said sales the costs of suit of both complainants and defendants, and also pay to the defendant and trustee, Dr. Joel R. Adams, the said amounts advanced and paid by him on account of the debts against the defendant, B. F. Davis, as set forth in his answer and exhibit therewith marked W, together with interest thereon, and retain in his hands the

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balance of the *proceeds of said sales, subject to the future order of this Court.

It is further ordered and decreed that the defendant, Dr. Joel R. Adams, trustee as aforesaid, do account to the Commissioner for the rents and profits of said land, the hire of said negroes, and the proceeds of the crops which he has received, or may hereafter receive, together with the interest thereon, and that the said account be carried up to the time of the sales of the property under this decree; in which accounting the Commissioner will ascertain and report what shall be a reasonable allowance for the support and maintenance of the defendant, Mrs. Gracey W. Davis, up to the time of said sales.

It is further ordered and decreed that the Commissioner do ascertain and report upon the amount of indebtedness of the defendant, B. F. Davis, previous to the date of the said last mentioned deed; and upon the amount of said debts secured by liens of judgment, or otherwise secured, and the dates respectively of such liens and securities, as well those which are omitted, as those which are mentioned in the bill; and that he advertise for the creditors of the defendant, B. F. Davis, previous to the 10th of January, 1846, to appear and establish their demands before him before the first day of January next.

On the coming in of the Commissioner's report, the following decretal order was made:

Johnston, Ch.—The Commissioner having reported, amongst other things, a balance in his hands in this case of ten thousand five

hundred and fifty-four dollars and seventy-six cents, and upon hearing argument in behalf of the judgment creditors of B. F. Davis on one side, and of his obligation and simple contract creditors on the other, and it appearing from the pleadings in the cause, as well as from the decretal order made in June last, that no fraud whatever was intended by any of the parties in executing the said deeds of January, 1846; and it further appearing that said judgments have been obtained since that period, the Court is of opinion that the said funds in the hands of the Commissioner are equitable assets, and must be distributed accordingly:

Thereupon, it is ordered and decreed that the Commissioner do pay the said fund in his hands, as specified in his report, after paying the costs that have remained unpaid, and that have accrued since the said decretal order, and after paying a proper fee to the solicitor or solicitors who brought the general bill on behalf of the creditors, the amount of which fee shall be determined by the Commissioner on satisfactory evidence, to the said judgment creditors, obligation creditors, and simple contract creditors, of said B. F.

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Davis, whose *debts have been established before him, including the claims of David R. Evans, B. D. Boyd, assignee, David English and John J. Kinsler, assignee; provided the said David English shall establish his claim before the Commissioner to his satisfaction, on or before the tenth day of August next; and provided also, that the order relative to the claim of B. D. Boyd, assignee, shall not be overruled by the Appeal Court.

The Court, as before stated, being satisfied that the above funds are equitable assets, and distributable accordingly:

It is further ordered and decreed that they be paid over to the above specified creditors of B. F. Davis *pari passu*, or in proportion to the amounts of their respective debts.

Inasmuch as there is an appeal from the order of the Court in reference to the claim of B. D. Boyd, assignee:

It is further ordered, That the proportion of the aforesaid fund to which the said B. D. Boyd, assignee, may be entitled, shall be invested in some safe security by the Commissioner, till the further order of this Court.

The judgment creditors of B. F. Davis appealed from so much of the decree as directs that the creditors shall be paid *pro rata*, and submitted that the decree be so modified that the judgment creditors shall be paid before the simple contract and bond creditors, and according to the priority of their liens.

W. F. DeSaussure, for the motion.
Tradewell and Gregg, contra.

Curia, per DUNKIN, Ch.—Where a deed is set aside as interfering with the rights of creditors, it is, as to those creditors, as if it

had never existed. A party may honestly conceive himself able to make a settlement, and yet reserve an abundant estate to satisfy his creditors, as in *Izard v. Middleton*, Bail. Eq. 228, or, as in this case, he may, by the deed, provide a fund for the payment of debts, and settle the residue. In neither case is there any moral fraud. But, in both, the deeds were set aside, because the fund, supposed to be abundant, proved insufficient. The effect of setting aside the deeds is to leave the creditors to enforce their claims and obtain satisfaction according to their legal priorities; or, if this Court takes charge of the fund, to direct them to be paid according to their legal rank. This rule has been well established from an early period; see *Austen v. Bell*, 20 J. R. 442, and *Codwise v. Golston*, 10 do. 508; nor is the Court aware of any decision to the contrary. The principle is fully recognized by the Court in *McDermott v. Strong*, 4 J. C. R. 687, and has been uniformly regarded by our own Courts, as may be seen by reference to the cases of *McMeekin v. Edmonds*, 1 Hill Eq. R. 293 [26 Am. Dec. 203]; and *Anderson v. Fuller*, 1 M'Mul. Eq. R. 34, [36 Am. Dec. 290.] The principle is, that this Court will not disturb legal liens. If, as in *Le Prince v. Guillemot*, Rich. Eq. R. 220, the assigned estate has

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been sold, and only the *fund was in the hands of the assignee when judgment was rendered, the judgment created no lien, and the judgment creditor was held entitled to no priority. But, in the case before the Court, the property was subject to a lien until the sale by the Commissioner, the voluntary deed of the debtor being regarded as a nullity.

It is ordered and decreed that the appeal of the execution creditors be sustained, and that the decretal order be reformed according to the principles herein declared.

The whole Court concurred.

Decretal order reformed.

3 Strob. Eq. 59

W. W. LANG, Ad'mr et al. v. H. C. BREVARD et al.

(Columbia. Nov. and Dec. Term, 1849.)

[*Principal and Surety* ⇨ 115.]

The surety is not discharged by the omission of the creditor to record the mortgage of the principal debtor, which was executed for the purpose of securing the payment of the debt.

[Ed. Note.—Cited in *Arthur v. Brown*, 91 S. C. 324, 74 S. E. 652.

For other cases, see *Principal and Surety*, Cent. Dig. § 263; Dec. Dig. ⇨ 115.]

[*Principal and Surety* ⇨ 115.]

If the creditor do an act injurious to the surety, or omit to do an act, when required, which equity and his duty to the surety enjoin it upon him to do, and which omission is in-

jurious to the surety—in either case, the surety will be discharged.

[Ed. Note.—Cited in *Jackson v. Patrick*, 10 S. C. 200, 205; *Rosborough v. McAliley*, Id., 245; *Hellams v. Abercrombie*, 15 S. C. 117, 40 Am. Rep. 684; *Gardner v. Gardner*, 23 S. C. 593; *Greenville v. Ormand*, 51 S. C. 129, 28 S. E. 147; *Fales & Jenks Mach. Co. v. Brown*, 68 S. C. 25, 46 S. E. 545; *Exchange Bank v. McMillan*, 76 S. C. 568, 57 S. E. 630.

For other cases, see *Principal and Surety*, Cent. Dig. § 263; Dec. Dig. ⇨ 115.]

Before Johnston, Ch., at Kershaw, June, 1849.

The bill in this case was filed by the administrator of Alfred Brevard against the distributees of Dr. Brevard, praying for leave to sell the real and personal estate of the intestate, in order to pay his debts, and for leave to account before the Commissioner for his administration of the estate. By order of the Court the whole estate was sold upon a credit, and the proceeds of sales delivered to the administrator to pay the debts of the intestate. At June Term, 1848, an order was passed injoining the creditors from suing the administrator at law, and permitting them to file petitions in this cause, praying that the debts due them might be paid, and requiring the Commissioner to report all debts due by the intestate, on sealed instruments, and the balances due thereon. Under these orders, the President and Directors of the Bank of the State of South Carolina filed their petition, and showed that on the 26th of July, 1836, J. W. Cantey executed his bond to the petitioners for the sum of thirty thousand dollars, payable in four equal annual instalments, with interest payable annually, with several personal sureties thereon, among whom was the intestate, Dr. Alfred Brevard. That the

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following *amounts were still due upon the bond, to wit: \$1189.40, with interest from 7th February, 1848; also, \$4000, with interest from 24th September, 1845; and the petitioners prayed that the said amounts should be paid to them out of the estate of the intestate. This petition was referred to the Commissioner to report upon, and on the reference the following facts were proved, to wit:—

Thomas Salmond.—On 26th July, 1836, J. W. Cantey executed his bond to the Bank, conditioned for the payment of \$30,000, in four equal annual instalments from the date, with interest, with ten sureties on the bond, of whom Dr. Alfred Brevard was one. The balances due on the bond were,—\$1189.40, with interest from 7th February, 1848, together with \$4,000, with interest from 24th September, 1845, which latter sum arose from the sale of the Hobkirk house, the proceeds of which had been credited by the Bank on the bond, but which, by a decree of the Court of Errors afterwards, had been declared to be properly applicable to other persons, as hereinafter stated.

J. W. Cantey was frequently called on for payment of the bond. At the date of the bond, J. W. Cantey executed two mortgages to the Bank to secure the payment of the bond, one for 72 negroes, the other for 23 acres of land, on which was located the Hobkirk dwelling house of J. W. Cantey. The whole mortgaged property was sold on the 7th February, 1842. The mortgage on the 23 acres of land was recorded on 1st March, 1841. On the 8th April, 1837, J. W. Cantey executed a mortgage of the same land to John A. and William E. Ross, in consideration of their lending their two notes of \$3000 each, to be discounted at bank for the benefit and use of J. W. Cantey, which mortgage was recorded on 23d May, 1837.

At the time of the sale of the land, it was agreed on between the Bank and Messrs. Ross, that a good title should pass to the purchaser, and the contest should be had for the proceeds of sale, in the same manner as if the contest was for said land.

It was admitted that in the bill filed by Messrs. Ross against the Bank, it was decreed by the Court of Errors that Messrs. Ross were entitled to the proceeds of the sale of the land, on the ground that the mortgage executed by J. W. Cantey to the Bank was not such mortgage as is registered by the charter without being actually registered—and ought to have been recorded within the time prescribed by law for other mortgages—and not being so recorded till after the junior mortgage to Messrs. Ross was recorded, the junior mortgage took precedence.

J. W. Cantey proved, (whose testimony was excepted to on the part of the Bank), that he

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borrowed \$30,000 from the Bank in 1836, on bond—that Dr. Brevard was one of his sureties. He told his sureties that he would mortgage property amply sufficient to secure the loan, and told them what property it was. Thinks he told Dr. Brevard so. Dr. B. had formerly been surety for him on the security of a mortgage. Does not remember whether he told him that the mortgage would be given to the Bank or the sureties.

Cross examined—Does not think he named the sureties in the application to the Bank for the loan. He promised to secure the debt by bond and security, and perhaps by mortgage of property. He was determined to secure them and his sureties—he intended a mortgage from the first—does not remember that Dr. Brevard required a mortgage—is satisfied that he told Brevard he would mortgage property—does not recollect whether the bond and mortgage were sent to the Bank for approval—thinks the bond and mortgage were sent down at same time to bank—does not know whether there was any understanding between the Bank and Dr. Brevard.

Thomas Salmond—Sent word to A. F. Peay, one of the sureties, that the mortgage

was not recorded in Alabama—Peay, at his own expense, had it recorded there. This was some time after the execution of the mortgage, to wit: on ———. Peay got the mortgage from the parent Bank. Knows nothing of the loan to J. W. Cantey. It was refused at first—got through Col. Butler.

Sixty four of the negroes were in Alabama at the date of the mortgage, as stated therein, and remained in Alabama till brought here by the Bank in January, 1842.

Mr. DeSaussure presented a paper whereby the parties to the bond agreed to the sale of the Hobkirk House at public sale, and that the proceeds should be held subject to litigation, which it is admitted was shown to W. W. Lang, administrator of Dr. A. Brevard, on 7th February, 1842.

The Commissioner rejected the claim of the Bank for four thousand dollars, with interest from the 24th Sept. 1845, on the ground that the Bank, by laches in not recording their mortgage in due time, had lost the proceeds of the sale of the Hobkirk house, and to that extent the sureties were discharged, and found a balance of \$1,134.28, with interest from 7th February, 1848, to be due on the bond; and as there were seven solvent sureties on the bond he recommended that the estate of Dr. Brevard do pay one seventh part thereof, to wit, \$162.05, with interest from 7th February, 1848.

Exceptions of the Bank.

1. Because the petitioners are entitled to a decree against the estate of Dr. A. Brevard, one of the sureties on the bond to the Bank executed by J. W. Cantey, as principal obligor, for the whole balance found to be due

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on the said bond by the Commissioner, to wit, \$1,134.28, instead of one-seventh thereof.

2. Because the petitioners are entitled to a decree against A. Brevard, surety on said bond, for the further sum of \$4,000, with interest from 24th September, 1845, being the amount still due on said bond; it having been adjudicated that the proceeds of the sale of the Hobkirk house mortgaged to the Bank to secure the payment of said bond, belonged to Messrs. Ross, and the Bank has been decreed to pay the said amount to them.

3. Because the mortgage of the Hobkirk house, executed to the Bank, was so executed for the safety of the Bank, and not of the sureties.

4. Because there was no privity of contract between the Bank and the said sureties respecting said mortgage.

Exceptions by Administrator of A. Brevard.

1. Because neither the estate of A. Brevard nor his administrator is in any way liable to the payment of any balance due on the bond executed to the said Bank by J. W.

Cantey, as principal obligor, with the name of the said Alfred Brevard as one of the several sureties thereto.

Decree.

Johnston, Ch. On hearing the report of the Commissioner upon the petition of the Bank of the State of South Carolina said report bearing date 11th instant, and the exceptions put in thereto,—

It is ordered that the first exception on the part of the said Bank be sustained, and that all the other exceptions, on both sides, be overruled.

The Bank of the State of Carolina moved to reverse the decree of the Chancellor, so far as the same overruled the second, third and fourth exceptions to the Commissioner's report filed by said Bank, on the same grounds alleged against the report of the Commissioner.

The complainant, W. W. Lang, ad'mr., moved to reverse the decree of the Chancellor, so far as the said decree overruled the exceptions filed by said complainant to the report of the Commissioner on the petition of the Bank of the State of South Carolina, and so far as the said decree sustained the exceptions of the said Bank to the same report,—

1. Because the estate of Alfred Brevard is not now liable for any balance which may be found due on the bond given by J. W. Cantey to the President and Directors of the said Bank, although the said Alfred Brevard was a surety to the said bond, the said complainant, administrator, not having had due and legal notice, or any notice whatever, of the existence of the demand of the Bank against his intestate.

2. Because the said Bank failed to perform its part of the *contract under the said bond with the surety thereto, and that the surety is therefore discharged from any further liability on the bond.

3. Because the said Bank has varied said contract with the surety, and the surety is therefore discharged from any further liability on the said bond.

4. Because in contracts which are founded on some statutory power, and in which the legislature has imposed the necessity of a surety or sureties being joined, the requisitions of the statute must be strictly pursued, in order to make the surety or sureties liable—that the contract with the said surety on the bond aforesaid, is a contract founded on some statutory power, in which the legislature has imposed the necessity of sureties being joined—that in the said contract, the Bank has not pursued the requisition of the statute, and the surety, therefore, to the said contract, is no longer liable, nor is his administrator, the said complainant.

J. M. DeSaussure, Solicitor for the Bank.
Chesnut, Solicitor for complainant.

Curia, per DARGAN, Ch. The only question which I deem it necessary to discuss in this case, is whether the complainant's intestate, (Alfred Brevard) as the surety of James W. Cantey, has been discharged by the laches of the Bank, in not recording the mortgage of the said Cantey, for the tract of land on Hobkirk Hill; which mortgage was executed for the purpose of securing the payment of the debt for which the complainant's intestate was liable as surety.

If the question here raised were res integra in our courts, it might well be considered a debateable one. Even in that case, however, upon a careful collation and review of the English and American authorities, I think I should be led to the same conclusion to which I am constrained by the solemn adjudications of our own tribunals. This case is no way to be distinguished, by the most critical comparison, from that of *Hampton v. Levy*, 1 McC. Eq. R. 107, where the identical question was made, upon precisely the same state of facts, and where, after the same course of argument here urged, the decision of the Court was, that the surety was not discharged by the omission of the creditor to record the mortgage of the principal debtor. The case of *Smith v. Tunno*, 1 McC. Eq. R. 443, [16 Am. Dec. 617,] is, if not a stronger case, one equally as strong against the surety. There Gibbes the Master in Equity, selling property under a decree in Chancery, took no mortgage at all; though it was a part of the published conditions of the sale, that in addition to personal security, a mortgage of the premises would be required; and if the conditions were not complied with in a month from the day of sale, the property was to be resold at the risk of the first purchaser. And it was not shown

that the surety sanctioned, *or was aware of, the waiver of or omission to take a mortgage, in pursuance of the conditions of the sale. The surety in such a case might with great force and plausibility exclaim, non hæc in fœdera veni. But on application to this Court, he was held not to be discharged. And if an omission to take any mortgage, when it was a part of the stipulation that one should be taken, does not discharge the surety, it is difficult to perceive why the omission to record a mortgage actually taken, could have that effect. Certainly the interests of the surety are less jeopardized in the latter case, inasmuch as, at the date of these occurrences, an unrecorded mortgage would have prevailed against a subsequent judgment, or any other incumbrance, except a subsequent mortgage duly recorded.

The prominent and well defined distinction, that pervades all the cases that may be deemed authoritative on this subject, is, that the surety will be discharged by any acts on the part of the creditor of a positive character, whereby the remedy against the

principal debtor is lost; so that payment cannot be enforced against him. Such would be the case where on the part of the creditor, there was a destruction, abandonment, or waiver of counter securities. If the creditor, for a consideration, and by a binding stipulation, gives time to the principal debtor, without the consent or concurrence of the surety, the latter will be discharged, though the principal debtor is perfectly solvent. This is not only a positive act on the part of the creditor, but it is a new contract, to which the surety is no party. For acts of mere passive sufferance, omission, and delay, the surety will not be discharged. And this rule is the more reasonable, inasmuch as a surety thus aggrieved, has the remedy in his own hands; and by various alternative modes of procedure, may redress himself. He may convert the passive indulgence and delay of the creditor, into a positive wrong, by demanding that he proceed to the collection of his debt. If the requisition be not complied with, in a reasonably diligent manner, and the principal becomes insolvent, it will afford ground for relief. The doctrine here asserted is not involved in this case, and has never been judicially recognized by the Courts of this State. But it is fully affirmed in the well considered cases of *King v. Baldwin*, 17 Johns. Ch. R. 384, and *Paine v. Packhard*, 13 Johns. Ch. R. 154. The judgment in the case first cited, was the result of much elaborate consideration, and the principle involved was this: "Where the creditor did an act injurious to the surety, or omitted to do an act, when required, which equity and his duty to the surety enjoined it upon him to do, and which omission was injurious to the surety, in either of these cases the surety would be discharged."—And accordingly, in that case the creditor was adjudged to have lost his claim against the surety; having refused or omitted, at the request of the surety, to proceed against the

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*principal. I am authorized to say, that a majority of this Court are prepared to adopt the principle of this decision, and to extend similar relief to a surety under the like circumstances.

Another remedy, which a surety might have against a too indulgent creditor, would be, on the quia timet doctrine, to file a bill in this Court, both against his principal and the creditor, and to compel the latter to accept payment, or to proceed to the recovery of a judgment. *Nesbit v. Smith*, 2 Bro. 578, *King v. Baldwin*, 17 Johns. 384. Or, the surety might, in consistency with the terms of his own contract, pay the debt of his principal, and bring an action at law against him, to recover the amount. In the case we are considering, *Alfred Brevard*, if he had been himself active and vigilant, might have easily discovered that the mortgage was not recorded. He might have demanded that the mort-

gagee should have it recorded; or that it should be delivered to him for that purpose. If this legitimate demand were refused, and injury had resulted to the surety, from the non-registry of the mortgage, he would have been entitled to relief. In not pursuing this course, he has not himself been vigilant, and the maxim *vigilantibus and non dormientibus*, &c. applies.

I will not say that there might not occur a case of outrageous neglect on the part of a creditor, in omitting to recover his money from the principal debtor, in which the surety would be exonerated. It is not difficult to conceive of cases in which the neglect would be so gross as to amount to a fraud upon the surety. In an instance of this kind, he might be relieved. In the present case, the omission of the Bank to record, cannot in any possible light be regarded as a criminal or culpable neglect.

It has been the opinion of some lawyers eminent for their learning, that the Bank charter dispensed with the necessity of registering mortgages to the Bank. A distinguished jurist, who long and ably presided over the affairs of that institution, was of this opinion and acted upon it. And the Bench itself, of the present day, are not unanimous on the question. The Bank must therefore stand acquitted of any gross neglect, or of any intention to do that which was not becoming and just towards the sureties of Genl. Cantey. There is then nothing presented in the case made by the sureties which entitles them to relief in this Court. And considering the various remedies which the surety himself possesses, against the passive indulgencies and omissions of the creditor, the rule that refuses him exoneration for such passive indulgencies and omissions, is neither unreasonable nor severe.

It would seem that the complainant, as administrator, not anticipating that this specialty debt of the Bank would be presented, has applied assets to the payment of simple con-

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*tracts; and that there will now be a deficiency of assets to pay all the debts, including this claim of the Bank, hereby adjudged to be legal. If, upon a future investigation, it should appear that previous to an application of the assets to simple contract debts, he duly and legally, as required by law, advertised for creditors to present their demands, and paid away the assets before he received notice of this claim, he will not be required to pay the claim of the Bank out of his own estate. In such case, the Bank will be entitled to a decree for the whole balance due upon the bond, to be paid out of assets, quando accederint, and in the mean time, to take what remains in the hands of the administrator, applicable to the debt. The question as regards the liability of the administrator out of his own estate, is reserved, and it is ordered that the Commis-

sioner report the evidence upon this part of the case.

It is ordered and decreed, that so much of the Circuit decree as disallows the claim of the Bank for four thousand dollars and the interest, be reversed. It is also ordered and decreed, that the said Bank of the State of South Carolina do recover, as well the sum of four thousand dollars with interest from the 24th September, 1845, as the sum of eleven hundred and thirty-four dollars 28-100, with interest from the 7th February, 1848, allowed by the decree. It is also ordered that the Circuit decree be affirmed in all respects wherein the same is not modified by this appeal decree, and that the appeal in all other respects be dismissed.

The whole Court concurred.

Decree modified.

3 Strob. Eq. 66

W. W. HOLEMAN et ux. et al. v. A. H. FORT et al.

(Columbia. Nov. and Dec. Term, 1849.)

[Deeds \S 31.]

The deed of gift was to "the joint heirs" of the daughter and son-in-law of the donor. They had two children living at the time. The deed was *held* to be valid, but to operate only in favor of the two children in esse at the time of its delivery, to the exclusion of the after-born children.

[Ed. Note.—Cited in *Bailey v. Patterson*, 3 Rich. Eq. 158; *Cloud v. Calhoun*, 10 Rich. Eq. 362; *McCown v. King*, 23 S. C. 238; *Mellichamp v. Mellichamp*, 28 S. C. 130, 5 S. E. 333; *Shaw v. Robinson*, 42 S. C. 346, 20 S. E. 161; *Reeves v. Cook*, 71 S. C. 279, 51 S. E. 93; *Rembert v. Evans*, 86 S. C. 450, 68 S. E. 661; *Church v. Moody*, 98 S. C. 239, 82 S. E. 430; *Smith v. Clinkscales*, 102 S. C. 247, 85 S. E. 1067.

For other cases, see *Deeds*, Cent. Dig. \S 61; *Dec. Dig.* \S 31.]

[Deeds \S 31.]

If the donee can be identified, either by name or description, the deed will not be void for the want of a proper party to take under it.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 61; *Dec. Dig.* \S 31.]

Before Dunkin, Ch. at Lexington, June, 1848.

The following circuit decree contains all the facts of the case:

Dunkin, Ch.—The lapse of time has combined with the tortuous conduct of some of

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the parties to involve the facts *of this case in some obscurity. It seems, however, that prior to 1813, the ancestor's or original stock of the slaves in dispute, were the property of "old Mr. Hoof," (as the witness called him,) the father of the defendant, James D. Hoof, Sr. and the grandfather of the complainants. This person died intestate, and William Geiger, (the witness,) together with the widow, administered on his estate. The only distributees were the widow and her son, the de-

fendant, J. D. Hoof, Sr. then about 12 or 14 years of age. The negroes went or remained in the possession of the widow. Sometime after the death of the intestate, she intermarried with Thomas Jackson. This event probably took place in January, 1813. In April, of the same year, the defendant, J. D. Hoof, Sr. married his present wife, who was the daughter of Thomas Jackson—he was, then, very young, probably about 17 years of age. He and his wife lived with their parents for three or four years after his marriage: they then removed to Edgefield, taking the negroes with them, where they remained long enough to make one crop. Hoof became involved in a law suit, sold Mary, one of the slaves, and they then returned back.—Thomas Jackson went to Edgefield and arranged the difficulty in which Hoof had been involved, and on his return, the deed on which these proceedings are founded, was executed. The deed is in the following words, to wit:

"To all people to whom these present writings shall come, be seen or made known, greeting: Know ye, that I, Thomas Jackson, of the State and district aforesaid, in consideration of the very great love and affection that I bear my son-in-law, James D. Hoof, and daughter, Ann Hoof, of the State and district aforesaid, and for other good causes and considerations me thereunto moving, have given, granted and confirmed unto the joint heirs of said James D. Hoof, and Ann Hoof, his wife, the following negroes, viz: Rose, Milly and Jack, to have and to hold the said three negroes, Rose, Milly and Jack, with all the issue of the said Rose and Milly, which they may hereafter have, to the joint heirs of the said James D. Hoof, and Ann, (his wife.) I, the said Thomas Jackson, for myself, my heirs, executors and administrators, do warrant and forever defend the said three negroes unto the joint heirs of the said James D. Hoof, and Ann, his wife, and to their heirs shall and will warrant and forever defend, by these presents. In witness whereof, I, the said Thomas Jackson, have hereunto set my hand and seal, this twenty-third day of October, in the year of our Lord one thousand eight hundred and seventeen, and in the forty-second year of American Independence.

(Signed) Thomas Jackson, [L. S.]

Signed, sealed, and delivered in the presence of Laban Williams, William Paulding, J. Q."

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*The deed was recorded in Orangeburg district, where all the parties resided. James D. Hoof was not present when the deed was executed, and so far as the subscribing witness could testify, he had no knowledge of its existence. The negro Jack, mentioned in the deed, was originally the property of Jackson, but had been purchased from him by James

D. Hoof, Sr. his son-in-law. William Geiger, apparently a highly respectable witness, testified that he had heard Jackson say he had got Jimmy's (James D. Hoof) property settled to him and his wife for their lives. Mrs. Jackson and witness's mother were sisters, and on the first visit after this deed was executed, Jackson told him he got Jimmy's property so fixed that he and his wife could have the use of it without being liable for his debts, and afterwards to their children.

James D. Hoof, Sr. says in his answer, that when the deed was executed, Rose, Milly and Jack were his own property; that his mother, prior to her marriage with Jackson, conveyed these negroes to him by deed. In this there is one mistake. At the date of the deed his mother was the wife of Thomas Jackson, and the donor is styled Sarah Jackson.

But Hoof says that, when he married in 1813, he was very young, and became improvident; and that within four years afterwards he found it convenient to consent, and did consent, that his step-father, Thomas Jackson, should make a bill of sale of the slaves, Rose, Milly and Jack, by which bill of sale he would secure to the defendant and his wife, Ann, the joint use of the said slaves for life, and with a limitation to their children upon their death. That Thomas Jackson agreed to execute such instrument, and he understood from him that he had done so; that Jackson paid him no consideration for the slaves, and he expressly agreed that the deed should secure to him and his wife a joint interest in and use of the said slaves during their lives, with remainder to their children.

J. D. Hoof, Sr. has been always in possession of the negroes, until about the time of instituting these proceedings: he has been always embarrassed. In August, 1823, he applied for the benefit of the Prison Bounds Act, swearing that he had no property, real or personal, and was discharged by the plaintiff. Again, in October, 1824, he was arrested in a different suit, made substantially a similar affidavit, and was discharged by the Commissioner of special bail. He has held out to others, as appears from the testimony, that these negroes were the property of his children, and not his own. It is difficult to say that there is any evidence of any claim to the contrary, on the part of James D. Hoof, Sr. until having successfully baffled his creditors, for a series of years, it became necessary to contest the importunate

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demands of his *children. This controversy is between him and his children,—some of the children insisted on having a portion of the negroes, and Hoof thereupon, for reasons stated in his answer, sold them for \$3600, and he has been required to give security for their forthcoming, to abide the decree.

The Court rather concludes from the tes-

timony, (and J. D. Hoof, Sr. is not at liberty to controvert the inference,) that prior to the execution of the deed of October, 1817, the negroes mentioned in that deed were the property of James D. Hoof, Sr. If the deed of Jackson had given a life estate to James D. Hoof, with remainder to the joint heirs of him and his wife, "to their heirs and assigns forever," it would have been in strict conformity with the authority which Hoof admits that he vested in him, and such deed would have been perfectly valid for all the purposes intended to be accomplished.¹ If James D. Hoof, Sr. being the owner of the negroes, had executed a deed in the terms of that of October, 1817, by which he gave, granted and confirmed to the "joint heirs" of himself and wife three negroes, it would be competent for the Court to enquire into the meaning, and if not inconsistent with principle, to give effect to that intention. In *Bagshaw v. Spencer*, 2 Atk. 581, Lord Hardwicke, admitting that there ought not to be one rule of property in Law, and another in Equity, says: "but surely a Court of Equity may be more liberal in the construction of words, to make them agree with the intent of the party;" and he denied that "even in the case of volunteers, the words must be taken as they are, and cannot be varied from." P. 582. According to the strict legal construction, no persons could be said to be the "joint heirs" of J. D. Hoof, Sr. and Ann, his wife, as both of them were still in esse.—The term "joint" indicates that no immediate transfer and enjoyment was intended, but rather that it was a settlement on the issue of that marriage, in contradistinction to the issue of any other marriage. It is not very distinguishable from the case of *Dawson v. Dawson*, Rice Eq. R. 243. It was there held that an interest might pass by deed, which was to be enjoyed in futuro, and that the grantor himself stood seized in the meantime. It was also ruled that if a trustee were necessary, this Court would appoint a trustee in that case. In that case the donor "gave up all to the children named in his will." It was determined that the enjoyment of the property, given by the deed, was postponed until the will went into operation by the death of the testator. The admissions of James D. Hoof, Sr. are perfectly competent to show that the deed of the 23d October, 1817, was made with his privity and consent. It was manifestly intended as a settlement upon the joint heirs of J. D. Hoof and wife, as the terms purport, and as the defendant admits. In order to blind his creditors, the very inartificial (but as it proved

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very effectual) expedient *was resorted to of having the deed executed by his father-in-law, Thomas Jackson. It is not for Hoof to defeat the purposes of the settlement al-

¹ Rice Eq. R. 184.

together by alleging that a life estate to himself was not expressly given. The life interest was left in the original owner, and thus the effect was in conformity with the admitted intention—nor is it perceived that the result would be different as to the rights of the complainants, if Thomas Jackson had been the real owner at the time of the execution of the deed. The terms indicate clearly enough that the object was to make a settlement, and not to transfer an immediate interest and right of enjoyment to those in whose favor the deed was executed. The father would be construed a trustee, but as to the complainants only for the purpose of preserving the property, and delivering it up when the right of enjoyment commences.

It is ordered and decreed that the transfer of the slaves, made by the defendant, James D. Hoof, Sr. pendente lite, be set aside and annulled, and that he be perpetually enjoined from eloining, removing or otherwise disposing of the same. That he file forthwith in the office of the Commissioner, an inventory of said slaves, and that the bond heretofore given by him, stand as security for his observance and fulfilment of this decree. Parties to pay their own costs.

The complainants, William W. Holeman, and Sarah, his wife, Polly Hoof, Isabel R. Hoof, and Walter M. Hoof, appealed and moved to reverse or modify the circuit decree, upon the following grounds:

1st. Because the deed of Thomas Jackson, dated 23d October, 1817, vested an absolute estate in the slaves Rose, Milly and Jack, in Thomas C. Hoof and Sarah Hoof, the only children of James D. Hoof, and Ann, his wife, in esse at the execution of said deed.

2d. Because his Honor, the Chancellor, admitted parol testimony to explain, control, and vary the terms of the said deed.

3d. Because the declarations of Thomas Jackson, made subsequently to the execution of the said deed, were admitted in evidence.

The defendant, J. D. Hoof, Sr. appealed from the decree of the Chancellor, and moved to reverse the same, upon the ground that the deed of October, 1817, conveying slaves to the heirs of a person in esse, is a nullity, and that neither the complainants nor any other children of J. D. Hoof, Sr. take any interest in the said slaves by virtue of the said deed.

Bauskett & Boozer, Complainants's Solicitors.

W. F. DeSaussure, Carroll & Griffin, Defendants's Solicitors.

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**Curia, per CALDWELL, Ch.*—The instrument under which the questions in this case arise, is in the words following:

"To all people to whom these present writings shall come, be seen, or made known, greeting: Know ye, that I, Thomas Jack-

son, of the State and district aforesaid, in consideration of the very great love and affection that I bear my son-in-law, James D. Hoof, and daughter, Ann Hoof, of the State and district aforesaid, and for other good causes and considerations me thereunto moving, have given, granted and confirmed unto the joint heirs of said James D. Hoof, and Ann Hoof, his wife, the following negroes, viz: Rose, Milly and Jack, to have and to hold the said three negroes, Rose, Milly and Jack, with all the issue of the said Rose and Milly which they may hereafter have, to the joint heirs of the said James D. Hoof, and Ann, his wife. I, the said Thomas Jackson, for myself, my heirs, executors and administrators, do warrant and forever defend the said three negroes unto the joint heirs of the said James D. Hoof, and Ann, his wife, and to their heirs shall and will warrant and forever defend, by these presents. In witness whereof, I, the said Thomas Jackson, have hereunto set my hand and seal, this 23d day of October, in the year of our Lord one thousand eight hundred and seventeen, and in the forty-second year of American Independence.

(Signed) Thomas Jackson, [L. S.]

Signed sealed, and delivered in the presence of Laban Williams, William Paulding, J. Q."

There are three classes of persons that have claims under this instrument: 1st. James D. Hoof; 2d. The two children, Thomas C. Hoof and Sarah, who were in esse at its execution; and 3d. The other children of James D. Hoof and Ann, his wife, born since.

But the preliminary point must first be determined—is it a valid deed?

It has all the requisites of a deed, both in form and substance, except the names of the grantees who are to take under it. The gift is to "the joint heirs of said James D. Hoof and Ann Hoof, his wife."

It cannot be controverted that, according to the strict rules of the common law, a deed conveying lands to the heirs of a person living, is void, and cannot be set up either at Law or in Equity. The indefinite description of the donee, and the rules that *nemo est hæres viventis*, and that a freehold cannot be created to take effect in future, combine to defeat such an instrument.

But here the subject matter is personal property, and the word heirs is not necessarily used in such conveyances.—The common law, as well as history, often speaks

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of the *heir apparent and of the heir presumptive to the throne of Great Britain; and in common parlance he who stands nearest in degree of kindred to the ancestor, is called in his lifetime, his heir, although no one can be an heir, strictly speaking, until the ancestor be dead. The word heir is, apart from its technical meaning, universally used as synonymous with child.

In an ancient case, *Burchett v. Durdant*, 2 Vent. 311, there was a devise to the heirs made of Robert Durdant, then living, and it was adjudged in Westminster Hall, and twice affirmed in the House of Lords, to be a good limitation to George, the eldest son of Robert Durdant, although Robert Durdant was then living. So in *Darbien* on the demise of Long v. Beaumont, 1 Pr. Wms. 229, a devise to the heirs male of J. S. begotten, J. S. having a son, and the testator taking notice that J. S. was then living, was considered a sufficient description of the testator's meaning, and such son was adjudged to take, though strictly speaking he was not heir.

The case of *Thomas v. Bennett*, 2 Pr. Wms. 342, arose out of marriage articles, to which greater latitude has been extended than to construction of the limitations of estates; there the words were: "to the heirs of the body of my niece, Mary Bennett, by her said husband, and to their heirs," and the Court held that these words shall be construed children.

In *Loveday v. Hopkins*, Ambler, 274, 1755, the words of the will were, "I give to my sister Loveday's heirs, £6000." "I give to my sister Brady's children, each £1000." The sister, Mrs. Loveday, had two children at the making of the will, and she survived the testatrix; one of her children died, leaving children, in the lifetime of the testatrix, and the surviving child claimed the £6000. The master of the rolls, Sir Thomas Clarke, held that the defendants who were the children of the deceased child of Mrs. Loveday, were excluded, and that her surviving child was entitled to the £6000.

Where one gave his wife the residue of his estate, "for her life and no longer," and upon her decease he gave and bequeathed it "to the children of Mr. John Ayton and his wife, Jane, to be equally divided amongst them, the said Jane Ayton's children, and not to any child by another marriage of either party," the residue was held divisible amongst the children of Ayton and his wife who were living at the death of testator's wife, but children born after her death were excluded. There the time of distribution was not indefinite, but was fixed at the death of the tenant for life, and all those that were then in esse, came within the class that were to take the gift.²

In *Lockwood v. Jessup*, 9 Connect. Rep. 272, the plaintiffs brought an action on a promissory note, payable to the heirs of J. S. and averred that, at the date of the note,

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they were the children, and the *only presumptive heirs of J. S. then living; the word heir was held on demurrer to denote the

presumptive heir of a person living, and that the action was sustainable.

In *Stroman and wife v. Rottenbury* and wife, 4 Des. E. R. 272, the deed purported to have been made by the donor, "in consideration of the love I have and bear to my beloved grandchildren of my daughter, Catharina, I have given and granted, &c. unto the said my grandchildren of my daughter, Catharina," it was held not only to be sufficient, but to comprehend only the grandchildren then born, and not others born afterwards.

In *Moone et al. v. Henderson*, 4 Desaus. 459, incorrectly reported as *Moore v. Henderson*, the limitation was to a son and his heirs, but if any of the testator's children should die without an heir, then his share to go to the rest of testator's children; it was held not too remote, and that the testator used the word heirs as synonymous with children.

In *Kitchens v. Craig*, 1 Bail. R. 119, there was a deed of gift to the heirs of a person then living, in which it was recited that the donor had delivered the slaves which were the subject of the gift to the heirs, and it was held that this recital manifested the intention of the donor to restrain the gift to the heirs or children then living, and that children born afterwards did not take.

Where the words were, "I give and bequeath unto my dear and beloved grandchildren," without any qualification or limitation of time or circumstances when distribution should be made; that period was considered indefinite, and the Court, therefore, excluded the grandchildren born after testator's death, and held that the devise vested only in those born at his death. *Myers v. Myers*, 2 M'C. Eq. R. 214, [16 Am. Dec. 648.]

The donor when he made this deed knew well the condition and relation of the persons designated in it, and may have adopted the expression, "joint heirs" of James D. Hoof and Ann, his wife, from the fact that they, at that time, had two children, Thomas C. Hoof and Sarah Hoof. From what had already occurred from James D. Hoof's improvident management of his affairs, the donor may be presumed to have had apprehensions, if he conveyed the negroes to Hoof or his wife, they might be made liable for his debts, and the family lose the benefit of their services, and subsequent events have demonstrated that he acted wisely in not making the conveyance to either of them. Hoof has been insolvent from thence forward, and has, during that period, twice taken the benefit of the Prison Bounds Act, but the negroes have not been embraced in either of his schedules, nor taken by his creditors. As far as such extrinsic evidence can corroborate the construction given to the deed by all parties, it would seem that James D. Hoof has not been considered as

² Cox's Cases, 327; *Swinton v. Legare*, 2 M'C. Eq. 440; *Cole v. Creyon*, 1 Hill Eq. 322, [26 Am. Dec. 208.]

the owner of the property: such circum-

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stances may not be conclusive, but are well calculated to raise presumptions against his right. The terms of the deed do not convey any interest or estate to any other persons but to the joint heirs of James D. Hoof, and Ann, his wife, and the enquiry is, do these words sufficiently designate the donees? Can such expression be applicable to any other persons than these two children? If the donee can be identified, either by name or by description, the deed will not be void for want of a proper party to take under it. There is a material difference between a will and a deed; the latter takes effect from its delivery, and vests the title of the property in the donee immediately; the former usually looks forward to the future, and contemplates the condition of things at the period of the testator's death, or the distribution of the estate; hence after-born children are rarely provided for by a deed, the object being generally to pass a present interest, but they are frequently let in under the construction of wills by which gifts are made to children, when there is an anterior interest and they come in esse before its determination, especially if there be no child to take at the time of vesting in possession, or where there is a fixed period for the distribution: a legal remainder in real estate would constitute an exception.

This being a gift inter vivos, and operating per verba in presenti, it must fail if there was no one in esse in whom the title could vest; no one but a child of James D. Hoof, and Ann, his wife, could be their joint heir; and Thomas C. Hoof and Sarah Hoof being the only persons who came within that description, it appears to be sufficiently certain that they were the persons the donor intended should receive the benefit of the gift. Had such persons not been in existence at its execution, it would either have been considered void, or a different construction would have been given to it, from the necessity of the case; no one could take but after-born children, and as there was no definite period for distribution, it might be presumed the donor intended that all the children should come in and participate equally; this interpretation might be given, ut res magis valeat quam pereat, and a clear implication might arise from the circumstances in favor of all the after-born children. But here the donor knew that James D. Hoof, and Ann, his wife, had two children living, and as nothing was expressed in or can be implied from the terms of the deed in relation to after-born children, they do not appear to have been either nec-

essary to its completion, or contemplated by it, and it would require a clear and necessary implication from its context, before it could be held to open and let them in. That this was not the donor's intention, may be inferred from the facts that no contingency was contemplated as necessary to complete the gift, and no period was designated for the distribution of the property among the

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*donees. The slaves given by the deed vested in the children in esse at its execution, and their rights ought not, upon a slight presumption, to be abridged in favor of those that have been born since; there having been no express provision for them, and there being others who came within the description and were capable of taking, repels the conclusion that they were intended to be included: expressio unius (est) exclusio alterius.

It is apparent from the face of the instrument, that the donor meant that no other class but the "joint heirs" should receive the benefit of the gift. An immediate interest and title passed to these two children on the delivery of the deed; they then became entitled to the absolute and unconditional enjoyment of the property, and but for the birth of the other children, there would have been no doubt that they were the only persons the donor intended: their rights stand upon the terms of an express grant; but the claim of the after-born children can, at best, rest only on an implication from circumstances which have arisen independently of the deed, and were unnecessary to its consummation; such, however, as the donor might have anticipated and provided for if he had thought fit: nothing but a clear and necessary implication ought to abridge their vested rights in favor of the after-born children, and the terms of the deed do not warrant such a construction.

It is, therefore, ordered and decreed that Thomas C. Hoof and Sarah Hoof (who has intermarried with W. W. Holeman) are entitled to the said slaves absolutely in exclusion of James D. Hoof, and Ann, his wife, and of their children born since the delivery of the said deed; and that the said James D. Hoof do deliver them up to the said Thomas C. Hoof and Sarah, and that his bond, heretofore given, stand as a security for his fulfilment and performance of this decree, and that the circuit decree be modified in these, and that it be affirmed in all other points.

JOHNSTON and DARGAN, CC., concurred.

Decree modified.

3 Strob. Eq. *76

*E. WATERMAN, Trustee, v. ELI KENNERLY et al.

(Columbia. Nov. and Dec. Term, 1849.)

[Trusts ⇨263.]

Complainant, as trustee, in behalf of his cestui que trusts, a married woman and her two children, without joining them, filed his bill for the specific delivery of certain slaves alleged to be part of the trust estate. At the hearing, finding it impossible to make out his case without the testimony of the husband of the married woman, he moved for leave to examine him as a witness, and conceding that he was not competent, for the purpose of rendering him so, moved likewise to dismiss the bill as far as the interests of the married woman were concerned, and to retain and prosecute the suit for the benefit of the children, her co cestui que trusts. The Circuit Chancellor refused to pass the order, and dismissed the bill. On appeal his decision was affirmed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 373; Dec. Dig. ⇨263.]

[Equity ⇨385.]

The Court will not retain a cause after a full hearing, in order to allow testimony to be subsequently prepared.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 833; Dec. Dig. ⇨385.]

This cause was heard by Johnston, Ch. at Columbia, June, 1849; from whose decision this appeal was taken. The facts appear in the following opinion of the Appeal Court.

Curia per JOHNSTON, Ch. The defendants had purchased two slaves, John and Stono, as the property of Jos. S. Bossard, at sheriff's sale; and the bill was filed by the plaintiff, Waterman, trustee of Bossard's wife and children, (but without joining his said cestui que trusts in the suit,) to recover these slaves, that he may subject them to the provisions of the trust deed.

The deed, which was alleged to have been executed by the late Francis Withers, conveyed to Waterman, the trustee, a tract of land and sixteen slaves—of whom the slaves in question were alleged to have been two,—upon the following trusts:

"For the sole and separate use" &c. "of Matilda Ann Bossard, the wife of Joseph S. Bossard, and in no way to be subject," &c. "during her present coverture, or widowhood,—or, until one of the children of the said Joseph S. Bossard and Matilda Ann Bossard shall marry or attain the age of 21 years. Then, two of the negroes, and a life estate in the real property aforesaid, to go to the said Matilda Ann, during her natural life; and the residue be equally divided among the children of the said Joseph S. Bossard and Matilda Ann Bossard, their heirs and assigns, forever."

John Bossard, one of the children, had attained full age: but no division had been made of the trust property.

The plaintiff, at the hearing, having exhausted his testimony, and having, as his counsel very candidly stated to the Court,

produced no testimony entitling him to a decree, moved for leave to examine Bossard as a witness,—at the same time conceding that, according to the case of Footman v. Prendergrass, he was incompetent. For the purpose of rendering him competent, he

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"moved to dismiss the bill, so far *as the interests of Mrs. Bossard were embraced in the suit, and to retain and prosecute the suit for the benefit of her children."

The Court signified its willingness to pass an order granting leave to the plaintiff to disclaim title or interest in the two slaves in dispute, to the extent of 1-8th or 1-9th thereof (being the extent of Mrs. Bossard's interest in them);—but declined to pass the order moved for, without the consent of the defendants,—which consent was withheld. The plaintiff's counsel refusing to accept these terms, the bill was dismissed.

An appeal has been taken from this decision, and argued.

The case quoted by counsel of Motteux v. Mackreth, 1 Ves. J. 142, decided by Lord Thurlow, and followed by Lord Eldon, in Lloyd v. Makeam, 6 Ves. J. 145, is not in point; and besides, it is to be observed that in these cases, Lord Thurlow decided with manifest hesitation, and Lord Eldon followed him against his own judgment.

In both cases, the parties, whose evidence was sought to be used, were parties (as plaintiffs) to the record. In the case of Motteux v. Mackreth, Dallas, the witness proposed was one of the several annuitants, and being the only witness to some of the securities, in which his co-plaintiffs were interested, an order was granted upon terms to strike out his name as a plaintiff, and make him a defendant, to enable him to give the necessary evidence.

In Lloyd v. Makeam the names of two out of four plaintiffs, who had executed releases to their co-plaintiffs, were struck from the bill, to enable them to give evidence.

In the case before us, Mrs. Bossard was no party to the bill, nor to the suit; and if her interest in the slaves, the subject of the suit, had been a several interest, and capable of being released by a femme couverte, she had not released it. Ewing v. Smith, [3 Desaus. 417, 5 Am. Dec. 557:] Magwood v. Johnston, 1 Hill's Eq. 228; Reid v. Lamar, 1 Strob. Eq. 27.

The plaintiff had no power to destroy or release her equity. That was a thing which she alone was competent to do. It was competent for the plaintiff, if the subject of the suit was devisable in its nature, to have relinquished a portion of his claim, but not to designate the part thus disclaimed by him as Mrs. Bossard's portion. He had no authority to throw this loss exclusively upon her. He could not have resisted her claim to participate in the residue left, and which

was to be recovered by her husband's testimony. And so long as this right existed on her part, her husband could not be sworn.

But, besides all this, the subject matter of the suit, in which her interest inhered, was incapable of division. The bill was for the specific delivery of slaves; and the plaintiff's counsel perceived that a simple disclaimer of right in any proportion of them, without a release of that proportion, to the plaintiff, or to Mrs. Bossard's co-cestui que trusts, would have destroyed his right to a decree; and, therefore, very properly, re-

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fused to *take the order offered him by the Court; which was the only order the Court could make.

The Court very properly refused to retain the cause, after a full hearing, in order to allow testimony to be subsequently prepared.

It is ordered that the decision appealed from be affirmed, and the appeal dismissed.

DUNKIN, and DARGAN, CC., concurred.

CALDWELL, Ch., having been of counsel, declined to sit.

Decree affirmed.

3 Strob. Eq. 78

THOMAS FINLEY, Adm'r et al. v. A.
HUNTER, ex'tr et al.

(Columbia. Nov. and Dec. Term, 1849.)

[Wills \hookrightarrow 583.]

Testator, in the first clause of his will, after making an absolute bequest to his wife, devised and bequeathed to her the land on which he resided, together with all his negroes and property of every kind whatsoever, that he might die possessed of, for her use during her natural life. The second clause is as follows—"After the death of my wife Jane, and after the payment of the several legacies, &c. I give and bequeath to Reuben Finley, of the State of Tennessee, &c. the aforesaid tract of land, together with all the negroes, and all the property belonging to my estate, of what kind soever, real and personal, at the death of my said wife Jane, to him and his heirs forever." The Court was of opinion that the testator intended to give to his wife the use and benefit of the property specifically, for her life, with all the rights and privileges incident to its possession and enjoyment; and therefore held, that at the death of the wife, her executor was not accountable for the value of the property at the time it went into her possession, but that it was to go over to the remainderman such as it remained at the time of her death; in the condition it was after her specific and legitimate use of it during her life.

[Ed. Note.—Cited in Brooks v. Brooks, 12 S. C. 447; Moody v. Tedder, 16 S. C. 561.]

For other cases, see Wills, Cent. Dig. § 1272; Dec. Dig. \hookrightarrow 583.]

[Wills \hookrightarrow 583.]

Where money is given to one for life, the life-tenant is entitled to the use or interest of the money, and at his death, the principal is to be accounted for to the remainderman.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1272; Dec. Dig. \hookrightarrow 583.]

[Life Estates \hookrightarrow 21.]

Where a life estate is created in live stock, consisting of flocks or herds, the rule is that the original stock must be kept up or accounted for, unless it has been diminished or destroyed without neglect or default on the part of the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 5, 17, 19, 20; Dec. Dig. \hookrightarrow 21.]

Before Caldwell, Ch., at Abbeville, June, 1848.

Caldwell, Ch. This case was presented on exceptions to the Commissioner's report.

Plaintiff's Exceptions.

"1. Because the Commissioner held that Alexander Hunter, the executor of the tenant for life, Jane Finley, was liable to account for only so much of Thomas Finley's

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estate as re*maind in the possession of the tenant for life, at her death, or the corpus of the personalty bequeathed to her use for life, which went into her possession.

"2. Because from the sum of \$1,757.40, the value of articles that went into the possession of the tenant for life, at the death of the testator, after excluding specific legacies, the Commissioner deducted the sum of \$269.98 $\frac{1}{4}$, being the value of sundry articles as given in the appraisement of Thomas Finley's estate, which at the death of the tenant for life were so diminished in value as to amount, at the sale of tenant for life's estate, to only the sum of \$105.01 $\frac{1}{2}$.

"3. Because the Commissioner held that according to his construction of Thomas Finley's will, the tenant for life was not liable to account for any property of testator that went into her possession; and of the whole estate that so went into her possession, gave to complainant only the sum of \$105.01 $\frac{1}{2}$, the value of the articles which remained at the death of the tenant for life."

"6. Because the Commissioner erred in not charging the estate of Jane Finley with the sum of \$283, money which went into her hands at testator's death."

These four exceptions bring up the questions that arise under the will of Thomas Finley. After the testator had bequeathed several slaves and other personal property to his wife Jane Finley, absolutely, he devises and bequeaths as follows, "that she may have a comfortable support and maintenance, I give her the tract of land on which I now live, containing 250 acres, situate on Sawney's creek, in the District and State aforesaid; together with all my other negroes and property of every kind whatsoever, that I may die possessed of, for her use during her natural life, &c. After the death of my said wife Jane, and after the payment of the several legacies herein mentioned, I give and bequeath to Reuben Finley, of the State of Tennessee, Wheelwright, whose mother's maiden name was Catharine Kind-

er. the aforesaid tract of land, together with all the negroes and all the property belonging to my estate, of what kind soever, real and personal, at the death of my said wife, Jane, to him and his heirs forever on the following conditions," &c.

The first question is as to the cash on hand at the testator's death; if that had been the only article bequeathed, there would scarcely be a difference of opinion as to what was intended by the testator; the tenant for life was entitled to the use, or interest, of the money for her life, and her estate is liable at her death to account for and pay over the principal to the remainderman.—The Commissioner has properly sustained the sixth exception in his report on the exceptions.

The question as to the other articles of personal property, is, I think, no longer

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open, since the cases of *Patterson v. *Devlin*, 1 McMul. Eq. 459, and of *Robertson et al. v. Collier et al.*, [1 Hill Eq. 370.] The principle was clearly expressed in the former, and recognized and approved in the latter case, "that the perishable articles cannot be considered as belonging absolutely to the tenant for life, neither can they be sold, because they are necessary to the preservation of the estate. The tenant for life must therefore be considered as a trustee for the remainderman, and must preserve the estate, with all its appurtenances, in the situation he received it." In illustrating this view, Chancellor Harper says, "the tenant for life is entitled to the use of the estate, but it is such a use as a prudent proprietor would make of his estate. The profit of an estate is the nett income, after defraying all necessary expenses; and to renew a plough that is worn out, or replace a horse or mule that dies, comes under the head of necessary expenses. Thus the relative rights of the tenant for life and remainderman will be the same, whether the estate be sold and the proceeds vested, or retained in kind. If at the termination of the life estate all the articles of the sort mentioned, are not in as good condition as when he received it, the tenant must make good the deficiency."

If I did not consider the question settled by other cases I should be inclined to a different opinion as to some of the articles; but I feel bound to adhere to established rules, and it would be unsafe to depart from them, unless the terms of the will clearly expressed that the testator intended that a different principle should be adopted in the disposition of his estate.

The 4th and 5th exceptions are as to the allowance of counsel fees to the executor for professional advice and services. The Commissioner reports on these exceptions as follows:—"The first item of counsel fees referred to in this exception, (4th,) to wit, \$200, is included in the return of A. Hunter, exec-

utor of Jane Finley, who is also the executor of Thomas Finley, and was for counsel and advice in relation to the estate in litigation, in this case, prior to the filing of the answer. Upon a more mature reflection, the last counsel fee, to wit, \$200, for the present litigation, the Commissioner reduces to \$100; and his report is so modified, in all other respects; this exception is overruled." Upon the 5th exception, the Commissioner reports: "The counsel is mistaken as to the reference; upon one of the references held in this case, it was distinctly announced by counsel, in the presence of Mr. Thomson, that a reasonable fee was claimed to be charged upon the balance found in A. Hunter's hands; and although no testimony was offered to fix the amount—supposing it to be allowed—the Commissioner being fully aware of the professional services rendered, thought it not going beyond the limits of his duty to fix it

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himself, and *thinks the fee, modified as above, very reasonable indeed. The only question with the Commissioner was whether the balance found in the executrix's hands should be charged with it" There is no difficulty as to the principle upon which counsel fees are to be allowed to an executor or administrator; when an estate requires professional services to prosecute or defend its interest, and where the executor or administrator does not litigate for his own benefit, he will be allowed a counsel fee; so he will be allowed fees paid for general advice as to the most proper and profitable course of administration; but where he fails to do his duty, and is called to account, or litigates questions on which he is individually interested, or where he resists the claims of those interested without some reasonable ground, he is not entitled to charge the estate with costs or counsel fees that he has incurred.—*Warden v. Burtz*, 2 McC. Eq. R. 76; *Wright v. Wright*, Ib. 186; *Sherman v. Angel*, 2 Hill, Eq. R. 26; *Wham v. Love*, *Rice's Eq. R.* 51. The evidence of the amount or value of the services, is what the Commissioner states of his own knowledge; and this, as the charges appear to be reasonable in his opinion, might be sufficient, if they had not been objected to, and if it were not that there was some mistake of the plaintiff's counsel about the claim. In the despatch of business, such accidents will occur; and to confirm the report without giving the party a further opportunity of examining the charge of the counsel fees might operate as a surprise; and as the report will have to be modified, these exceptions are recommitted with it. The Commissioner will report the specific services rendered, and their value.

"7. Because the Commissioner should have allowed the administrator of Reuben Finley the hire of the slaves, after the death of tenant for life, until the end of the year 1845." The tenant for life, Jane Finley, died

on the 29th of November, 1845. The construction of the will of Thomas Finley, expressed in this opinion, and the decisions in *Leverett et al. v. Leverett et al.*, 2 McCord's Eq. R. 84, and in *Herbemont, Adm'r v. Percival*, 1 McMul. Law Rep. 59,—preclude this charge from being sustained against the estate of the tenant for life.

"8. Because the commissioner allowed commissions on sums received by A. Hunter, belonging to the estate of the remainderman." The Commissioner in his report on the exceptions, sustains this exception, except as to the commissions on the last item of rent and hire, "which (he says,) should be allowed the executor, inasmuch as the rent and hire were by the consent of all the parties."

An executor or administrator is entitled to retain or receive for his ordinary services $2\frac{1}{2}$ per cent, for receiving, and $2\frac{1}{2}$ per cent, for whatever he pays in credits, debts, legacies, or otherwise, during the course or con-

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tinuance of his management or administration; but the funds so received or paid must belong to or arise out of the estate of his testator or intestate. This principle cannot apply to the receipt and disbursement of the funds of another person. If there was any special agreement for him to receive other funds, it must provide for his commissions, or they cannot be allowed. A private agent is not entitled to any such claim, unless he make it a part of his contract. (*Ravenel, adm'r. v. Pinckney*, quoted in *Muckenfuss v. Heath et al.*, 1 Hill Eq. R. 183.)

Defendant Excepted,

"Because the Court having ordered, by its previous decree, that the costs of A. Hunter should be paid out of the estate of Thomas Finley, the Commissioner erred in reporting his costs should be paid out of the estate of Jane Finley." The decree of Chancellor Johnston is conclusive; it orders the costs "of A. Hunter and Thomas M. Finley, as representatives of Jane and Thomas Finley, and Reuben Finley, respectively, to be allowed out of the estate represented by them."

By taxing the items of costs incurred by the representative of each estate separately, it will be easy to apply the principle, and to determine which estate is liable.

It is therefore ordered and decreed, that the Report of the Commissioner be modified agreeably to these views, and that it be re-committed to him for that purpose.

The defendant, A. Hunter, executor of Jane Finley, appealed from the decree, on the grounds:

1st. That by the terms of the will of Thomas Finley, nothing whatever is given to the remainderman, Reuben Finley, except such property as should exist and remain in kind after the use of it by the tenant for life, Jane Finley. And to require her execu-

tor to account for the value of the property at the time it went into her possession, is wholly inconsistent with the intention of the testator.

2d. Because his Honor erred in sustaining the 8th exception to the Commissioner's Report, allowing commissions to the executor upon sums received for the rent and hire of land and negroes, which by the decree were ascertained to belong to the remainderman, but which were rented and hired by the executor, as of the estate of Thomas Finley, up to the rendition of the decree ascertaining the rights of the parties.

3d. Because it being the duty of the executor to rent and hire the land and negroes, during the litigation, he is entitled to compensation for the same; and if he is not entitled to commissions *eo nomine*, he has a just claim for services rendered against the remainderman, Reuben Finley, which this Court will recognize and enforce in the accounting between them.

Perrin, McGowen & Wilson, for the motion.

—, contra.

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*Thomas Finley's Will.

In the name of God, amen—I, Thomas Finley, of the State of South Carolina, and District of Abbeville, Planter, being in health of body, and of sound disposing mind, memory and understanding—praise be to God for the same—do make and ordain this my last will and testament, in manner following—that is to say:

I give and bequeath to my dearly beloved wife, Jane Finley, the following part of my estate, namely; negroes Finder, Tom, Jude, William, Caroline, Milly and Rose, and all my beds and bed-clothes, with my mahogany table, cupboard and cupboard furniture, and kitchen furniture—to her and her heirs and assigns forever. That she may have a comfortable support and maintenance, I give her the tract of land on which I now live, containing two hundred and fifty acres, situate on Sawney's creek, in the State and District aforesaid, together with all my other negroes and property of every kind whatsoever, that I may die possessed of, for her use during her natural life. And I hereby declare that the bequests and provision hereby and hereinbefore made to my said wife, Jane, if accepted, is to be taken and received by her in bar and in lieu of dower in my estate.

After the death of my said wife, Jane, and after payment of the several legacies hereinafter mentioned, I give and bequeath to Reuben Finley, of the State of Tennessee, Wheelwright, whose mother's maiden name was Catharine Kinder, the aforesaid tract of land, together with all the negroes and all the property belonging to my estate, of what kind soever, real and personal, at the death of my said wife, Jane—to him and his heirs

forever, on the following conditions, viz.: that he emancipate all the female children of my two negro women, Nancy and Jinny, or cause them to be sent to the State of Indiana or Ohio, where the laws of the State will liberate them. The said female children are to be set free, as they respectively arrive at the age of twenty-five years, and all their children with them, should they have any; as it is my wish and desire to put a stop to the slavery of the race of negroes belonging to me in future. I also request that said Reuben Finley have marble head-stones put at the head of my and my wife Jane's graves, with our names and the dates of our births and deaths respectively engraven on them. Also to enclose our graves with a stone wall of five feet high, with a shutter to the door, of some durable materials, and that spot of ground to be reserved, and never conveyed away with the tract of land. I was born the 11th of February, 1757, and my wife, Jane, was born the 8th of November, 1765.

I give and bequeath to my niece, Ann Fin-

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ley, my negro *boy, Franklin, to her and her heirs forever, and also my negro girl, Peggy, until she arrive at the age of twenty-five years, at which age she is to be emancipated, or sent to the State of Indiana or Ohio, where the laws will free them; and her children, if she have any, shall go free with her. The negro boy, Franklin, is not to be bartered or sold out of her family, where I trust he will be well treated.

I give and bequeath to Thomas Finley Mitchel, son of Francis Mitchel, of the State and district aforesaid, my negro boy, Robert, to him and his heirs forever, hoping he will use him well.

And I do hereby nominate, constitute and appoint my trusty friends, Alexander Hunter and John Clark, executors of this, which I declare to be my last will and testament. In witness whereof, I have hereunto set my hand and seal, this day of in the year of our Lord eighteen hundred and twenty-three. Thomas Finley.

Signed, sealed, declared and published, by the above mentioned Thomas Finley, as and for his last will and testament, in the presence of us, who, at his request, and in his presence, have subscribed our names thereto as witnesses.

Thomas Hunt,
Thomas Brough, Jr.
William Clark.

Curia, per DARGAN, Ch. From the view which the Court has taken of this case, I am relieved from the necessity of discussing the embarrassing questions raised and discussed on this appeal. I am not called on to apply, as the Chancellor did in his decree, the doctrine asserted to have been determined in the cases of *Patterson v. Devlin* and

Robertson v. Collier, 1 Hill Eq. 370. This case does not call for any expression of opinion on the questions raised in those cases. I, therefore, express no opinion as to the extent of the liability of the tenant for life of personal property, to the remainderman, in cases like those alluded to.

This case is adjudged upon the strong and peculiar phraseology of the testator's will, and a manifest intention appearing from the expressions he has employed in the gift to his wife for life, and the limitation over. In the first place, it is a case entirely different from that of *Robertson v. Collier*. It is not the case of a gift of a plantation, negroes, stock, provisions, &c. to one for life, with remainder over to another. Thomas Finley, by his will, gave, out of nineteen negroes, (one of them old and a charge) six of said negroes, and a considerable portion of his household goods, to his wife, Jane Finley, to her, her heirs and assigns forever. And, that she might have a comfortable support and maintenance, he gave her the tract of

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land on which he lived, together *with all his other negroes and property, of every kind whatsoever, that he should die possessed of, for her use during her natural life. At his death, the surviving wife, under the last mentioned clause, took into her possession, and has enjoyed, all the property given to her for life; consisting, (besides the land and the negroes) of \$283 in cash, and of various articles of personal property, generally possessed by a planter of his means, living on his farm; namely, of horses, cattle, hogs, sheep, carriage, wagons, agricultural implements, and provisions. Jane Finley being dead, her personal representative is called upon to account to the remainderman for the various articles of personal property, of which, by the will, she was to have the use during her life. And some of the articles being consumable in their use, and having been consumed, and some of them having been totally worn out, by the wear and tear incident to their use and the operation of time, and others, though remaining, having become deteriorated in value from the same causes, the question is, upon what principle is the estate of the life tenant to account?

This Court discovers in the will itself a solution of this question. The second clause of the will is as follows:—"after the death of my wife, Jane, and after the payment of the several legacies, &c. I give and bequeath to Reuben Finley, of the State of Tennessee, &c. the aforesaid tract of land, together with all the negroes, and all the property belonging to my estate, of what kind soever, real and personal, at the death of my said wife, Jane, to him and his heirs forever." The Court is of the opinion, that the testator intended to give to his wife the use and benefit of the property, specifically, for her life,

with all the rights and privileges incident to its possession and enjoyment. All the property belonging to his estate at the death of his wife, he gave to Reuben Finley after the death of his wife. Such as the property remained, at the death of his wife; in the condition it was, after her specific and legitimate use of it during her life, it was to go over to Reuben Finley. It follows from this, that her estate is not responsible for articles that were consumable in their use; nor for the horses, mules or oxen, that died from disease or old age; nor for the destruction of articles that were worn out and went to decay in their lawful use; nor for the deteriorated value of those that remain, whose value has been impaired by the abrasions of time. In regard to the articles that are forth-coming, as well as those that are not, the question will be, whether they have been rightfully used and enjoyed by the tenant for life. If this be decided in the affirmative, the estate of the life tenant is not liable, and the remainderman must take the articles that remain, in the condition in

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which he finds them. *In regard to the cash, the principal must be accounted for, and as to live stock, in flocks or herds, the rule is, that the original stock must be kept up or accounted for. These are re-productive, and, with good management, perpetuate themselves. Yet even in regard to this kind of property, the life tenant will be permitted to shew that they have been destroyed or diminished without neglect or default on her part.

The decree is modified, and the report is referred back to the Commissioner, with instructions to state the accounts in conformity with this decree. In all other respects the decree is affirmed and the appeal dismissed.

JOHNSTON and DUNKIN, CC., concurred.

Decree modified.

3 Strob. Eq. 86

JOHN J. RYAN, Adm'r of Duncan, v. WM. R. BULL & Wife et al.

D. F. JAMISON, Trustee, v. GEO. D. KEITT, Sheriff.

(Columbia. Nov. and Dec. Term, 1849.)

[*Husband and Wife* ⚭12.]

The guardian of a female ward who had been married, and was an infant, and whose property, consisting of lands, slaves and money, was still in his possession, before a settlement with her husband, required him to execute a trust deed of the lands and negroes "to the sole and separate use" &c. of his wife. The deed was made to a trustee, selected by the guardian, in consideration of the marriage, of the guardian's fully accounting and paying over such sums of money of the ward as had come to his hands, delivering up the negroes, &c. At the time of its execution there was existing against the husband the lien of a judgment for

a small amount in favor of one who was no party to the bill; he was also indebted to several others (one of whom only was a party) on demands upon which judgments were subsequently obtained. The Court sustained the settlement, against the claims of the creditors of the husband.

[Ed. Note.—Cited in *Pettus v. Smith*, 4 Rich. Eq. 205.

For other cases, see *Husband and Wife*, Cent. Dig. § 61; Dec. Dig. ⚭12.]

[*Husband and Wife* ⚭12.]

What the Court, on application, would have ordered to be done, it will sanction, when done by the parties voluntarily.

[Ed. Note.—Cited in *Godbold v. Bass*, 12 Rich. 203; *Trustees v. Bryson*, 34 S. C. 412, 13 S. E. 619; *Shumate v. Harbin*, 35 S. C. 530, 15 S. E. 270.

For other cases, see *Husband and Wife*, Cent. Dig. § 61; Dec. Dig. ⚭12.]

Before Caldwell, Ch., at Orangeburgh, February, 1849.

Caldwell, Ch. As these cases depend upon the same facts and principles, they were taken up and heard together, and must therefore abide the same result; the trustee, by bill for injunction against Sheriff Keitt, (who levied upon Catey, one of the trust negroes,) insists on the same rights that he sets up, by way of defence, in the first case.

William R. Bull was born on the 10th of May, 1819, and Julia A. Carson on the 24th of January, 1823. They intermarried on the 2d of December, 1838, while Thomas W. Glover was her guardian, under the appointment of the Court of Equity. On the 10th

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of September, 1839, William R. Bull *gave a note, with Willis J. Duncan as surety, for \$440.43, payable one day after date, to J. G. W. Duncan, who obtained judgment by confession against them, for \$507.98, with interest on \$440.43, from 11th January, 1841. Judgment was entered up and a fl. fa. issued against them, on the 15th January, 1841, which remained unsatisfied. William R. Bull is insolvent, and all legal remedies against him have been exhausted; after all his property has been sold, he still owes, (as appears from a schedule of his debts, offered in evidence,) several debts; in one of them, *McTyre v. Bull*, judgment was entered up on 2d of May, 1839, on which no satisfaction has been entered. William R. Bull became greatly involved in debt during his infancy, and after he arrived at age, the guardian of his wife, before a settlement with him for his wife's property, required him to execute a trust deed to David F. Jamison, on the 20th of May, 1840, conveying certain tracts of land situated in Edisto Fork, on the North Edisto river, (being lands devised by the late James A. Carson to Julia A. Carson and Mary Wingham, sometime Mary Carson, his widow,) and thirteen slaves, and the issue of the females, in consideration, as the deed expresses it, of the marriage, and of the guardian's fully accounting and paying

over such sums of money of the ward as had come to his hands, and of delivering up the negroes, and in consideration of the sum of one dollar. The trusts are "to and for the sole and separate use and benefit of the said Julia A. Bull, during the joint lives of her and her husband, William R. Bull, and to and for the use and benefit of the survivor during life, and after the death of the said William R. Bull and Julia A., to and for the use of such child or children as shall survive them: and if there be no child of said marriage, then to the survivor absolutely." It appears from the release of Wm. R. Bull to the guardian, contemporaneously executed with their settlement and the trust deed, that the guardian paid over to him, on their adjusting their accounts, the sum of \$2826.80, which was in full "for negro hire, rents, money received, or from any other source." The bill seeks to set aside the trust deed, as fraudulent and void, and to subject the property to the payment and satisfaction of the judgments remaining open and unsatisfied against Wm. R. Bull, and particularly the judgment of J. G. W. Duncan against him and Willis J. Duncan, his surety, (of whom John J. Ryan, the plaintiff, is the executor,) in the same manner and to the same extent as if the trust deed had not been executed, and that the trustee render an account of all the property which was conveyed by the trust deed, and of the subsequent increase thereof; and that the whole of the property may be subjected to the payment and satisfaction of the plaintiff, and other creditors of Wm. R. Bull; also for general relief. The defendants, Wm. R. Bull and his wife, state in their answer, that she was

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entitled, at her marriage, to the lands and negroes described in the bill, which, with securities drawing interest, were under the control and management of Thomas W. Glover, her guardian. That Wm. R. Bull applied to her guardian for the possession of her property, on his attaining the age of twenty-one years, on the 10th May, 1840, and that the guardian declined and refused to comply with his request, or to account with, or pay over to him the amount in his hands, unless Wm. R. Bull should make provision for his wife from her property in the hands of the guardian, and that Wm. R. Bull therefore consented to execute, and did execute, the trust deed, and the guardian accounted to him for the sum of two thousand eight hundred and twenty-six dollars and eighty cents. Wm. R. Bull admits as true, that he drew the promissory note in favor of J. G. W. Duncan, as set forth in the plaintiff's bill, while an infant, and he expected to pay it and other debts, out of his own property, and he believes that many of his Barnwell creditors looked to the same source for the payment of their claims against him. That on the 18th of March, 1840, a division of his father's estate was made, and eleven negroes

were allotted to him as a distributee, which, with the rest of his patrimony, and the amount he had received of Thomas W. Glover, the guardian of his wife, were applied to the payment of debts which were contracted, with few exceptions, in his infancy, &c. The defendants insist that the provisions of the trust deed were proper, just and equitable, and that it is neither fraudulent or void, or subversive of the rights of the creditors of W. R. Bull.

The property of the ward, Julia A. Carson, at her intermarriage with William R. Bull, and also at the time of settlement with her guardian, and of the execution of the deed of trust, consisted of three classes—lands, negroes and choses in action. The only subsisting judgment that existed prior to this time, is that of McTyre, for \$50.68 and costs \$9.05. This judgment and execution has a lien on whatever property was vested in Wm. R. Bull, and must be paid in preference to all other claims brought forward against him. I shall consider the question of the liability of the property of the ward, in the hands of her guardian, to her husband's debts, in the order in which they have been named. The husband has only a qualified right to rents and profits of his wife's lands, if he survived her. At common law, however, he is entitled to such as become due during the coverture; but if she survived him, she would be entitled to them, and not his executors; but the husband could not recover rent in arrear before the marriage, yet he is entitled to recover all that arose during coverture; the former part must be considered as a chose in action, and the latter part of the rent was a right that he could have enforced without the intervention of this Court, as the marriage of the ward terminated the guardianship, so that

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*the husband might legally have taken possession of her lands and received the rents and profits.¹

The negroes compose the second class. The possession of such personal chattels by an agent or attorney, always enures to the same legal extent as if it were the possession of the principal; and upon the same principle the possession of the tenant is considered the possession of the landlord, and has the same legal effect in protecting his rights as if he actually occupied the premises. When a female ward intermarries, her husband's marital rights, ipso facto, attach as absolutely and indefeasibly upon her personal chattels, in the possession of her guardian, as if they had been formally delivered to the husband. *Davis v. Rhame*, 1 McCord's Eq. R. 191. The marriage transfers their title and possession to him, and they are equally subject to the claims of his creditors as any of his other personal property, of which he

¹ Clancy on Married Women, 10; Ognell's case, 4 Rep. 51, 1 Ves. 91.

had obtained possession by a bona fide bargain and sale. The legal effect of marriage is to deprive the wife of her equity in such property and to vest the chattels in the husband absolutely. The negroes, therefore, of Julia A. Carson, in the hands of her guardian, on her marriage, became the property of William R. Bull, and must be held as subject to the claims of his creditors as his other property. The same may be said of the hire of the negroes after the intermarriage, as that was a mere incident, to which he was absolutely entitled as to them. But I think there is a material distinction between the securities bearing interest, and the other choses in action, in the hands of the guardian, and that these could with propriety be settled upon the wife; they were, however, paid and delivered over to the husband on his executing the trust deed. The guardian would not have delivered the property, or accounted to the husband, unless he had made a suitable settlement upon his wife. Such a course was highly prudent on the part of the guardian, and there can be no doubt of the propriety of the motives of all the parties to the settlement, and to the trust deed, the terms of which appear to be reasonable and just. But the rights of creditors, who are a class of persons highly favored by the law, must be protected, and the whole transaction must stand upon the question, how far the marital rights attached upon the wife's property absolutely, and the consideration of the trust deed. If the negroes and their hire, after the marriage, constituted the sole consideration, then the trust deed must be set aside, unless the property of the husband was sufficient to pay his subsisting debts. But as there were other considerations, and the funds which have been received have been applied to discharge his debts, such part of the ward's estate, in her guardian's hands, as consisted of choses in action, in which she had an equity, was a fair subject of settlement by a trust deed, and to this extent the deed is valid. The guardian,

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no doubt, presumed *in the future what he had perceived in the past conduct of the husband, that he was improvident, and would probably waste his wife's property; it was therefore his duty to secure his ward, by all legal means, against such an impending calamity. If the husband does voluntarily what this Court would have decreed to be done, in making a settlement of the wife's property, for her benefit; if he or his creditors had been compelled to come here to obtain her property, such a settlement upon her must be supported. But if the consideration of the trust deed be grossly inadequate, it ought to stand good only for the amount of the choses in action in the guardian's hands, in which the wife had an equity at the time of the settlement.

It is therefore ordered and decreed, that it be

referred to the Commissioner of Orangeburg District to report on the matters of account in these cases, and that he do ascertain and report particularly what choses in action were in the guardian's hands, liable to the wife's equity, at the time of the settlement, and to what extent they constituted the consideration of the trust deed; also what was the value of the property, lands and negroes, conveyed by William R. Bull to the trustee, and what proportion the value of the absolute estate of the husband, in the wife's property, bore to the choses in action aforesaid; and that he report any special matter.

D. F. Jamison and W. R. Bull and wife moved to reverse his Honor's decree, made in the two above cases, on the following grounds:

1. That Wm. R. Bull's marital rights did not attach on the property in the guardian's hands, under the circumstances of this case.

2. That the deed executed by Wm. R. Bull was neither fraudulent nor void against his creditors.

The complainant also gave notice that in the Appeal Court a motion will be made to reverse so much of the Chancellor's decree as decides that the marital rights of Wm. R. Bull did not attach absolutely to all the property in the hands of the guardian of his wife—which property, in fact, consisted of nothing but the negroes and cash received by the guardian, whose possession enured to the same legal extent as if it were the possession of the husband.

Glover, for the motion.

Bellinger & Hutson, contra.

Curia, per JOHNSTON, Ch. It has been insisted, in the argument, that the slaves embraced in this settlement had become the absolute property of the husband, *jure mariti*, upon the marriage; and that, therefore, he had no right to settle them, to the prejudice of his creditors.

It is unnecessary to conclude any thing on this point, there being other considerations,

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upon which the settlement may, *in our opinion, be fully sustained. But I take the occasion to say, that in the actual state of the case I would incline to sustain the settlement independently of the other considerations to which I have alluded.

The case at the time of the settlement, was that of a female ward, who had been married in her infancy, and whose property still remained in the custody of the officer specially deputed by the Court to take charge of it, and hold it for her benefit. She was still an infant, at the time of the settlement, and incapable of attending to her property interests. If, under these circumstances, the guardian had declined to settle with the husband, and deliver over to him his wife's property without a settlement upon her, and had applied to this Court to have a settle-

ment made. I think the experience of the profession in this State must furnish them with proof that his application would have been sustained; and what the Court would have ordered to be done, it will sanction, when done by the parties voluntarily.

It is said that, at law, the title of the slaves vested in the husband, upon the marriage. This may be so. But the question is, whether it vested so as to put it beyond the control and interference of this Court, acting for the protection of its ward, and in relation to property still in the custody of the trustee, to whose hands the Court had, itself, specially confided it. I do not speak of cases where the property had been surrendered by the trustee; nor of cases where the ward had attained age; but of the actual case before us,—in which the trustee was still in possession, and holding for an infant, entitled to the protection of the Court by the double claim of being an infant and a married woman. In such a case, I apprehend the trustee has always been sustained in an application for a settlement. It seems very difficult to say, in such a case, that because a Court of Law may regard the chattels of the wife in the hands of her guardian as covered by the marital right of her husband;—that, therefore, a Court of Equity is to disregard the infancy of the wife, and the possession conferred by itself upon the trustee of its own appointment; or forget that the very object of the Court in taking charge of the infant's property, and in placing it in the guardian's hands, was to protect it for her benefit; or that duly estimating the obligation thus assumed, it should shrink from the complete performance of it. Nor am I aware that it has ever done so. Certainly nothing of the sort is to be inferred from the case of *Davis v. Rhame*, nor from *Sausey v. Gardner*, [1 Hill, 191,] quoted in argument, where the wife was dead, and a settlement, therefore, out of the question.

But, passing by these considerations, the Court is of opinion that the settlement must stand upon other grounds.

At the time of its execution there was ex-

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isting against the husband the inconsiderable lien of a judgment for 50 dollars, held by a creditor who is no party to these proceedings;—and he was also indebted to Duncan, (and to another person who is not a party,) upon demands on which judgments were subsequently obtained.

If, under these circumstance, he had for a valuable consideration and bona fide sold to a stranger the same property which he conveyed to the trustee by way of settlement, it is impossible to say that the sale could have been impeached by Duncan or the other creditor who had not obtained judgment. And, although the lien of the small prior judgment might have followed the property, or its holder might have been relieved against

the conveyance, if he had applied for relief; yet no other creditor, not standing in his circumstances, is entitled to claim the advantage of his lien, there being no intentional fraud in the case. In such a case, the discharge of the lien would free the transaction of all imputation; and it is not perceived how other parties, not defrauded, nor intended to be defrauded, could impeach the transaction, in the name of one who does not choose to complain; or have a remedy greater in extent than that to which, if complaining, he would have been entitled. The doctrine we are now discussing has no relation, whatever, to voluntary conveyances, which are voidable generally by any existing creditor; but it is intended to be applied exclusively to conveyances for valuable consideration and made in good faith. And such conveyances are liable only to pre-existing liens.

This was a case, however, in which the alienation was not made to a stranger, nor did the consideration proceed from the stranger. The conveyance was made to a trustee selected by the guardian, and the consideration was money in the hands of the guardian, and which he paid over to the husband on condition that he would make it.

This money was not subject to the marital right of the husband. Although due to the wife, it was still a chose in action, resulting from the accountability of the guardian. If the husband had called upon this Court, as he must have done, for an account, undoubtedly the guardian, or any other friend of the wife, might have interposed for a settlement. The evidence is, that, when called on, the guardian did insist on a settlement.

The case, then, is as if the guardian holding the wife's money, and entitled to have it settled, had purchased the property which was settled, with the money. It is, in principle, precisely the case of *Banks v. Brown*, 2 Hill Eq. 558 [30 Am. Dec. 380,] in which it was held that a purchase of the husband's property by the wife out of her own property, if made bona fide, was entitled to be supported. It is entirely unlike the case of *Bank v. Mitchell*, Rice Eq. 405, quoted in argument, in which it appears that nothing "was said

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about the settlement when the money was paid." It stands upon a principle well established, and recognized, among other cases, in the *Union Bank v. Toomer*, 2 Hill Eq. 27.

Of the bona fides of this settlement there is not a particle of doubt. The evidence shews that it was made without reference to creditors, and without the least intention to defraud them; but solely upon the ground that the trustee would not part with the money unless a settlement was made. The only objection, then, that can be urged against it, is, that the money was not equivalent to the property settled. This objection can only apply to the slaves; for the land

was the undoubted property of the wife. Regarding the slaves as belonging to the husband, as contended for, it does not appear that they greatly exceeded in value the price paid for them. There were 13 of them, of whom 7 were children. What were their qualities we do not know. The sum paid was near 3,000 dollars. It is not pretended that there was the semblance of such inadequacy as infers a fraudulent intent. But as Chancellor Harper observes in the *Bank v. Mitchell*, "if there is any consideration, then the question is of bona fides, or of actual fraudulent intention;" and the Chancellor, upon the evidence in this case, tells us that no fraud was intended; for, says he, "there can be no doubt of the propriety of the motives of all the parties to the settlement," "the terms of which appear to be reasonable and just."

It is ordered and decreed that the bill in the first case (that of *J. J. Ryan, adm'r. of Duncan*.) be dismissed; and that in the second case (that of *D. F. Jamieson, trustee, v. Geo. D. Keitt, sheriff*.) an injunction do issue perpetually enjoining the defendant from proceeding to enforce the execution referred to in the pleadings in that case.

DUNKIN, Ch., concurred.

DARGAN, Ch., absent at the hearing.

Bill dismissed in the first case, and decree reformed in the second.

3 Strob. Eq. *94

*HENRY H. HILL, JOHN BATES et al. v. JONATHAN M. HILL and Wife et al.

(Columbia. Nov. and Dec. Term, 1849.)

[*Husband and Wife* ⚭12.]

Where there is a general decree for a settlement, during the life of a wife, the equity of the wife is always intended to embrace the interests of her children, unless by the terms of the decree the children are excluded; and if the wife die after such a decree, the Court will execute it for the benefit of the children.

[Ed. Note.—Cited in *Taylor v. McRa*, 3 Rich. Eq. 104.]

For other cases, see *Husband and Wife*, Cent. Dig. § 64; Dec. Dig. ⚭12.]

Before Dargan, Ch., at Edgefield, June, 1849.

Dargan, Ch.—This case was heard on report and exceptions. It has heretofore been before the Circuit and Appeal Courts on other issues than those now made. The questions now presented relate, exclusively, to a portion of the share of Lucinda Hill in the estates for the distribution and settlement of which these proceedings were instituted. In a former stage of the case, it was decided by the appellate jurisdiction of this Court, that on a part of the estate of Lucinda, amounting to some \$12000, the marital rights

of her husband, Jonathan Hill, had attached. This amount he had got into possession previous to the institution of this suit, and it has been dissipated by him. As to the remainder of the wife's estate, (the subject of the present controversy,) it was held that the marital rights had not attached. In regard to this portion of her estate, (amounting to about \$8,000, or one-third of the whole,) the Court, at June Term, 1843, made an order that it be referred to the Commissioner to report suitable terms of settlement upon the wife Lucinda Hill. See this order in *Hill v. Hill*, 1 Strob. Eq. 10, where the case is reported. It is in the following form, and occurs in the decree of the Chancellor:

"Recurring to the 7th exception of the plaintiff, it was stated that Jonathan Hill had abandoned his wife, and having run through all the property in his possession, had left her in destitute circumstances; and an application was made for a settlement upon her of what may be recovered in this case. It is ordered that it be referred to the Commissioner to enquire into the truth of these facts, and report the facts which he may ascertain by evidence; and that he report what would be a suitable settlement to be decreed in the premises, the name of a proper trustee, and the terms and form of a decree."

The case was carried before the Court of Appeals, though not on this point, at December Term, 1844, and was remanded to the Circuit Court, with leave for the defendant to file a cross bill, making new parties. The case was again heard before the Circuit Court, and a decree delivered. Both of the circuit decrees were in review before the Court of Appeals, at December Term, 1846,

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by way of appeal. And *among other things, it was ordered that the Commissioner "enquire and report what provision for Mrs. Lucinda Hill should be made out of her distributive share of the intestate estates of her brothers, Theodore S. Bond and Felix P. Bond." *Hill v. Hill*, 1 Strob. Eq. 26. It is to be remarked that in neither of these orders are the children or the issue of Lucinda Hill mentioned or alluded to, in express terms, as being intended to be embraced within the provisions of the settlement.

At June Term, 1847, the Commissioner filed a report on the matter referred to him. The filing of this report bears date the 12th June, 1847, but it was not submitted to the Court, nor was there any judicial action ever taken upon this report. Lucinda Hill was living. She died the 7th October, 1847. Her four children survived her; are still living, and are parties to these proceedings. Rhynonia, one of the daughters, has intermarried with one James Goodwin, with whom she resides in Arkansas. The other children, yet infants, reside with their father in Texas.

In the report filed 12th June, 1847, the Commissioner states that Lucinda Hill is a "lunatic, and has been abandoned by her husband, without any provision for her support. There was testimony of unkind and improper conduct, on the part of Jonathan Hill towards his wife, before he abandoned her. Jonathan Hill received with his wife a considerable property, amounting to about \$5,300 and four negroes; besides the amount applied by the decree of the Court in this case, to the payment of his debts, due to his sureties." He says "it was also proved that the said Jonathan Hill owed debts to a large amount in Alabama, besides the debts which it appears, by the evidence in this case, he owes in this State." The Commissioner, then, recommends "that the whole amount that may be found due to Jonathan Hill and wife, in right of the wife, and as to which his marital rights have not attached, be settled and secured to her sole and separate use for life; and after her death to her lawful lineal descendants; and that Henry Hill, her committee, be appointed her trustee." To this report no exceptions have ever been filed. The solicitor for the sureties and creditors of Jonathan Hill, (who are parties before the Court,) on the trial before me objected, but did not except to the report. He stated that he had no notice of the reference held by the Commissioner, as to the terms of the settlement, and assigned this as a reason that no exceptions had been filed. I referred it, during the progress of the trial, to the Commissioner to report the facts. He reported that at June Term, 1847, having been urged to make his report as to the terms of the settlement, in pursuance of the previous orders during the term, from evidence previously taken by him, when all the solicitors were present, he made up his report: that he

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heard no additional testimony; that the solicitor for Lucinda made suggestions to him, without there being any formal reference or argument, as to the terms of the settlement; that the solicitor for the sureties of Jonathan Hill had no notice that he was, then, about to make up his report, and that he heard no argument or suggestions from him. The Commissioner further reported that within a day or two after the filing of the report, and during the term, he informed the solicitors that the report as to the terms of the settlement, was on the file. Lucinda Hill having died on the 7th October, 1847, (as before stated,) her children have filed a supplemental bill, in which they have asserted their claim to the benefit of the settlement. —They set up a claim to the same benefits under the report, and the previous orders, (under the authority of which the report was made,) as if the settlement had been consummated by a final decree of the Court, in the life of their mother. On hearing the supplemental bill, in which the children set

up their claim, the subject was again referred to the Commissioner, and by a report filed 9th June, 1848, he says that in pursuance of the orders of reference, directing him to inquire and report the proper amount to be settled and secured to the four children of Mrs. Lucinda Hill, who (meaning the said Lucinda,) has died since the last term of the Court, &c. "I beg leave to report that Lucinda Hill having died since the last term of the Court, leaving as her next of kin her husband, Jonathan Hill, and four children, Rhydonia, wife of James Goodwin, James Hill, Amanda Hill, and Henrietta Hill," he recommends, instead of a settlement, a distribution, according to the statute of distributions, in cases of intestacy.

To this report, the children of Lucinda Hill have filed exceptions, one of which is, "that the Commissioner has recommended a distribution under the provisions of the Act of 1791, whereas it is submitted that the whole of the estate of their mother, upon which the marital rights had not attached under the decree of the Court, survived to and should have been settled upon the exceptants."

In the foregoing statement, I have mentioned all the facts that have a bearing upon the question at issue, and which will be material in elucidating the discussion which follows. Though the wife has an unquestionable right to a provision by way of settlement, out of her fortune, upon the peculiar doctrines of this Court, it is also equally undeniable that the husband has also rights, even in her equitable estate or assets, which will not be disregarded or superceded, except under peculiar circumstances. The general rule is, that the husband has rights, more or less extended, according to circumstances, to have provision made for him in the usufruct of his wife's separate and settled estate. If he is worthless and debauched, maltreats,

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abuses or abandons his wife, or if he is a bankrupt, so that he is incapable of supporting her, and his participation in the use of the estate would only operate for the benefit of creditors, this Court has the power to exclude, and will exclude him entirely, and will settle the whole estate to the sole and separate use of the wife, with the remainder to the children. All these circumstances combine against the right of the husband in the case before me. And in addition to these he had before received a considerable amount of property belonging to his wife; about \$12000, and constituting two-thirds of her estate. After dissipating her property which he had got into his hands, he turned in the ferocity of a callous and savage heart upon her, from whom it was derived, and who had confidently placed her person and estate in his possession. He cruelly neglected, and grossly abused, the being whom, of all others, by the laws of God and man, it was his sacred duty to cherish and protect. After,

ly an accumulation of insupportable wrongs, he had driven her to madness, he cast her from him as a worthless and despised thing, rifled of her attractions and her reason, without a cent for her subsistence. Leaving the State, he threw her upon the kindness and charity of friends. I have said that he drove her to madness. In justice to the husband, I must qualify the expression by saying that there was no direct evidence of her mental derangement having been occasioned by the misconduct and unkindness of her husband. But whenever I hear of brutality on the part of the husband, and lunacy on the part of the wife, I cannot but strongly suspect that, between the two facts, there is a natural connexion and sequence, as of cause and effect. Be this as it may, whether he did or did not inflict upon his wife this greatest calamity that can befall a rational being, there is a revolting array of facts that cannot be controverted. He had dissipated the estate which she brought him.—He had misused, neglected, and abused her. She was a lunatic. In a state of lunacy and poverty, he threw her upon the world, perfectly indifferent whether under her awful affliction and privation she obtained bread and raiment. If there ever was a case in which it would be proper for the Court, in its high discretion, to secure the wife's estate to her and her issue, to the entire exclusion of the husband, this certainly is such a case. And if Lucinda Hill were now living, and now before me, asking for a settlement, I should, unhesitatingly and without discussion, secure by a decree, for her sole use, with remainder to her children, the whole of her remaining estate, even if it were ten times as large as it is. And perhaps the certainty that such would have been the result, may afford an explanation of the apparent neglect of the solicitor in not filing exceptions to the report.

But this is not altogether the case that is

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presented. The *unhappy Lucinda has sought a refuge from her sorrows and misfortunes, in the peace of the grave. And it is her children who now seek, through her equity, the benefit of the same provisions they would clearly have been entitled to if she had now been living. And the question is whether, under the circumstance stated, their equities survive to them, notwithstanding the death of their mother before a final decree.

As a general rule nothing can be clearer than that the equity to a settlement out of her fortune is personal to the wife. The marital rights, even in this Court, will prevail against any person but her, (*Scriven v. Tapley*, Ambl. 509.) And though the children or issue are always included in the benefits of the settlement, where chancery takes hold of the matter, yet without doubt, she may waive her equity, to their exclusion; and in

such case they would have no right to insist upon a settlement, (*Murray v. Ld. Elibank*, 10 Ve. 84, 1 Mad. 550.) They have no legal or equitable rights in their mother's estate, more than in their father's, except such as may be founded upon contract or the decrees of the Court, so that even if there be a preliminary order for the terms of a settlement to be proposed or reported, the wife may, at any time before the proceeding is consummated by a decree, renounce the provisions in her favor, and exclude the children. And if the wife dies before any preliminary order for a settlement, the equity of the children is gone, and cannot be asserted.

I have said that, as a general rule, the equity is personal to the wife. I know of but two exceptions, which have been already intimated. One is, where the children have been provided for in an agreement between the husband and wife. Such a stipulation in their behalf will, after the death of the mother, be enforced by this Court according to the terms of the agreement. The second exception is, where there has been a preliminary order contemplating a settlement upon the wife and children. Here their rights are based upon the decree of the Court. And though the wife dies pending the proceedings, and before the final decree, or even a report is filed or proposals made, the Court recognizes their rights, and will perfect and consummate them, in the same manner as if their mother were still living, and as a party before the Court were prosecuting her equity.

Thus far I consider the law as very clearly settled. The question now narrows down to a single point. It will be remembered that an order of reference was made by the Circuit Court, for the Commissioner to report suitable terms for a settlement, and that a similar order was made by the Court of Appeals. Both of these orders were made in the life time of the wife, but in neither are the children expressly provided for or named.

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And the difficulty (if it be one) is, whether, under these orders, in which they are not specifically or by name provided for, and a report made and filed in pursuance of the orders, in which provision is made for them, they have acquired rights which they are entitled to set up in this Court, though their mother be dead before any final decree in her or their favor. And this is the question to which I must now address myself. But before proceeding in the discussion, I will remark that it may well be doubted whether the order of reference, made on the supplemental bill, and alluded to in the Commissioner's report of June 9th, 1848, directing the Commissioner to inquire and report, (not whether the children were entitled to a settlement,) but "the proper amount to be settled and secured to the four children of Lucinda Hill," is not a judicial recognition of

their right to a settlement of some portion out of their mother's estate, beyond what they would be entitled to under the statute of distributions. May not such an order be regarded as a decree of the Court in their favor? But I pass on to a consideration of their claims, under the previous orders of reference, made in the life time of their mother. Have they the right to prosecute their equity, under these orders, as if they had been included therein by express terms? I think they have, and I will proceed to state my reasons for the opinion.

Though the right of the wife is a perfect right which she may assert or repudiate at her will, until the settlement is consummated by a final decree, yet the Court never permits it to be enforced in behalf of the wife, without also making a provision for the children. The husband is sometimes excluded, but the children never. In *Murray v. Lady Elibank*, 13 Vesey, the master of the rolls (Sir William Grant) said: "I am not aware that the wife has, in any case, been permitted to say she claims a settlement for herself and not for her children; she has the option not to have any settlement made: but if a settlement is made, it is always directed for the benefit of the wife and children; if she does not desire any settlement, then the money is paid to the husband; if she desires a settlement, the settlement is upon her and her children." To this forcible enunciation of the principle of the inseparability of the wife and the children, in any and every settlement ordered by this Court, other authorities might be added. I doubt if in the whole range of British and American authorities, a single case can be found in which the rule has been violated, and the wife provided for by a decree of this Court, and the children excluded. Can such a case be found in the practice of the Courts in this State? If this be correct as a statement of the law, then the mention of the children, in the preliminary order, though proper as to form, would be non-essential as to their rights. Taken in connexion with the unvarying practice of the Court, an

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order to the Commissioner to report the terms of a settlement upon the wife is essentially, and by the legal and technical sense of the phrase, an order that he also report provisions in favor of the children. It is always so understood. If the Commissioner were, on the authority of such an order, to proceed to report provisions for the benefit of the children, though not expressly named, could an exception be taken to his report on this ground? The answer would be, that the children are always included, and were intended to be included.

The practice of our Court on this, as on most other subjects, is not as formal as in the English Chancery.¹ I think that there

are but few of these preliminary orders for settlement that have fallen under my observation in the practice of our Courts, which are not, as to form, similar to those which I have cited as having been made in this case; first, in the Circuit Court, and again in the Court of Appeals.—These orders present a fair specimen of our forms of practice in these matters. If the two learned Chancellors, who penned those orders, had been interrogated, after framing them, as to their meaning, and whether the children were included, I doubt not the reply would have been affirmative. They would have said that "a settlement upon the children is a necessary concomitant of that upon the wife. To refer as to her, is to refer as to them also, for benefits are invariably secured to them through the instrumentality of the wife's equity, where she seeks to enforce it." Such, they would say, "is the necessary import of the orders that have been made." Such I think is the proper construction of them. I think that they virtually, and to all legal intents and purposes, embrace the children within their purview.

Having arrived at this conclusion, I advance one step further in this discussion. If the children are included, or were intended to be included, in the orders for settlement, I think it very clear upon authority, that their equity survives to them, and that they have the same rights in this Court as if their mother had lived to the consummation of the settlement.

Judge Story has well summed up this matter. He says "the wife's equity for a settlement is generally understood to be strictly personal to her, and it does not extend to her issue, unless it has been asserted and perfected in her life time. If, therefore, she should die entitled to any equitable interest, and leave a husband, and her children are unprovided for by any settlement; still the husband will be enabled to file a bill to recover the same, without making any provision for the children. In truth the equity of the children is not an equity to which they are entitled in their own right. It cannot, therefore, be asserted against the wishes of the wife, or in opposition to her rights.

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The Court in making a *settlement of the wife's property, always attends to the interest of the children, because it is supposed that in so doing it is carrying into effect her own desire to provide for her offspring. But if she dissents, the Court withdraws all right from the children. But the right of the children, to the benefit of a settlement, attaches upon the wife's filing a bill for that purpose, and if she should die, pending the proceedings, without waiving the right to a settlement, the children may, by a supplemental bill, enforce their claim."²

¹ 1 Danl. Prac. 141.

² 2 Eq. Jur. 1417.

I would refer to the elaborate and masterly opinion of Sir Thos. Plumer, in *Lloyd v. Williams*, 1 Mad. 244, in which all the cases are collated and reviewed. The conclusion arrived at is, that the children have no equity after the death of the mother, unless there has been a contract or decree for a settlement in her life time. If, however, there has been an order or decree, referring it to the master to approve a proper settlement to be made upon the wife and the children, and she die before the master has made his report, the children will have a right to a settlement, under the order, out of their mother's property. *Murray v. Lady Elibank*, 13 Ves. 84, s. c. 13 Ves. 1, s. c. 14 Ves. 496.

In *Rowe v. Jackson*, 2 Dickens, 604, on an application by the husband for payment of the wife's legacy, an order was made for the husband to go before the master and submit proposals to him for a settlement upon the wife. In this order it does not appear that the children were named. Before the proposals were laid before the master the wife died. And the husband again applied for the wife's legacy. The Lord Chancellor (Thurlow) said, "if there be an order directing a husband to go before the master, and to lay proposal for a settlement on his wife and the issue of the marriage, and the wife dies, leaving children, this Court will not part with the property, but keep the husband to the order. In this case there are issue, therefore let the husband go before the master and prosecute the order."

In an anonymous case the facts are thus stated: "On the intermarriage of the petitioners, (husband and wife,) application was made to the Court 'to take care of the wife's money, and that the husband should make a proper settlement;' and for this purpose it was referred to the master.—Proposals were made, subscribed by the husband and wife, but before the settlement was concluded they went to Jamaica, where they lived six years. On their return they filed a petition to be released from their proposal. Lord Hardwick refused." "The proposal," he said, "was binding, and if the husband had died before he came home, and left children, under the articles, there would be a right to carry them into execution. And the Court has laid hold of a circumstance much less strong than so formal an agreement, to refuse what was desired." ³

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*If, as has been decided in *Stimith v. Halthin*, the equity of the children attaches on the filing of a bill by the wife for a settlement, subject to her waiver before the consummation, I should think, and for the same reason, the children's equity would attach, where in a bill not filed by her, but in which she is a party, she asserts her rights to a settlement by a motion, and ob-

tains an order for a report as to its terms. The same author observes, "if an order be obtained for the husband to lay proposals before the master for a settlement, and then the wife dies without waiving it; since such an order is a judgment, and the Court always includes the children in the settlement, they have, by the order, obtained a right to prosecute it, and procure a provision for themselves." ⁴

I have heretofore considered this question, in reference to the right of the children, as based upon the orders of reference. I consider these orders, as Mr. Roper has said, in the light of judgments or decrees, that a settlement should be made. And then, as children are always and inevitably included in such a settlement, I consider it, by the plainest intendment of law, a judgment or decree of the Court, that a suitable settlement should be made upon the wife and the issue. The omitted mention of the children in the order, would be supplied by the necessary implication. And in the language of Lord Hardwick, "the Court would lay hold of a much slighter circumstance" than this, to secure the children a provision out of the estate of their injured and deceased mother.

But there is another feature in the case to be considered. In pursuance of the order of reference, the Commissioner did, in the life time of the wife, report a settlement upon the wife and the children. It seems to me that this makes the case analogous to one where the husband is required to lay proposals for a settlement before the master, and in pursuance of such order he submits proposals for a settlement upon the wife and children. Before the Commissioner has reported on the proposal the wife dies; in which case, as we have seen, the husband would be held to his proposals. The report of the Commissioner presents, as the proposals of the husband do, in a definite and special form, the terms in favor of the children.

But, as I have before stated, the report of the Commissioner of the 12th June, 1847, made and filed in the wife's life, and recommending a settlement on the wife and children, has never, to this day, been excepted to by the defendants, nor by the husband; though it was known by their solicitor that it was on file. This report having lain so long without any exception from any party having an interest in the fund, may be considered as having been acquiesced in by the husband and wife, and to have the force

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of an agreement *between them. If the wife had lived to the ensuing term, the husband could not, then, after such a lapse of time, have been permitted, under the practice of the Court, to file his exceptions. This question would have been adjudged against him

³ 2 Ves. Sr. 671.

⁴ 1 Roper, Husband and Wife, 265, 274.

by default. And so it must be now. His rights cannot be considered as having improved by a longer period of default. This exception is sustained.

The second exception of the defendants (complainants in the supplemental bill) is, that the Commissioner, dividing the fund according to the statute of distributions, and giving the husband one-third, has charged the support of the children on their own shares, instead of that of their father. As I have given the whole fund to the children, it will be unnecessary for me to consider this exception.

In considering the first exception, on the part of the children of Lucinda Hill, I have necessarily considered and decided the questions made in the exceptions of Jonathan Hill and his creditors, all of which are overruled. It is ordered and decreed that the case be referred back to the Commissioner, and that he modify his report in conformity with this decree.

The defendant Jonathan M. Hill, and his sureties Theophilus Hill and Bryan Dean, appealed from this decree, on the following grounds, viz:

1. Because the decree previously made in this case, ordering an account in favor of J. M. Hill and wife, (the wife having died, pending the proceedings and before any settlement,) survives to the husband, the said J. M. Hill.

2d. Because under the agreement, made at the sale of the estates in question, between J. M. Hill and the administrators, to discount the interest of Mrs. Hill, on the purchases of said J. M. Hill, under the faith of which agreement Theophilus Hill and Bryan Dean became the sureties of the said J. M. Hill, the said sureties are now entitled to a credit on their notes for the entire amount reported to be due to Mrs. Lucinda Hill.

3d. Because the circumstances of this case, established on the hearing of the cross-bill before his Honor Chancellor Dunkin, at June term, 1846, render the equity of the sureties to this fund superior to that of the children.⁵

4th. Because the children not being provided for in any of the orders of reference preliminary to a settlement on Mrs. Hill, cannot be equitably entitled to the whole fund.

5th. Because the claim of the children ought not, in any view of the case, to be extended beyond the recommendation of the Commissioner's report, which allows them two-thirds of the fund; especially as their support, for many years past, has been allowed out of the fund, and they are now

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living *with and maintained by their father, J. M. Hill; and because their equity to this fund was never before raised, and is now presented by strangers.

6th. Because his Honor erred in placing his decree, in any measure, on the alleged report of 12 June, 1847, in favor of Mrs. Hill, because that report was made, according to the statement of the Commissioner, without notice to the adverse parties or their solicitor, was never in the Commissioner's office at any time, and remained in the possession of the solicitor of Mrs. Hill, from June, 1847, till June, 1849, without notice of its character or contents to the solicitor of the defendants, or to the defendants themselves; and because leave was refused to the defendants to file exceptions to that report; and further, because the solicitors for the children did not, on the trial, nor do they now, insist on that report, under the circumstances attending it.

7th. Because the sureties of the defendant J. M. Hill, are entitled to credit for this fund, as assignees thereof, before any order of the Court, looking to a settlement on the wife, before any interposition of her equity, and by the express agreement of H. H. Hill, the plaintiff, who is now raising the equity of the children.

8th. Because under all the circumstances of the case, the Court having full discretion as to the amount to be settled on the children, it is respectfully submitted, would be doing great injustice to the sureties of J. M. Hill, to take from them more of this fund than the sum reported by the Commissioner, as properly to be settled on the children.

Griffin, for the motion.

Bauskett, contra.

Curia, Per JOHNSTON, Ch. The error into which the Chancellor fell, of supposing that the children of Lucinda Hill were plaintiffs, instead of defendants, in the supplemental bill, is an accuracy perfectly immaterial to the real questions discussed in the decree: which relate to the rights arising to the issue of Lucinda from the general order for a settlement.

It is unnecessary to place any reliance upon the report made at June sittings, 1847. For though it be conceded that there were no such report, or that it may be now taken from the file, on the ground that defendant's counsel were not apprised of its existence; there is enough in the case to shew that the decree of the Chancellor is still sustained by principles too well founded to admit of question.

The authorities shew, that where there is a general decree for a settlement, during the life of a wife, the equity of the wife is always intended to embrace the interests of her children, unless by the terms of the decree the children are excluded; (an exclusion which

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the Court is very unwilling to countenance;)—and that, if the wife dies after such a decree, the Court will execute it for the benefit of the children.

⁵ 1 Strob. Eq. 12.

Such a decree creates an impediment against the husband's afterwards reducing the choses of the wife. And, though the statute of 29 Charles entitled the husband to administer to the wife, without account, yet where a settlement was decreed, he would not have been allowed thus to possess himself of her choses, to the exclusion of her children; unless the children were put without the pale of the settlement.

The former decrees in this case have established that the sureties of Jonathan M. Hill are not entitled to be regarded as his assignees of his wife's equities in the fund to be settled. Being a femme coverte she was not capable of barring herself by the agreement insisted on. And, though the husband might have transferred her interests, his attempt to do so was by executory agreement, which remained unexecuted at her death.

The Court, therefore, acting under the decree for a settlement, was to execute, on behalf of the children, such a settlement as it would have approved, if Jonathan M. Hill were, personally, the opposing party, instead of his sureties. And it will not admit of a doubt, that if he were present, instead of them, he could offer no successful opposition to the terms imposed by the Chancellor. He had already received twelve out of twenty thousand dollars of the wife's fortune, and after wasting it, abandoned her. And it would have been but an aggravation of his misconduct, if he had come forward to strip her children of the remnant which was left.

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN and DARGAN, CC., concurred.

CALDWELL, Ch., having been of counsel, did not sit in this case.

Decree affirmed.

3 Strob. Eq. 105

JENNINGS J. WOOD and Wife et al. v. B. F. INGRAHAM and Wife et al.

(Columbia, Nov. and Dec. Term, 1849.)

[Deeds \S 56.]

Where a voluntary deed was executed, when neither the cestui que trust nor trustee, nor any one acting for them was present, and the donor retained the entire possession and control of the deed, and made no publication of its contents, nor declaration of her intention to deliver it—the deed was held not to have been delivered.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 120; Dec. Dig. \S 56.]

[Deeds \S 56.]

To give validity to every deed, it is necessary it should be delivered; and this may be done either formally, or the delivery may be inferred from circumstances which indicate that the grantor intended to part with the dominion

of the instrument, and to put it into the possession of the grantee.

[Ed. Note.—Cited in Carrigan v. Byrd, 23 S. C. 91.

For other cases, see Deeds, Cent. Dig. \S 117–123, 125; Dec. Dig. \S 56.]

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*Before Caldwell, Ch., at Barnwell, February, 1849.

After a full hearing of this cause upon bill, answer, &c. his Honor pronounced the following decree, which sufficiently states the facts:

Caldwell, Ch. Lucy E. Minor, on the 14th of July, 1847, made an instrument in writing, which is the subject of this suit, as far as the personal property comprised in it extends, conveying thirteen slaves, household furniture, and all her real estate to Francis F. Dunbar, for the plaintiff, Laura A. Wood, on certain terms and conditions therein expressed.

Mrs. Minor was the mother of Mrs. Wood and a Mrs. Garvin—she was in her second widowhood and far advanced in years—she was on the eve of marriage with Benjamin F. Ingraham, a young man who had just arrived of age. She and Ingraham intermarried on the day following. She had, previously to her signing and sealing this paper, made a will, which she had deposited with Francis F. Dunbar; and being disposed to alter the same, (as she says in her answer,) from considerations arising out of the intended marriage, she, on or about the 12th of that month, called on him and informed him of her intention to alter it, and of the manner she intended to dispose of her property, and requested him to prepare, or cause to be prepared, the deeds necessary to carry her intention into effect. It appears he had four deeds prepared, which she signed and sealed in the presence of Ingraham and another person, who subscribed their names as witnesses. She then handed the papers to Miss Hext, (who lived with her,) directing her to put them in her (Mrs. Minor's) drawer; she states in her answer, "that she retained the said deeds in her own possession with the intention of reflecting on the subject before she delivered them." Ingraham states in his answer, that "he was ignorant of their contents, that is to say, he conjectured, and, possibly, knew that the defendant, Lucy E. Ingraham, intended by the said deeds to dispose of a portion of her estate; but he did not know what part, in what manner, or to whom."

She relates in her answer the circumstances under which she destroyed the deed:—"That, influenced solely by her own judgment, and for reasons satisfactory to herself, she made up her mind to destroy the said deeds; and for that purpose, took them from a drawer, where they had been from the time they were signed, and the key of which she alone kept; and cutting the deed,

in which the complainants claim to be interested, into several pieces, threw it into the fire; but before it was entirely consumed, it occurred to her that simply cutting her

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signature from the papers would accomplish her object, and she took up what remained of the said deed. Of the part preserved, she made an exhibit with her answer." The defendants distinctly state, that neither of the deeds were, at any time after they were signed, out of the possession of the said Lucy E. Ingraham; nor did the defendants, or either of them, at any time, by word or act, or otherwise, deliver the said deeds or either of them, to the complainants or either of them, or to any other person or persons in trust, for the use of the intended donees; and they submit, that no estate, title, right, or property, vested or contingent, passed to the intended donees, from or out of the defendant, Lucy E. Ingraham, by force or virtue of the deeds.

The only question involved in this case is, was the deed, the subject of dispute, delivered? When she signed and sealed the paper, neither the trustee nor the cestuique trust was present, nor did any one act on their behalf or as agent. Ingraham and another person subscribed their names as witnesses, and none of the papers were either formally or informally delivered to any person for the trustee or cestuique trust. No declaration was made at the time indicating her intention to deliver it. She kept it in her possession, within her control, in her drawer, under her key; and if the intermediate period were struck out from the time of her signing and sealing it to the moment she destroyed it it would seem that her possession was as perfect and her dominion as absolute as when she handed it to Miss Hext, with directions to put it away in her drawer; had she thrown it in the fire, or torn it up before she did this, would any one have doubted that the delivery was not made, and that what she had done was inoperative and void? And can the mere preservation of the paper a few days under her absolute control, alter the case, during which she neither did any further act to carry out her intention, or made any declaration shewing that she intended it should be considered as delivered? She states the reason she declined to deliver it—she was deliberating on the subject; while she held the paper in her own hand, the property could not vest in another.

An instrument of this kind is a dead letter, although signed and sealed, until it be delivered—the delivery gives it vitality and validity. No matter with what solemnities, or in what a multitude of witnesses the maker may sign and seal such a paper, some further act or declaration is necessary to its completion; if nothing else be done or said, the reservation of the possession rather

rebutts than raises the presumption that a delivery was intended.

The party may pause as long as she pleases upon the very verge of consummating the deed, but if she destroys it before she has parted with it, or before she makes some declaration that shews she intends a delivery of it, it is inchoate and inoperative. A delivery of a deed may be inferred from circumstances—such as the donor's declaring she intended it should take effect, or her having it proved and recorded, or if the deed was in the donee's possession, or if it had been left on the table after being executed, with the knowledge of the donor, and a friend of the trustee or cestui que trust had taken it up to hand it over to either of them, without objection being made by the donor. But this case presents no such circumstances, and must be therefore decided on the ground that there is no evidence from which a delivery may be presumed. Without running through the long list of English cases on the subject, which are not easily reconciled with each other, it would seem that a formal delivery is not necessary, if there be acts evincing an intention to deliver, and that less evidence will suffice in voluntary conveyances than in other cases, yet whenever the circumstances establish that the grantor never parted or intended to part, with the possession of the deed, it will not be considered as delivered.¹ Perhaps the mere fact of retaining possession where the circumstances do not prove a formal delivery, would not lead to the conclusion that the deed was not intended to be absolute, and the onus would seem to be upon the grantor, or those claiming in opposition to the deed, to shew that there was no delivery. But in this case, all the circumstances appear, and it is not a matter of inference as to what the defendant, Mrs. Ingraham, did. In one of our own cases, *Jackson v. Inabnit*, 2 Hill Eq. 411, a father made a deed, conveying slaves in trust for a son; neither trustee nor cestui que trust was present; one of the witnesses to it proved it before a magistrate, but he stated that he did not see the deed delivered—that the grantor took it with him and kept the control, and there was no proof that he ordered it to be recorded; it was held that the deed had not been delivered, and the property mentioned therein was not controlled by it. The doctrine was fully discussed in the case of *Gilmore, Adm'r, v. Whitesides, Adm'r*, *Dudley's Eq. Rep.* 14, [31 Am. Dec. 563.] *Mss. Cases* 1849, and recently re-considered in *Sadler v. Scott*, May T. 1848, as to the delivery of an instrument to the agent of the donor, with instructions to keep it till the donor's death, and then deliver it, the donor retaining dominion over it during his life,

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¹ *Naldred v. Gilham*, 1 Peere Wm's. 578; *Cotton v. King* 2 *ibid.* 359; 4 *Comyn's Dig.* 278.

was held not such a delivery as would make the instrument valid, as a deed, and a delivery (by the agent,) after the donor's death, would be void.

Notwithstanding there was considerable deliberation on the part of Mrs. Minor, before she signed and sealed the paper, yet she appears carefully to have kept the staff in her own hand and not to have parted or intended to part, by any act or declaration, from the possession of the instrument. I do not think the circumstances are sufficient to warrant the conclusion that there was a de-

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livery. It is therefore ordered *and decreed, that the bill be dismissed—each party paying their own costs.

Grounds of Appeal.

The complainants give notice that at the next sitting of the Appeal Court a motion will be made to reverse the Chancellor's decree, in the above cause, on the following grounds, viz:

1st. Because there was sufficient proof that the deeds in question were delivered; and having been duly executed, the said deeds ought to be sustained.

2nd. Because, even if there were not sufficient proof of a technical delivery of the deeds in question, they ought to be sustained and carried into effect as articles of marriage settlement. Nor should the defendant, Ingraham, be allowed so to avail himself of the marriage as to enjoy the fruits of a fraud perpetrated under such circumstances.

3rd. Because the decree is contrary to evidence, law and equity.

Bellinger & Hutson, J. Bausket, for the motion.

Curia, per CALDWELL, Ch. To give validity to every deed, it is necessary it should be delivered, and this may be done either formally, or the delivery may be inferred from circumstances, which indicate that the grantor intended to part with the dominion of the instrument, and to put it into the possession of the grantee. The common law required a delivery in every case, whether it be a gift of a personal chattel, or a deed of real or personal estate: the Civil Law only required delivery of some gifts, which, as a class, was very limited, yet the rule was so stringent as to exact an actual transition to perfect the gift. It would seem that there was wisdom in the Common Law's relaxing the rule requiring a formal delivery, and in permitting the fact of a delivery to be inferred from the circumstances. The situation of parties often affords the means of coming to a correct conclusion in relation to their declarations or acts—here, neither the cestui que trust, or trustee, or any one acting for them, was present; they had neither paid anything or incurred any liability, in con-

sideration of Mrs. Minor's making the deed; and it may well be doubted whether either of them knew any thing of her intention; it is clear they were ignorant of the contents of the deed. She declined publishing what the instrument was, when one of the witnesses made some objections to subscribing it without knowing its contents, and she seems to have carefully kept not only the control but the actual possession of it through the whole transaction.—Nothing occurred at the time that bears any resemblance to a formal delivery, and the circumstances rebut the presumption of any intention to deliver

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the deed, as she kept the pos*session of it, and made no declaration and did no act that had a tendency to complete its execution.

There is nothing in this case that is opposed to the rule that has been settled in New York since 1814, and in England, since 1826, that if a deed be signed and sealed, and declared by the grantor in the presence of attesting witnesses, to be delivered as his deed, it is an effectual delivery, if there be nothing to qualify it, notwithstanding the grantee was not present, nor any person on his behalf, and the deed remained under the grantor's control.

It is not now necessary to consider the doctrine laid down in *Cecil v. Butcher*, 2 Jac. & Walk. 573, that a Court of Equity will regard the instrument as imperfect, if it be voluntary and never parted with, and executed for a special purpose never acted on, and without the knowledge of the grantee, and in such case will lend no assistance to the grantee.

This case is to be distinguished from those cases where the voluntary conveyances in the grantor's possession have been held to operate in favor of the grantees, as they were in every instance complete deeds, wanting no other act or declaration to confirm them, but were legal transfers of the property or title. *Antrobus v. Smith*, 12 Ves. 39. *S. Bonnerly v. Arden*, 1 John. 254. *Burns v. Winthrop*. *Ib.* 337.

It has been argued that this case bears an analogy to *Dawson v. Dawson*, Rice Eq. Rep. 243, but a comparison of the evidence will demonstrate the difference—there the affidavit of the witness that the deed had been signed, sealed and delivered, the recording of the deed at the instance, (as was presumed) of the donor, and his subsequent declarations that he held the property in trust for his children, when taken together, left no doubt as to his intention to deliver the deed and to make it irrevocable. There is the absence of all these circumstances in this case, which only resembles that in one point; that in both cases the grantors had possession of the instruments.

In *Carr v. Hoxie*, 5 Mason's Rep. 60, [Fed. Cas. No. 2,438,] an instrument was signed and sealed by the grantor, in the absence of

the grantee, but left with a third person, without any express or implied authority to deliver it to the grantee, the Court held it was not the deed of the grantor.

Proof that a deed was signed and attested, and left on the table without delivery to any one, in the absence of the donee, was held, in *Hughes v. Easten*, 4 Marsh. 572, not to be sufficient evidence of delivery. If delivery could not be presumed from the facts of these cases, much less can it be in the present case, where the right of Mrs. Minor to the possession of the paper was not suspended for a moment, but her absolute control over it continued from the commencement to the conclusion of the transaction—and no declaration or act shewed that she intended to part with it, or to permit any other person to have the possession of it.

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*In *Uniacke v. Giles*, 12 Cond. Eng. Ch. Ca. 445, the Lord Chancellor greatly relied on the circumstance of the grantor's not depositing the deed with a third person. But he proceeds much further and says, "I will suppose she went through the legal formalities of saying not only, I seal and sign, but I deliver this deed, still these legal ceremonies did not finally conclude her. By carrying the deed back to her depository, she shewed a plain intent not to divest herself of power over it, but to hold it just as revocable as a will, and whatever words she used, that intent must determine its character."

Ch. Justice Abbot, in *Murray v. Earl Stair*, 2 Barn. & C. 88, 4 Barn. & A. 44, in the case of a conditional delivery, seems to corroborate the conclusion in the preceding case; he says "it is not necessary that any express words should be used at the time; the conclusion must be drawn from all the circumstances."

The reasonableness of the provision of the deed seems to strengthen the argument that it was delivered, but suppose it had conveyed her whole estate absolutely, would not the contrary conclusion be deduced without doubt, and demonstrate the propriety of her pausing before she consummated the act?

The grantor may have had as cogent reasons before she completed the gift, to keep the control of the instrument in her own hands, as if she had conveyed her whole estate—the future conduct of her children towards her might be much more easily controlled by that means than any other within her power.

The current of decisions has already gone sufficiently far to enable the courts to carry out the intention of the donor and to protect the rights of the donee, but they have never presumed delivery without some evidence that it was the intention of the donor, and no case can be found that would warrant the conclusion, that a delivery had been made, merely because the grantor had

signed and sealed the instrument without any further act or declaration.

The disastrous consequences of any such rule cannot be calculated. It would greatly tend to disturb domestic quiet and enkindle inextinguishable feuds in families; and few could feel secure in keeping by them such instruments for further reflection or future action, without subjecting themselves to the painful process of having their private papers brought before the Court for its judgment. The second question, as to the instrument being marriage articles, depends upon the same principle—such articles would be void if they were not delivered.

It is therefore ordered and decreed that the appeal be dismissed, and the Circuit decree affirmed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch. Absent at the hearing, from indisposition.

Decree affirmed.

3 Strob. Eq. *112

*SAMUEL MAYRANT, Ex'tr. of Charles Mayrant, v. JAMES S. GUIGNARD, Junr. et al.

(Columbia. Nov. and Dec. Term, 1849.)

[*Trusts* ⚡181.]

The waiver by a trustee of the rights of his cestui que trust, by a contract executory in its character, and without a valuable consideration, and in behalf of a party who was aware of the equities of the cestui que trust, will not be enforced to the prejudice of the trust estate.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 328; Dec. Dig. ⚡181.]

[*Witnesses* ⚡54.]

Husband and wife cannot be witnesses for or against each other. And it makes no difference whether the interest of the husband or wife, to be affected by the testimony, be legal or equitable.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 142; Dec. Dig. ⚡54.]

[*Continuance* ⚡6.]

Where, on Circuit, the defendant moved for a continuance, that he might have time, not to prove a fact that he could swear actually existed, but to ascertain the existence of a conjectural fact, and if that should turn out on investigation, to have existence, that he then might prove it.—The Court held that the Chancellor had most judiciously exercised his discretion in refusing the motion and ordering the case to trial.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 6, 7; Dec. Dig. ⚡6.]

[*Continuance* ⚡6.]

The party who seeks a continuance, must be prepared to make a very strong showing.—Nothing short of this will answer for the dispatch of business in the Circuit Courts of Equity.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 6-11, 16, 33, 35, 117; Dec. Dig. ⚡6.]

[This case is also cited in *Sollee v. Croft*, 7 Rich. Eq. 46, as to the rules governing examinations of parties defendant.]

Before Dunkin, Ch., at Columbia, June, 1848.

Dunkin, Ch. A correct narration of the circumstances which gave rise to this litigation, would require a transcript, both of the pleadings and the testimony. It is proposed to advert to only so much of the history as will render intelligible the judgment of the Court.

In the year 1833, the late Charles Mayrant, and his brother, Robert P. Mayrant, one of the defendants, entered into an agreement, under which Robert carried to the west certain slaves of Charles Mayrant, for the purpose of engaging in agricultural pursuits. In the following year, (1834,) a crop was made, and in 1835, Robert sold to Alfred Fowler the slaves of Charles, eleven in number, as well as several other slaves, for a large sum of money—receiving in payment five thousand dollars in cash, and four notes of the purchaser for twelve thousand dollars each; the first note payable 1st February, 1836, and the others on the same day of each successive year; the last note falling due 1st February, 1839. Before the sale to Fowler, (to wit, in 1834,) Charles Mayrant had departed this life, leaving a last will and testament, of which his widow, Caroline Mayrant, was appointed executrix, and his brother, the late William Mayrant, executor. It does not appear that Robert P. Mayrant had any authority to make the sale to Fowler; but the executrix and executor of Charles Mayrant, having power, under his will, to sell his property, confirmed the transaction of Robert P. Mayrant. This was done by executing titles to Robert for the slaves, and on the same day, (to wit, 12th July,

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1835,) he executed *to them his bond, conditioned for the payment of eight thousand dollars, in four equal annual instalments of two thousand dollars—the first instalment payable 1st February, 1836, and the last on 1st February, 1839—the instalments not to bear interest until after they became due. Contemporaneously with the execution of this bond, and to secure the payment of the same, Robert P. Mayrant assigned to the said executrix and executor of Charles Mayrant the sum of two thousand dollars out of each of the notes of Fowler to him, and which fell due at the same time with the several instalments of his bond to them. Robert P. Mayrant had previously (to wit, on the 14th September, 1834,) executed a bond to William Mayrant, as executor of Charles Mayrant, dec'd., conditioned for the payment of five hundred and forty dollars, in five equal annual instalments; the first instalment falling due 14th September, 1835. On the 1st January, 1836, Robert P. Mayrant executed a paper, in which, after reciting that he was the owner of a note for twelve thousand dollars, given by Alfred Fowler to himself, and payable 1st February, 1839—that the consideration of the note was a sale of negroes

by him to Fowler, among whom were sundry negroes included in the marriage settlement made between himself and his wife, with John G. Guignard and James S. Guignard, Jr., on the 12th of May, 1831, he assigned the said note (a copy of which was annexed) to the said J. G. Guignard and J. S. Guignard, Jr., as trustees under the said marriage settlement, the proceeds of the note, when paid, to be laid out in other property, to be held subject to the trusts of the deed of May, 1831, and of another deed of 31st October, 1832. Endorsed on the original assignment, and in the handwriting of James S. Guignard, the elder, was the following memorandum: "Two thousand dollars of the above note was transferred, on the 12th July, 1835, to William Mayrant and Caroline Mayrant, executrix and executor of Charles Mayrant, by R. P. Mayrant, by way of collateral security for certain debts, and which have been nearly satisfied." There was no evidence as to the time when or at whose instance this memorandum was endorsed. The next transaction, in order of time, is an assignment of Robert P. Mayrant to William Mayrant, bearing date 23d March, 1839, and executed in the presence of James S. Guignard, as subscribing witness. The instrument recites that William Mayrant is surety for Robert P. Mayrant, in several bonds and notes, which amounted then to about seventeen thousand dollars, and in order to secure him against his liability on such bonds and notes, and to enable him to indemnify himself against all his liabilities as security for the said Robert P. Mayrant, he, the said Robert P. Mayrant, assigns to William Mayrant all his "right, title and interest in two notes of Dr. A. Fowler for \$12,000,

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which were made payable at the Commercial Bank in Columbia, secured by a mortgage or deed of trust of lands and negroes; which notes are now deposited in one of the Banks at Manchester, Mississippi. One of the said notes is paid, or nearly so; the mortgage or deed of trust, also, is hereby assigned." Other debts and property are included in the assignment, and it is declared that "William Mayrant shall have the right to apply and use any of the debts, notes or property above mentioned, in any way or manner which shall be necessary to enable him to indemnify himself against any of his liabilities as security for Robert P. Mayrant."

It is not necessary further to notice, in this connexion, the individual transactions between William Mayrant and Robert P. Mayrant, but the Court will have occasion to advert to them in subsequent periods of the inquiry.

William Mayrant died in March, 1840, leaving a last will and testament, duly executed, of which his widow, the defendant, Sarah H. Mayrant, was appointed executrix. In the course of the spring or summer of

that year, the complainant, Samuel Mayrant, went to the west for the purpose of collecting the debts due to Robert P. Mayrant, but returned without success. In the fall or winter of that year the defendant, James S. Guignard, Jr., who then had charge of the affairs of Robert P. Mayrant, being about to proceed to the West, an arrangement was made, on the 3rd December, 1840, which is set forth at large in an instrument of writing of that date, under the hand of the said James S. Guignard, Jr., as follows, viz.: "Whereas, Robert P. Mayrant did, on the 12th July, 1835, transfer and assign to William Mayrant and Caroline Mayrant, executor and executrix of Charles Mayrant, the sum of eight thousand dollars, say two thousand dollars, part of each of four notes of Alfred Fowler, of twelve thousand dollars each, by way of collateral security for the payment of Robert P. Mayrant's bond to the executor and executrix of said Charles Mayrant, for eight thousand dollars, dated the 12th day of July, 1835, and on which bond there is now due a balance of two thousand four hundred and forty-one dollars and twenty cents and also another bond, due by said Robert P. Mayrant to said executor Charles Mayrant, on which there is a balance due of five hundred and forty-four dollars and sixty cents, making in all the sum of two thousand nine hundred and eighty-five dollars and eighty cents, with interest on \$2,600 from the first day of the present month. And whereas the said Robert P. Mayrant did, on the 23d day of March, 1839, transfer and assign to William Mayrant two notes of Alfred Fowler, of twelve thousand dollars each, by way of collateral security for certain bonds and notes of Robert P. Mayrant, which then amounted to about seventeen thousand dollars, but which now amount only to the sum of five thousand four hundred and twenty-

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eight *dollars eighty cents, with interest on \$4690 from the first day of the present month.

"And whereas, James S. Guignard, Jr., intends going to the State of Mississippi, as agent or trustee for Robert P. Mayrant, for the purpose of settling and adjusting the affairs of the said Robert P. Mayrant. Now, therefore, for the purpose of enabling the said James S. Guignard, Jr., more fully and completely to transact and settle all matters relating to the affairs of said Robert P. Mayrant at the west, Samuel Mayrant, the attorney or agent for Caroline Mayrant, executrix of Charles Mayrant, as well as attorney or agent for Sarah H. Mayrant, executrix of William Mayrant, hath delivered to James S. Guignard, Jr., the two original assignments referred to; and hath himself, the said Samuel Mayrant, executed a power of attorney, authorizing the said James S. Guignard, Jr., to receive and collect all the assigned notes &c. And powers of attorney are also intended to be obtained from the

said Caroline and Sarah H., executrices as aforesaid, to the said James S. Guignard, Jr., for the same purposes, and forwarded to him in case they should be necessary, to act fully and completely. The said James S. Guignard, Jr., promises to use his exertions to collect all the debts due to Robert P. Mayrant, and with the first moneys received, will settle with and pay to the said Sarah H. Mayrant, executrix of William Mayrant, and Caroline Mayrant, executrix of Charles Mayrant, or to their attorney or agent, the said sums of \$2985.80 and \$5428.80, making together the sum of eight thousand four hundred and fourteen dollars sixty cents, provided that, as to the last note of Alfred Fowler, to wit: the note due on the 1st February, 1839, only two thousand dollars and interest from said date, shall be paid to the executrix of Charles Mayrant in preference to the claim of John G. Guignard and James S. Guignard, Jr., trustees of Mrs. Frances Ann M. H. Mayrant."

[Signed.] James S. Guignard, Jr.

Columbia, 3d December, 1840.

This paper, marked exhibit E of the bill, is in the hand writing of James S. Guignard, the elder, and the sums are taken from a statement of the amounts due, prepared by the same gentleman, and marked No. 2 exhibit to answer of Sarah H. Mayrant. He mentioned, in his examination, that all the parties knew, before the power of attorney was executed, that two actions of trespass were pending in the west, by Fowler against Robert P. Mayrant, in each of which actions the plaintiff had since recovered damages for five thousand dollars.

What proceedings were taken by James S. Guignard, Jr., in the west, under these authorities, did not appear in the evidence, but after a protracted litigation with Dr. Fowler,

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in *which he succeeded in setting off the verdicts obtained by him against his debt to Robert P. Mayrant, a decree was finally rendered against Fowler for a large sum of money, exceeding \$16,000. In the spring of 1846, the property of Fowler was to be sold under this decree, and it was supposed that it might be necessary that James S. Guignard, Jr., should bid off the property for the benefit of the parties for whom he was acting. It was agreed that he should do so, and on the 18th April, 1846, he executed the paper marked exhibit F of the bill, referring briefly to the several assignments above mentioned, and agreeing to receive the moneys, or bid in the property, to be held until it was ascertained what portion thereof belonged to each of the parties. It proved to be unnecessary for James S. Guignard to bid in the property. It was sold; and it appears from exhibit N, of J. S. Guignard Jr's. answer, that he received from the proceeds of sales, in June, 1846, fourteen thousand three hundred and

twenty one dollars twenty-seven cents, (\$14,321.27.) The exhibit sets forth certain payments to other persons, leaving in his hands an admitted balance of ten thousand one hundred and thirty nine dollars and sixty seven cents, (\$10,139.67.)

The complainant is the executor of Caroline Mayrant, who was surviving executrix of Charles Mayrant, deceased, and he applied to the defendant, James S. Guignard, Jr., for payment of the amount due under the assignment of Robert P. Mayrant, and according to the undertaking of the defendant, under date of 3d December, 1840; Sarah H. Mayrant, executrix of William Mayrant, deceased, having already notified the defendant that she interposed no objection to the priority of the claim of Charles Mayrant's estate on the said funds. The defendant having declined to comply, this bill was filed on the 24th April, 1847, and the answer of James S. Guignard, Jr., was filed on the 17th June, 1847. The objections of the defendant to the payment of the debt due to the estate of Charles Mayrant, deceased, are set forth particularly and at large, and it is proposed to consider them in order.

It will be remembered, that by the instrument executed by the defendant, on the 3d December, 1840, at which time he received from the representative of Charles Mayrant the original assignment and the authority to act, he acknowledged that there was, at that date, due to the estate of Charles Mayrant, the sum of \$2985.80, with interest on \$2600 from 1st December, 1840, and he thereby engaged "to use his exertions to collect all the debts due to Robert P. Mayrant, and with the first moneys received, to settle with and pay" to the representative of the estates of William Mayrant and of Charles Mayrant, the specific sums acknowledged to be due, with the single qualification, that, out of the Fowl-

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er *note due 1st February, 1839, only \$2000 and interest should be paid to the estate of Charles Mayrant, in preference to the claim of the trust estate of Frances A. M. H. Mayrant. The defendant, in his answer, admits that several payments had been made on the \$8000 bond, to the estate of Charles Mayrant, "the three first of which have been accurately credited," "but that he has been informed lately, and believes, and hopes to be able to prove to the satisfaction of the Court, that the fourth credit thereupon should have been four thousand four hundred dollars, (\$400) instead of two thousand two hundred and eighty dollars (\$2280,) as this defendant has lately been informed and believes, and ascertained to his satisfaction, that in November, 1838, William Mayrant, as the executor of the said Charles Mayrant, received on account and in part of said notes given by said Fowler, and on account of said assignment thereof to him and said Caroline Mayrant, the sum of four thousand hundred dollars,

which should have been credited on said bond of eight thousand dollars, and which the defendant submits would very nearly have satisfied the same."

The Court is of opinion that there is much force in the objection suggested in the answer of the executrix of William Mayrant, that this error, like the other difficulties now made by the defendant, was not intimated at an earlier period, and before the power of attorney was executed—that the person who could best have explained the transaction, if any explanation were necessary, has been seven years in his grave, and that it was not until six years after the defendant had received authority, and had executed the instrument of 3d December, 1840, nor until after he had received the funds, that any doubt was suggested as to the correctness of the statement, the result of which is incorporated in the said agreement of the defendant. Certainly, after what has been done, after the time which has elapsed, and after the death of a principal party to the transaction, the Court would require strong evidence to shew that the receipt on the bond of 13th December, 1838, signed by William Mayrant, for \$2280, should have been a receipt for \$4400. The allegation is, that in November, 1838, William Mayrant, as executor of Charles Mayrant, received on account of the Fowler notes, and on account of the assignment thereof to the estate of Charles Mayrant, the sum of \$4400. The proof is, that on the 11th October, 1838, Robert P. Mayrant executed to William Mayrant, individually, a power of attorney to collect the notes due by Dr. Fowler. The power is witnessed by James S. Guignard, the elder. At that time, three of Fowler's notes had fallen due—the fourth note was not due until 1st February, 1839. William Mayrant went to Mississippi, collected \$4400 from Fowler, and

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in 1838 return*ed to South Carolina. Three instalments of the \$8000 bond of Robert P. Mayrant to the estate of Charles Mayrant, were then past due, and a balance of what had fallen due was in arrear and unpaid. The remaining instalment of \$2000 was not due until 1st February, 1839, when the last note of Fowler would fall due, and on which it was chargeable. William Mayrant, on his return, to wit: on the 13th December, 1838, accounted with Robert P. Mayrant for the \$4400 received from Dr. Fowler, by crediting his bond to the estate of Charles Mayrant with \$2280, (that being very nearly the amount then due on the bond) and paying to Robert P. Mayrant, in cash, \$2120, the balance of the \$4400, for which he took his receipt in full, in the following words, viz:—"Rec'd. Dec. 13, 1838, of William Mayrant, the sum of four thousand four hundred dollars, being the amount received by him of Dr. Alfred Fowler, on account of his notes to me—\$4400.—(Signed) Robert P. Mayrant."

On the transaction thus stated, it is difficult to perceive on what principle William Mayrant was bound to credit the \$4400 on the \$8000 bond to the estate of Charles Mayrant; nay more—what authority he had to require Robert P. Mayrant then to pay or allow in settlement the amount of the instalment which was to fall due in February, 1839, and for the payment of which another fund had been provided. It was proposed, however, to examine the defendant, Robert P. Mayrant, as a witness on behalf of the trust estate of Frances A. M. H. Mayrant, and to prove by him, not that he had not received in cash from William Mayrant \$2120, the balance of \$4400 after the credit on the bond, but "that William Mayrant, on his return from Mississippi, in December, 1838, told him that he had received the \$4400 for the estate of Charles Mayrant, but that a difficulty arose between them on the subject, and that in consequence of his (Robert's) remonstrances, William had paid him over in cash, the balance as above stated." Admitting this to be true, the Court deemed the testimony immaterial. William Mayrant was acting under a general power of attorney from Robert P. Mayrant to collect the Fowler notes. Suppose that in collecting the \$4400, he received the money, intending, and with the view, to appropriate the whole to the \$8000 bond of the estate of Charles Mayrant, which was not then due; what satisfactory answer could he, the attorney in fact of Robert P. Mayrant, offer to the remonstrances of his principal? He had received nothing on the note due February, 1839, nor was there any evidence even that he knew of the assignments to the trustee. But without dwelling longer on the effect of the proposed testimony, the Court was of opinion, and so ruled, that Robert P. Mayrant was not a competent witness for the

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trust estate. The contest *is between the complainant, as executor of Charles Myrant on the one side, and the trustees of Frances A. M. H. Mayrant, the wife of the defendant, Robert P. Mayrant, on the other side. According to the provisions of the deeds of 1831 and 1832, the funds claimed by the trustees are for the use of Mrs. Mayrant during her natural life.

A suit in Equity often contains many issues, and as the general rule requires all persons in any way interested to be made parties, leave is frequently given for a party defendant to be examined in reference to a point in which he has no interest. The rule is fully stated by Mr. Gresley in his Treatise on Equity Evidence, 242 et seq. Leave is granted, on motions suggesting that the party is not interested, and saving all just exceptions. Every objection holds good, except the single formal one of his being a party—*Rogerson v. Whittington*, 1 Swanst. 39. "Appendant to the rule we have discussed," continues Mr. Gresley, "is the ex-

clusion of the husband or wife of the party, for both are considered in law as one person; or as Lord Coke expresses it, *quia sunt duæ animæ in carne una*. This restriction applies to every sort of interest in the suit. It is looked upon as a matter of public policy. Where either of them is pecuniarily interested, the rule is still more strict; and the Courts do not consider this as a matter of technical form, but have excluded the evidence of a husband, tending to support any interest of his wife, whether legal or equitable, or whether she was a party to the suit or not. The judgment of Sir John Leach, Master of the Rolls, in *Gregg v. Taylor*, 5 Russ. 19, is cited, in which he says: "It is a settled rule of law, proceeding upon sound policy, that husband and wife cannot be witnesses for or against each other; and the case of *Davis v. Dinwoody*, 4 T. R. 678, has decided, what indeed was clear in principle—that it makes no difference whether the interest of the husband or wife, to be affected by the testimony, is legal or equitable." In the case of *Davis v. Dinwoody* the testimony of the husband, in support of his wife's interest, was directly opposed to his own interest. But still the Court held the rule of exclusion applicable. From these authorities it seems sufficiently apparent that Robert P. Mayrant could not be examined as a witness in support of his wife's interest.

The next objection stated by the defendant, James S. Guignard, Jr. to the payment of the demand of the estate of Charles Mayrant, is, that William Mayrant, in his lifetime, had received large sums of money on account of two notes, and a bill of exchange of one Marcus Pierce, and that, after making all proper deductions, there was still remaining in the hands of William Mayrant, a sum sufficient to satisfy the balance due on the bond of \$8000, and the bond of \$540

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*due to the estate of Charles Mayrant, as well as any balance due to William Mayrant, on account of his liabilities for Robert P. Mayrant—and "at all events, defendant insists that William Mayrant, in his lifetime and as executor of Charles Mayrant, deceased, had in his hands, possession and power, funds of said Robert P. Mayrant, more than sufficient to satisfy the said bonds of \$8000 and \$540, and applicable to the satisfaction of the same." The Court does not propose to state, with circumstantial accuracy, the facts in relation to the transactions with Marcus Pierce; but only so far as will enable the Court to determine whether the defendant has established that William Mayrant, in his lifetime, and as executor of Charles Mayrant, deceased, received from this source funds sufficient to satisfy the debts due by R. P. Mayrant to the estate of Charles Mayrant, deceased, and which funds were properly applicable to the satisfaction of those debts. Some time after

Robert P. Mayrant had sold out to Dr. Alfred Fowler, a written agreement was entered into between Robert P. and William Mayrant, bearing date 7th December, 1835. From this agreement, it appears that a planting interest was to be established, on joint account, in Carroll County, Mississippi. Robert P. Mayrant had purchased six hundred and forty-six acres of land in that county, of which he sold William a moiety, for four hundred and seventy-one dollars. William owned twenty-six negroes, a moiety of which he agreed to sell to Robert, for four thousand three hundred and eighty dollars, and William was to send, besides, eleven negroes, nine of whom were workers in the field, which belonged to him exclusively, and for which he was to draw shares. They hired an overseer, and Robert P. Mayrant started, in company with the overseer and the negroes, for the West. It was part of the agreement, that the title for the twenty six slaves should remain in William, as security for the purchase money. Immediately after the arrival of Robert P. Mayrant at the place of destination in Mississippi, he sold out the whole establishment—land, slaves, mules, wagons, etc. to Marcus Pierce; and the first intelligence that William Mayrant received of the transaction, was in a letter from Robert, of which the following is an extract:—"I got thirty-six thousand dollars for our property. It was so fine a price that I accepted it without your advice. I have a bill of exchange on New Orleans for thirteen thousand two hundred dollars, and twenty-four thousand dollars secured, I am sure, to your satisfaction. Now is the time, if ever there was, to make money," &c.

"This stunning transaction," says the widow of William Mayrant in her answer, "broke up her husband's plan of making a planting establishment in the West, and he

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did the *best he could to save himself under the necessity thus imposed upon him by the said Robert P. Mayrant. He was obliged either to ratify the act of his brother, or abide the risk of receiving nothing. If he repudiated the sale, he must go or send to Mississippi to recover the negroes by process of law, or else he must proceed against his own brother here, who had no means of reimbursing him for the loss of his property." Under these circumstances, the sale was affirmed. William Mayrant received the bill of exchange, on which he realized about twelve thousand dollars, and on the 27th October, 1836, an arrangement was made between them, both in relation to the bill of exchange and the two notes of Pierce, and the appropriation of the proceeds, which is explicitly set forth in a receipt for those papers, or rather for the nett proceeds of the bill and an order for the notes given on that day by William Mayrant to Robert P. Mayrant, of which a copy is exhibited with the

answer. "When the said bill of exchange," (runs the receipt) "is paid by the acceptor and the amounts of the two notes realized, then the same are to be appropriated as follows. The expenses which may attend the collection of the same, and transmitting or remitting the amounts to this State, to be paid therefrom. The said R. P. Mayrant is to be paid out of the amounts, the sums advanced for the purchase of the lands, and the amount advanced for the removing of the said negroes mentioned in the within agreement, with interest, and also his personal expenses incurred. And the said William Mayrant to be paid the amount advanced by him for the purchase of the within mentioned twenty-six negroes, one moiety of which he agreed to sell to the said Robert P. Mayrant, with interest. He, the said William Mayrant, is also to be paid out of the amounts which may be received on the above mentioned bill of exchange and notes, the value of his eleven negroes mentioned in the within agreement—also the amount advanced by him for the removal of the said negroes, and the amount paid by the said William Mayrant to one William Bell, under a contract to go out with the said negroes, and oversee the place, to be settled according to the terms of the within agreement, with interest; and after the payment to the parties respectively of the above amounts, which are yet to be settled and ascertained, then the balance to be equally divided."

As has been stated, the receipt sets forth that the bill of exchange, which was not then at maturity, had been discounted, and the proceeds, (\$12,014) received by William Mayrant. A memorandum to the receipt, states that the two notes of Marcus Pierce had been deposited with Hamer & Co. of New Orleans; and that "a joint power of attorney was given by said William and Rob-

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ert to Henry Vaughan, *to collect and manage said notes for their mutual benefit, according to their interests under the original contract." This memorandum is signed by both William and Robert P. Mayrant. Next in order of time is a letter from James S. Guignard, the elder, to William Mayrant, dated Columbia, 30th March, 1839, in which, after acknowledging the receipt of his letter, enclosing an assignment to be executed by Robert P. Mayrant, and which, he tells him, had been executed, and referring also to other matters, the writer continues: "You did not send me the statement of your and Robert's affairs. He wishes to know the exact amount of what he owes you, which he cannot ascertain himself, as there are expenses, &c. which he can tell nothing about. Do send it." "In reply to this letter," says Mr. Guignard in his testimony, "William Mayrant sent the statement, of which Exhibit (No. 6) is a copy 'made by himself,' (the witness.) Exhibit No. 6, is an account made up to January, 1839, and

sets forth the sum received by William Mayrant, on account of demands against Marcus Pierce, and his appropriation of the same on the basis of his receipt of 27th October, 1836. According to that statement, a balance remained due in November, 1838, to William Mayrant, of \$1609.30 cents, and to Robert P. Mayrant of \$1679.14, on the Marcus Pierce transaction. When this statement was exhibited to Robert P. Mayrant, "he objected," says Mr. Guignard, "to Catharine's price, and the eleven negroes sold to Pierce, as overcharged." It does not appear that these objections were communicated to William Mayrant, nor was there any evidence that they were well founded. But on the 1st December, 1840, (the year following) and after the death of William Mayrant and preparatory to the expedition to the West, of James S. Guignard, Jr. to arrange the affairs of Robert P. Mayrant, Mr. Guignard, the elder, made out a statement, which is styled, "Statement of Western and other matters, in regard to Robert P. Mayrant and William Mayrant, and estate of Charles Mayrant, made 1st December, 1840, by J. S. G."

In this account, the statement furnished by William Mayrant in March, 1839, is assumed to be correct, and the balances, due to William and Robert P. respectively at that time, are taken from that statement.—In a memorandum, the following is added by Mr. Guignard: "It is supposed that Wm. M. received a partial payment on this debt in Nov. 1839, and when ascertained, to be accounted for."—It was true and it was admitted at the hearing, that William Mayrant, to whom a balance of \$1609.30 was due in January, 1839, or November, 1838, under the arrangement of 27th October, 1836, received under the execution against Pierce in November, 1839, \$1554.76; and it is also true and was admitted at the hearing, that Robert P. Mayrant, to whom a balance of

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*\$1679.14 was due at that time under the same arrangement, received, on the 21st April, 1840, under the same execution against Marcus Pierce, the sum of \$3814. There was no evidence whatever that William Mayrant had, at any time, received any other moneys whatever on account of the debt of Marcus Pierce, except those for which he has given credit in the statement made by him, and the sum received in November, 1839, of \$1554.76. It is, then, quite apparent, so far as the Court may judge from the testimony submitted, that in relation to the transaction with Marcus Pierce and the agreement of the parties thereupon, the estate of William Mayrant is largely the creditor, and not the debtor, of Robert P. Mayrant. The Court does not perceive how this conclusion can be obviated, unless the defendant, James S. Guignard's remaining objection to the complainant's demand should be substantiated. The defendant proceeds

in his answer to say that he "has been informed and believes that the greater part of the balance of said two notes given by Marcus Pierce and others, has been, or is likely to be, utterly lost, through the entire mismanagement and negligence of said William Mayrant in his life-time, and therefore this defendant has been legally advised, and insists, and humbly submits to this Honorable Court, that his estate should bear the entire loss thereof, and that no part thereof should fall on Robert P. Mayrant." In what manner or upon what principle this supposed negligence of William Mayrant in collecting a debt due to Robert P. Mayrant and himself, could afford any answer to the claim of the representative of Charles Mayrant, or could warrant the defendant in withholding from that estate the amount due, was not suggested either in the answer or in the argument, nor is it perceived by the Court. It is not intimated that William Mayrant, in his fiduciary capacity as executor of Charles Mayrant, undertook the collection of Pierce's notes; and if he had done so, it would scarcely affect the legal result. It is but just, however, to the defendant, to say, that although this charge was not formally abandoned, it was not insisted on or urged in the argument of counsel. But the charge of "entire mismanagement and negligence," remains on the record, and evidence was brought from Mississippi to establish the charge. Something is due to the memory of a gentleman who, in life, was an ornament to his profession, and enjoyed in an eminent degree the confidence and esteem of all who had the advantage of his acquaintance. The testimony is altogether in writing, and it is not proposed to recite it, or to incorporate any part of it in the decree. It has been carefully considered by the Court; and it is quite adequate to say that the charge of mismanagement or negligence is without the shadow of foundation. So far as the testimony sheds any light upon the transaction, William Mayrant exhibited all the vigilance, sagacity and anxie-

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ty for the recovery of the debt, *which a man of sound judgment could be expected to evince in the security of his own interests. It seems to the Court impossible to doubt this, after an impartial perusal of the testimony, and particularly of his correspondence with Henry Vaughan, Esq., the friend who had been entrusted by both William and Robert with the charge of this matter. Whether the want of success in collecting the second note of Marcus Pierce was attributable to the folly or the fraud of the attorneys employed, or to any other cause, it is not material now to ascertain. It is enough only to decide that the charge of "entire mismanagement and negligence," on the part of William Mayrant, is as unsubstantiated by the testimony as it is improbable.

The Court has now considered and discussed the several grounds assumed by the defendant in his answer, as justifying his refusal to pay the demand of the complainant. According to the best judgment of the Court, they afford no ground for the refusal. There may be subsisting equities between Robert P. Mayrant, or the trustees of Mrs. Mayrant, and the executrix of William Mayrant, deceased. None have been established which can, in any manner, affect the right of the executor of Charles Mayrant, deceased. As between the other parties defendant, it would be premature for the Court, at this time, to make any final decree. Either of those parties, who desire it, may have an order of reference, for the purpose of stating the accounts between them, or may adopt such other measure as they may be advised to.

It is ordered and decreed that the defendant, James S. Guignard, Jr., pay to the complainant the sum of two thousand nine hundred and eighty-five dollars, with interest on two thousand six hundred dollars, from the first day of December one thousand eight hundred and forty, in conformity with the terms of his engagement.

The defendant, James S. Guignard, Jr., moved the Court of Appeals for a rehearing, or to reverse or reform the decree, on the following grounds:

1. That as the defendant, James S. Guignard, jr., had sent an agent in due time to the State of Mississippi, for the purpose of procuring certain exemplifications and original papers, material to the right understanding of the case and to his defence, which said agent, from some misapprehension, failed to procure, the cause should have been continued, to enable said defendant to procure said exemplifications and original papers.

2. That under the circumstances of the case, Robert P. Mayrant was a competent witness, and his testimony should have been received.

3. That William Mayrant, as the acting executor of Charles Mayrant, received and had in his possession funds arising from the assignment of Robert P. Mayrant, sufficient to

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pay *to himself as such executor, the said debts due to him as such executor, which were applicable to the payment thereof, and which should have been applied to the payment of the same, and which the law regards as thus applied.

4. That if any doubts were entertained whether William Mayrant, as such executor, received, and had in his possession, funds arising from said assignment, sufficient to pay said debts to himself as such executor, a cross bill and reference should have been ordered, to adjust the accounts between William Mayrant and Robert P. Mayrant, to ascertain the balance due by the former to

the latter, and to make that balance liable for the payment of said debts to the executor of Charles Mayrant.

5. That the answer of the defendant, Mrs. Sarah Mayrant, should not have been regarded as evidence against the defendant, James S. Guignard, jr., and more especially as the same was not sworn to, or even signed by her.

6. That Robert P. Mayrant was non compos mentis, and utterly unfit to transact any business, from his attack of paralysis, on the 13th of October, 1838, for upwards of a year, and especially on the 13th of December, 1838, when the receipt for \$4,400 was given to William Mayrant, and which therefore ought not to be regarded as valid and obligatory.

7. That the paper of which complainant's exhibit E is a copy, was signed by the defendant, James S. Guignard, jr., under a misapprehension and ignorance of the true state of accounts between William Mayrant and Robert Mayrant, and upon a reliance on the representations of the complainant, together with statements in the handwriting of William Mayrant, or taken from them, and without any satisfactory information from Robert P. Mayrant, who was not then, and had not been in a fit condition to give any, and therefore the same ought not to be held obligatory; nor ought any statements made by James S. Guignard, Sen., to be held binding, as he was under a like misapprehension and ignorance, and was no agent of Robert P. Mayrant.

8. That the decree requires the defendant, James S. Guignard, jr., to pay to the complainant, not only the balance remaining due on Robert P. Mayrant's bond, of the 12th July, 1835, for \$8,000, but also the balance remaining due on Robert P. Mayrant's bond, of the 14th September, 1834, for \$540; although no part of the debts due by Alfred Fowler was ever assigned to secure the payment of the latter bond; and although the defendant James S. Guignard, jr., by his agreement of 3rd December, 1840, expressly reserved the lien of the assignment in favor of the trustees of Mrs. F. A. M. H. Mayrant, upon the note of Alfred Fowler, due 1st February, 1839, except as to the amount of 2,000, previously assigned to the executor and executrix of Charles Mayrant; and al-

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*though the whole fund now in the hands of the said James S. Guignard, jr., is insufficient, by many thousand dollars, to satisfy the just claims of the trustees of Mrs. F. A. M. H. Mayrant.

9. That the decree, while not undertaking to settle the accounts between Robert P. Mayrant and the executrix of William Mayrant, yet assumes that Robert P. Mayrant is indebted to the said executrix; and also assumes, erroneously, that the eleven negroes of William Mayrant, sold to Marcus Pierce,

are not overcharged against Robert P. Mayrant, although the effect of the charge, or estimated value, is to make Robert P. Mayrant the insurer of profits which were never realized, but have been entirely lost under the mismanagement of William Mayrant.

All of which are respectfully submitted.

Cregg & Gregg, Solicitors for J. S. Guignard, Jr.

F. J. Moses, complainant's solicitor.

Curia, per DARGAN, Ch.—This Court is perfectly satisfied with the decree of the Circuit Court, except in one particular; which will be hereafter adverted to. Being content to adopt the views of the presiding Chancellor, except in reference to a particular point, it will be unnecessary to enter into any detailed consideration of the various grounds of appeal, discussed before this Court. Some observation, however, on the first ground, may not be inappropriate or uncalled for.—This ground is an appeal from the acknowledged discretion of the Circuit Court, in ruling the case for trial in opposition to a motion for a continuance. It assumes that this authority has been indiscreetly exercised. It is unnecessary to say that a discretionary power of continuing causes, or ordering them to a hearing, must necessarily be lodged with the tribunal charged with their trial. It is, furthermore, sufficiently obvious that the presiding Chancellor is a more competent judge of the causes that should operate as a continuance, than an appellate jurisdiction. It follows that an appeal from an exercise of this authority can find but little favor in a Court of Appeals. I will not say that no case can occur, in which an appeal would lie, from the discretion of the Chancellor in matters of this nature, to the discretion of this Court. On the contrary, I think it very clear that this Court does possess the power, which it will exert at its own discretion, of reviewing the manner in which the Circuit Court has exercised its discretionary powers; and in a proper case would interpose. But it must be an extraordinary case, and one in which it must obviously appear that the power to order a case to trial, in opposition to a motion to continue, has been rashly and indiscreetly exercised, that would warrant the interference of this Court. After these re-

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marks it is but justice *to the presiding Chancellor to say that, in the opinion of this Court, his discretion, in this case, has been most judiciously exercised. To say nothing as to whether there had not been ample time, from the filing of the bill to the term at which the case was tried, for the defendant to have made all the necessary preparations for the trial, there appears to be something preposterous in the ground on which the motion for a continuance was urged; (with

deference be it said, to the eminent and learned counsel who submitted it.) The defendant moved for a continuance, that he might have time to prove, not a fact that he could swear actually existed, but to ascertain the existence of a conjectural fact, and if that should turn out on investigation to have existence, that he then might prove it. This seems to me to be a total perversion of all the rules upon this subject. If there had been actual proof before the Court of the supposed fact, of which so much has been said; namely, that William Mayrant had signed the receipt to Fowler for the \$4,400, as "executor of Charles Mayrant," it does not appear to this Court that it would have been material. This sum was received on the third note of Fowler, which fell due on the first day of January, 1838. William Mayrant had a right to apply only so much of this sum as was sufficient to pay the third instalment on the \$8,000 bond, which fell due at the same time.—And this much was so applied. He had no legal or equitable authority under the assignment, to apply any of the proceeds of the third Fowler note as a pre-payment on the fourth instalment of the bond of Robert P. Mayrant to the estate of Charles Mayrant, which was actually not then due. It is true he collected more than was sufficient to satisfy the instalment of the debt to the estate of Charles Mayrant that had fallen due, but the excess he had collected, not under the assignment to him as executor, but under another and distinct authority; under a power to him in his individual capacity. The excess thus collected, over what was then due to Charles Mayrant's estate, he had no right to apply in further satisfaction of that claim, without the consent of Robert P. Mayrant, his principal. This consent was withheld. If, therefore, Wm. Mayrant had subscribed the receipt to Fowler, as "executor of Charles Mayrant," it would have been an immaterial fact, inasmuch as it was proved that he only applied what, under the assignment, he was entitled to apply to the third instalment of the bond, and had paid the balance to Robert P. Mayrant, who had a right to receive it. This act of receiving would be referred, by this Court, to the different authorities under which he received the money.—The peculiar form or style of his signature, would avail nothing. So much as he was entitled to receive under the assignment, would be referred to that

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instrument, and be dis*posed of as it directs, and the excess would be referred to his other authority as agent, and subject to the undoubted legal claims of his principal. It was for the purpose of being allowed time to prove a fact thus immaterial, and at best, but conjectural as to its existence, that a motion to continue the cause was made, and a refusal to grant that motion has been

made a ground of appeal to this Court. I have said more than I had intended, and certainly more than was necessary, on this part of the case. It is, however, a fit occasion to say, on this subject of continuances, that under the great facilities afforded for the preparation of causes for trial in this Court, and the infrequency of the sittings of the Circuit Courts, promptitude in bringing on causes to a hearing, may be reasonably expected, and will certainly be exacted. The party who seeks a continuance, must be prepared to make a very strong showing. Nothing short of this will answer for the despatch of business in the Circuit Courts of Equity.

There is, as I have said, one particular in which, in the opinion of this Court, the decree needs to be reformed, and this arises on a question made in the 8th ground of appeal. There cannot be a reasonable doubt that the complainant, as the legal representative of the estate of Charles Mayrant, has a lien upon the fund in the hands of the defendant, James S. Guignard, for the balance due upon the eight thousand dollar bond of Robert P. Mayrant, and this by virtue of the assignment of Fowler's notes for that purpose. This assignment was the first in point of time, and conferred a lien earlier than and paramount to all others. I do not wish to add a word to what the presiding Chancellor has so well said in relation to this part of the case. But the smaller bond for five hundred and forty dollars, though unquestionably a just debt, stands upon an entirely different footing. It has not been protected by any assignment or lien upon the securities from which the fund in dispute has been derived. The Court considers the stipulations of the defendant, James S. Guignard, of the date of 6th December, 1846, (exhibit E. of complainant's bill,) to the effect that this bond, as well as the balance due on the larger bond, should be first paid, as inoperative; or at all events insufficient to bind the trust estate, as regards its claims upon the fund. In the first place, it is doubtful whether the parties, at that date, did not deem the Fowler debt sufficient to satisfy both claims. And the agreement was evidently framed under a mistaken opinion, that both of the bonds due the estate of Charles Mayrant were covered by the assignment. Be that, however, as it may, it was a waiver by a trustee of the rights of his cestui que trust, by a contract executory in its character, and without a valuable consideration; and in behalf of a party who was aware of the equities of

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the cestui que trusts. This Court will not enforce such an agreement to the prejudice of the trust estate. And that part of the decree which gives to the complainant an unqualified right to be paid the balance due upon this bond for \$540, out of the fund in

the hands of the defendant, James S. Guignard, is erroneous, and must be reformed in the manner hereinafter expressed.

This brings me to the consideration of another aspect of the case. The fund in dispute is the nett proceeds, and the commingled and undistinguishable product of the third and fourth notes of Dr. Fowler, upon which one entire decree was rendered, and this much realized under that decree by the sale of his property. Each of these notes was for \$12,000. Upon that due 1st January, 1838, a payment of \$4,400 has been made to Wm. Mayrant, and by him correctly applied. The balance of the note and interest was due. Upon the other note (due 1st January, 1839,) the whole amount of the principal and interest was due. On the trial of the suit instituted in the Court of Equity, in the State of Mississippi, against Dr. Fowler, to recover the amount due upon these two notes, he succeeded in setting up, as a discount against them, the amount of two verdicts, each for the sum of \$5,000, which he had recovered against Robert P. Mayrant for certain trespasses committed by him against said Fowler. And the decree was for the balance due upon the two notes, after deducting the discounts. Fowler became insolvent, and the sales of his property did not satisfy the whole amount for which the decree was rendered. The amount actually realized by the sales, was further and greatly reduced by the heavy expenses incurred in carrying on a protracted and fiercely contested litigation, at a distance from the parties interested in its prosecution.

William Mayrant had become the surety of Robert P. Mayrant for a considerable amount; and to indemnify him against these liabilities, the latter had assigned to the former, by an instrument bearing date the 23d day of March, 1839, the second and third notes of Dr. Fowler, subject to the prior claim of the estate of Charles Mayrant. And to indemnify and secure the trust estate of his wife, F. A. M. H. Mayrant, for the 17 negroes of that estate, which he had sold to Dr. Fowler, he had assigned to the trustees, (of whom the defendant, J. S. Guignard, is one,) the fourth note of Dr. Fowler, due 1st January, 1839; subject also to the prior claim of the estate of Charles Mayrant, for two thousand dollars and interest. The trust estate had no assignment of or lien upon Dr. Fowler's third note. But as the amounts due upon these two notes were blended in the decree, and the fund in controversy is the nett amount realized from that decree, it cannot be said that this fund has been collected upon one of these notes,

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and not upon the other. It follows that if the estate of William Mayrant still has claims against Robert Mayrant, on account of the surety liabilities intended to be covered by the latter's assignment of the third

note of Dr. Fowler, it constitutes an equity which cannot be disregarded in the distribution of this fund.

Whatever rights of priority, or in the way of lien, the estate of Wm. Mayrant may have upon the fund, have been waived by the executrix of that estate, in behalf of the estate of Charles Mayrant. The executrix has, in her answer, so waived her rights, and thus has made the waiver a matter of record. The Court is disposed to carry into effect this transfer of lien, and by virtue thereof, to substitute (as regards priority of claim upon the fund) the estate of Charles Mayrant in the place of Wm. Mayrant. And it is the judgment of the Court, that any lien which the estate of Wm. Mayrant may have upon the fund in the defendant's hands, shall operate for the benefit of the estate of Charles Mayrant, towards the satisfaction of the bond for \$540. If the lien, in favor of Wm. Mayrant's estate, should be for less than sufficient to satisfy this bond, it shall operate pro tanto for the benefit of the estate of Charles Mayrant; if for more than sufficient to satisfy the bond, the residue shall remain for the estate of William Mayrant.

It is ordered and decreed that it be referred to the Commissioner to state the accounts between the estate of Wm. Mayrant and Robert P. Mayrant, and if he finds and reports a balance in favor of the estate of Wm. Mayrant, that he carefully discriminate and show how much, if any, be due on the liabilities intended to be secured in the assignment before referred to, and how much on general account. If the complainant should find a balance due the estate of William Mayrant, on account of surety liabilities, a question will arise as regards the apportionment of the fund between the estate of Wm. Mayrant and the trust estate. This question is reserved, as also all questions not adjudged by the circuit decree and the decree of this Court.

It is ordered and decreed that the circuit decree be modified as herein before explained, that in all other respects it be affirmed, and that the appeal, except as to the eighth ground, be dismissed.

DUNKIN and CALDWELL, CC., concurred.

Decree modified.

3 Strob. Eq. *131

*CAROLINE A. BUSH, per pro amy, v.
SAML. B. BUSH et al.

(Columbia, Nov. and Dec. Term, 1849.)

[Judgment ¶414.]

Under an unrecorded deed from her father, the complainant was the equitable owner of certain slaves which had been levied on and sold by the sheriff under an execution against

her husband, and purchased by defendant. Complainant's trustee had recovered in trover a verdict against defendant, which verdict the defendant had never paid. The Court held that in any aspect of the case, the complainant was entitled to its aid for the recovery of her property; and therefore ordered the specific delivery of the slaves to complainant, to be held subject to the provisions of the deed, and an account for their hire during the time she had been deprived of their possession; and also that the trustee be perpetually enjoined from enforcing his judgment in trover against the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 780; Dec. Dig. ¶414.]

[Vendor and Purchaser ¶220.]

The protection of a purchaser for valuable consideration stands on this; that he has, bona fide, acquired the legal title and paid the purchase money before notice of the complainant's equity. If he has acquired the legal title but has not paid the purchase money before notice, his plea fails. So, if he has paid the purchase money, but has acquired no legal title, and then receives notice of the complainant's equity, he cannot defeat that prior equity by procuring the legal title.

[Ed. Note.—Cited in Maybin v. Kirby, 4 Rich. Eq. 113; Brown v. Wood, 6 Rich. Eq. 175; Zorn v. Railroad Company, 5 S. C. 101; Richardson v. Chappell, 6 S. C. 158; Lynch v. Hancock, 14 S. C. 90; Peay v. Seigler, 48 S. C. 514, 26 S. E. 885, 59 Am. St. Rep. 731; Robert v. Ellis, 59 S. C. 147, 37 S. E. 250.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 461-465, 720; Dec. Dig. ¶220.]

Before Caldwell, Ch., at Barnwell, February, 1849.

The facts involving the points considered in this case, are sufficiently stated in the following Circuit decree:

Caldwell, Ch. Benjamin Foreman, on the 12th August, 1835, made a deed of trust of two negro women, Sophy and Sukey, and their future increase, to David Foreman, for the sole, separate and exclusive use of the donor's daughter, Caroline, who afterwards, on the same day, intermarried with Samuel B. Bush. The sheriff, Wm. J. Harley, levied a fi. fa. of Stephen S. Bush v. Samuel B. Bush on the negroes Sophy and Bill her son, and sold them on the 6th November, 1843, to the defendant, Neilson, for \$495, which he paid. David Foreman, the trustee, brought an action of trover in the Court of Common Pleas of Barnwell District, (without pursuing the provisions of the Act of 1827), for these negroes against Neilson, and at Spring Term, 1846, recovered a verdict for \$812.50. After the judgment was entered up, the sheriff, Wm. J. Harley, levied executions that were older than that of Foreman on the negroes, including Edward, an after born child of Sophy, as Neilson's property. David Foreman, the trustee, then filed his bill against Neilson and the sheriff for an injunction, and for the specific delivery of the negroes, which was dismissed without prejudice; and the cestui que trust has filed this bill for an injunction, and for the specific delivery of the negroes, and for an account of their hire. To this bill the defendant,

Neilson, pleaded in bar: 1st. The recovery

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at law; and 2nd. The dismissal of *the bill in equity. These pleas were overruled, and leave was given to the defendants to file their answer.

The defendant, Neilson, denies "most positively that he had, either before or at the time of the said sale, and payment of the said consideration money, and delivery to him of the said slaves, any notice whatever of the existence of the said deed."

If Neilson's defence had stood solely upon the ground of his obtaining a title to the negroes by the operation of law in the action of trover, he would be held subject to the same trusts that bound the trustee, whose proceedings against him brought home explicit notice of the deed of trust. But Neilson sets up the defence of being a purchaser for valuable consideration without notice.

This plea would certainly be no sufficient bar to a legal title; but it is equally well established that it is a good defence to a mere equitable title. The case then appears to depend upon the evidence; had the creditors of Samuel B. Bush or the defendant Neilson, notice of the trust deed before he purchased the negroes?

Neilson denies, in the most positive terms, any notice whatever of the deed, and the testimony of the auctioneer, Jeffcoat, corroborates to some extent that denial on the day of sale. The evidence does not establish explicit notice, either to the creditors of Bush or to Neilson. The purchasers at sheriff's sale each had a right to buy whatsoever the creditors of Bush had a right to sell, and if they had no notice of the plaintiff's equity, the purchaser would be protected, although express notice were given at the sale. But there was no proof of notice to either creditors or purchaser. If the cestui que trust will stand by and permit property to be sold, in which she had an equitable interest, without making any objection, this Court cannot set up her equity against the better equity of the purchaser, who paid a valuable and even an adequate consideration in market overt for the property. It is a hard case, on the part of the plaintiff, that she should lose her rights that might have been so easily established, but the trustee's transmitting the legal title to the defendant Neilson, by the proceeding at law, cannot invalidate his equitable defence, which arose out of a previous, distinct and separate transaction, and Neilson's defence must stand on the same footing against her claim as if the unsuccessful efforts of her trustee had never been made. The rumors about the trust deed in the neighborhood, and a knowledge of its existence by several persons, cannot affect creditors or purchasers who knew nothing of it: the notice necessary to neutralize such a defence is of a much more definite, distinct and explicit

character; but here they have had no information whatever that would put the most prudent man on his guard, and induce him to pause before he credited or purchased,

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and to *enquire and ascertain in whom the title to the property was vested. It is peculiarly proper in this State that the Courts should require explicit notice to a purchaser in cases like this, where such a trust deed is not required by law to be recorded, and may exist for years without other persons, except the members of the family, knowing of it.

The case then stands stripped of the legal title, and rests solely upon the footing of the plaintiff's equitable title in the negroes whom the defendant, Neilson, purchased for a valuable consideration without notice at the sheriff's sale, at the suits of her husband's creditors, who had no knowledge of this deed or notice of her claim, and he must therefore be protected.

It is ordered and decreed that the plaintiff's bill be dismissed.

Copy of Deed.

The State of South Carolina:

Know all men by these presents, that I, Benjamin Foreman, of Barnwell district, in the State aforesaid, in consideration of the natural love and affection which I have and bear to my daughter, Caroline Foreman, as well as in consideration of five dollars to me paid by David Foreman, of the district and State aforesaid, have given, granted, bargained and sold, and by these presents do give, grant, bargain and sell unto the said David Foreman, two female negro slaves, namely: Sophy and Suky, with their future issue and increase, to have and to hold the said negro slaves, and their future issue and increase, unto the said David Foreman, his executors, administrators, and assigns forever, for and upon these special trusts, that is to say, in trust for the sole, separate and exclusive use and benefit of my said daughter, Caroline Foreman, for and during the term of her life, not subject or in any way liable to the control, disposition, or debts of her husband, should my said daughter hereafter marry, and upon the death of my said daughter, then in trust for the use and benefit of the child or children of my said daughter, who may be living at the time of her death, share and share alike, if more than one; but if my said daughter should depart this life, leaving no child or children or grand children living at the time of her death, or should the child or children of my said daughter, who may be living at the time of her death, depart this life under the age of twenty-one years and unmarried, then, in such case and from thence forward, the said David Foreman, his executors, administrators and assigns shall have, hold and enjoy the said slaves and their future issue and

increase, to and for his and their own proper use and benefit forever, freed of and discharged of all other uses and trusts whatever. In witness whereof, I, the said Benjamin Foreman, have hereunto set my hand and seal, this the 12th day of August, in the

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year our Lord *one thousand eight hundred and thirty-five, and in the sixtieth year of American Independence.

Benjamin Foreman, [L. S.]

Signed, sealed and delivered in the presence of Thomas Morris, Griffin Owens, and Jane Weathersbee.

Griffin Owens made an affidavit of the execution of the deed before John N. Foreman, 16th February, 1841.

The complainant moved to reverse or reform the decree of the Circuit Court, on the following grounds:

1st. Because, on the pleadings and evidence in the cause, the complainant is entitled to the relief for which she prays, viz: A decree for the specific delivery of the slaves in question to her, and an account for their hire.

2d. Because, on the trial of the suit at law, the same defence was set up by the defendant, Neilson, and upon the same evidence the jury found against him.

3d. Because the Circuit Court, having doubts on the subject (it is respectfully submitted,) ought to have ordered an issue at law to try the fact whether Neilson or the creditors of Samuel B. Bush had notice or not of the complainant's equity, at or before the time Neilson purchased the slaves in question.

Patterson, for the motion.

Bellinger & Hutson, contra.

Curia, per DUNKIN, Ch. The leading facts of this case are set forth in the decree. The protection of a purchaser for valuable consideration stands on this; that he has, bona fide, acquired the legal title and paid the purchase money before notice of the plaintiff's equity. If he has acquired the legal title but has not paid the purchase money before notice, his plea fails. So, if he has paid the purchase money, but has acquired no legal title, and then receives notice of the plaintiff's equity, he cannot defeat that prior equity by procuring the legal title. These principles seem very well established by the authorities, to one or two of which only it is deemed necessary to advert. Ch. Justice Marshall, in *Vattier v. Hinde*, 7 Pet. 271, [8 L. Ed. 675,] says "the rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase money without knowledge of an outstanding equity. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity." And so, in *Boone v. Chiles*, 10 Peters, 177,

211, [9 L. Ed. 388,] "it is a general principle in Courts of Equity that, where both parties claim by an equitable title, the one who is prior in time, is deemed better in right;" and when the plaintiff has a prior equity this can be barred or avoided only by the union of the legal title with an equity arising from the payment of the money and the

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acquisition of the legal title, *without notice of the plaintiff's equity. In *Saunders v. Dehew* it was ruled that "a purchaser shall not protect himself by taking a conveyance from a trustee after he had notice of the trust, for, by taking a conveyance after notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust." This principle is fully recognized in *Willoughby v. Willoughby*, 2 Vern. 271, reported from the manuscript notes of Lord Hardwicke in 1 T. R. 762.

Under the deed from her father, Benjamin Foreman, the complainant was the equitable owner of the slaves, the legal title being in her trustee. When they were levied on and sold under an execution against her husband in Novr. 1843, the defendant, Neilson, became the purchaser. He acquired the title of the husband, and all the rights which the creditors of the husband were authorized to dispose of, and no more. Whether he paid five dollars, or five hundred, the rights of the purchaser were the same. But the husband had no right whatever in the slaves. Under the trust deed any interest or right on his part was expressly excluded. Something was said in the argument about the fraudulent possession of the husband. But the possession was in strict accordance with the provisions of the deed; and it is not an instrument which the law requires to be recorded. But all these questions were open for discussion in the suit at law instituted by the trustee, and were solved by the jury against the purchaser at sheriff's sales. It seems then very clear that although the defendant (the purchaser) may have paid his money to the sheriff without any knowledge of the plaintiff's right, he had no more claim to the slaves than if he had, ignorantly, purchased the property of any other third person which had been levied on and sold under an execution against S. B. Bush.

But the plaintiff's trustee brought an action of trover against the defendant, Neilson, and obtained a verdict for \$812.50. On this trial all the interests of the plaintiff under the trust deed were, of course, developed. No part of the judgment has ever been realized.—But it has been determined that the recovery in trover, without satisfaction, vested the legal title of the trustee in the defendant, Neilson. But, as was said on a former hearing of this cause,¹ Neilson can

¹ 1 Strob. Eq. 379.

certainly be in no better situation by this misapprehension of the trustee than if he had, at the time of the rendition of the verdict, purchased from him his legal title and paid him the money. Having then full notice of the equitable interests of the plaintiff, he cannot be permitted to shelter himself under a legal title thus acquired. Obtaining the legal title with knowledge of the trust, he becomes himself the trustee. But the defendant has not paid the verdict in

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trover. Neither the *plaintiff, nor her trustee, have ever received any value for the slaves which were taken from her possession; and under the proceedings in trover the defendant is entitled to no more favorable consideration than if he had received a bill of sale from the trustee, with full knowledge of the plaintiff's equity, and had given to the trustee a bond for the purchase money which was yet unpaid. In that case, or in any other view which the Court has been able to take the rights of the plaintiff would not be divested, but she would be entitled to the aid of this Court either against the trustee, or his vendee, for the recovery of the property.

It is ordered and decreed that the decree of the Circuit Court be reformed—that the negroes described in the pleadings be delivered up to the complainant to be held subject to the provisions of the deed of the 12th August, 1835, and that the defendant, Neilson, account for the hire of the negroes while they were in his possession, and that his co-defendant, N. G. W. Walker, account for the hire since that time. It is further ordered and decreed that the defendant, David Foreman (the trustee) be perpetually enjoined from enforcing the judgment in trover against the defendant Joseph Neilson.

JOHNSTON and CALDWELL, CC., concurred.

Decree reformed.

3 Strob. Eq. 136

The EXECUTORS OF ENOS TATE v. ALEXANDER HUNTER.

(Columbia. Nov. and Dec. Term, 1849.)

[Judgment ¶551.]

Complainant's testator, in his lifetime, had brought an action of assumpsit against the sheriff for a sum of money collected by him under the process of the Court of Law, and retained to be applied to an execution which had been assigned to defendant. The suit had abated by the death of the testator, renewed by the complainants, his executors, and a verdict found for defendant. On appeal for a new trial, their motion had been dismissed. The complainants then filed their bill praying that the execution and judgment in question may be postponed to the judgment in favor of their

testator, &c. The Court held the question to be res adjudicata.

[Ed. Note.—Cited in *Watson v. Columbia Bridge Co.*, 13 S. C. 437; *Ex parte Roberts*, 19 S. C. 157; *Green v. Iredell*, 31 S. C. 595, 10 S. E. 545.

For other cases, see *Judgment*, Cent. Dig. § 996; Dec. Dig. ¶551.]

[Judgment ¶540.]

The general rule is that the judgment of a competent Court is binding and conclusive upon the parties, and will not be reviewed or reversed by any Court possessing concurrent jurisdiction.

[Ed. Note.—Cited in *Clarke v. Jenkins*, 3 Rich. Eq. 339; *Darby & Co. v. Shannon*, 19 S. C. 532; *Abbeville Electric Light & Power Co. v. Western Electrical Supply Co.*, 66 S. C. 342, 44 S. E. 952.

For other cases, see *Judgment*, Cent. Dig. § 1079; Dec. Dig. ¶540.]

[Equity ¶87.]

In cases of concurrent jurisdiction the same rule as to the statute of limitations prevails both in the Courts of Law and Equity.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 242-244, 395; Dec. Dig. ¶87.]

Before Dargan, Ch., at Abbeville, June, 1849.

Dargan, Ch. This case is a remarkable instance of the pertinacity with which litigious parties are disposed to prosecute their rights real or imaginary. The same issues have

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*been tried at law, between parties substantially the same; twice in the Circuit Court, and twice in the Court of Appeals, with varying success. The questions have been complicated on this trial with a great deal of extraneous matter not necessary to a decision by the Court. I feel indisposed to load this decree with a statement of all the irrelevant facts that have been brought to my notice. But as I am persuaded that nothing short of the ultima ratio, a trial on appeal in the last resort, will satisfy the parties, I refer to my notes of the evidence taken on the trial, the depositions taken by the Commissioner, the answer of the defendant, and the report of Judge Withers on the last law trial, (agreed to be received,) as containing all the facts that were brought out on the hearing of the case by me. From this mass I will briefly state such of the facts as I deem material to a proper understanding of the opinion that I am about to pronounce.

A. D. Hunter, the son-in-law of complainant's testator, and the son of the defendant, was much embarrassed in his pecuniary circumstances; in fact, he was considered, as he has turned out to be, insolvent. The oldest lien on his property was an execution in favor of one M. B. Clark, for \$1,000, besides interest; the judgment of which bore date August 5, 1839, and was assigned by Clark to the defendant. The next eldest lien was a mortgage of A. D. Hunter to A. Hunter, for negroes, dated October 18, 1839, and executed to secure a debt of \$5,885, besides interest. This bond was lodged in the sher-

iff's office to be foreclosed. The next in order was a *fi. fa.* Speed, Hester and Tate v. A. D. Hunter, lodged February 2, 1842, amounting, at the sale of the property of A. D. Hunter, to \$407.25. Then, *fi. fa.*, Enos Tate v. A. D. Hunter, lodged September 13, 1842.

On the 4th October, 1842, certain property of A. D. Hunter, including the boy Henry, (who, by an agreement, had been released from the mortgage,) was sold by James H. Cobb, as sheriff, and the proceeds of the sale amounted to \$4,065.75. Two other negroes, May and Miriam, included in the mortgage, were also sold at this time, for \$1,055. This was applied *pro tanto* to the mortgage, leaving of the proceeds of that sale, (of 4th October, 1842,) \$3,010.75, to apply on the executions, according to the priorities. On the *fi. fa.* Speed, Hester & Co. v. A. D. Hunter, were paid \$407.25. On *fi. fa.* Enos Tate v. the same, \$1,326.91. And there was retained, for the satisfaction of the execution in favor of M. B. Clark the sum of \$1,276.59; making the total of the sales of 4 October, 1842. On 7 October, 1842, the sheriff sold ten negroes under the mortgage for \$1,962, all of which was applied to the mortgage. On 7 November, 1842, as sheriff, he sold land for \$1,500, and on 8 November, 1842, he sold

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furn^{*}iture, &c. for \$993.65, the proceeds of both of which last sales were applied to the execution of complainant's testator.

The sums applied in the Tate execution were as follows:

Part of the proceeds of sale of 4	
October, 1842.....	\$1,326 91
Sale of land, 7 November, 1842.....	1,500 00
Sale of furnit ^u re, 8 November, 1842..	993 65
Total	\$3,830 56

This sum is insufficient to satisfy the debt; and the complainants claim the further application of the sum of \$1,276.59, retained for the Clark judgment, on the ground that said judgment was either null and void, or satisfied. And this is the true issue, the sole controversy in the case.

Enos Tate, the testator, in his lifetime, at these sheriff's sales had bought of the property of A. D. Hunter an amount exceeding that in controversy; and in settling with the sheriff he claimed to discount it on his execution. This the sheriff refused to allow, and refused title for the property purchased by Tate, except on the condition of payment. Whereupon Tate paid the amount of his several bids into the hands of the sheriff, and took titles, with a protestation as to his rights.

Enos Tate, in his lifetime, brought an action of assumpsit against James H. Cobb, (the sheriff,) for the sum of \$1,276.59, which he had retained to apply to the Clark judgment. The suit abated by his death, and was renewed by his executors, Uriah O. Tate and Thomas J. Heard. The case was tried at

March term, 1846, and the plaintiffs had a verdict for \$1,276.59, the sum now in issue. On appeal the verdict was set aside, and a new trial granted. The case again came on for trial at March term, 1847, when the jury found a verdict for the defendant. The plaintiffs moved the Court of Appeals for a new trial, and, on a hearing, their motion was dismissed.

Shortly after the termination of this controversy at law, the complainants filed this bill against the defendant, and they pray that the execution and judgment in the case of M. B. Clark v. A. D. Hunter may be set aside, on the ground that it is null and void, or satisfied; or that, at all events, it may be postponed to the judgment in favor of their testator.

The question which presents itself in limine is whether the complainants are not concluded by the trial and judgment of the Court of Law. I think most decidedly that they are. The subject matter and the issues are precisely the same with those in the former trial. The complainants are also the same, and the defendant is substantially the party interested in and who defended the suit at law. The general rule certainly is that the judgment of a competent Court is binding and conclusive upon the parties, and will not be reviewed or reversed by any Court possessing concurrent jurisdiction.

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*It is not only binding and conclusive, as to all questions of law and fact, that were made upon the first trial, but as to all questions of law and fact which, from the organization and powers of the Court, that first entertained the case, might have been submitted. *Simpson v. Hart*, 1 John. Eq. Cases, 91; *McDowall v. McDowall*, Bailey Eq. 324; *Hibler v. Hammond*, 2 Strob. L. 105; *Stoney v. Bank of Charleston*, 1 Rich. Eq. 275. The rule extends even to foreign judgments, and proceeds from the comity of nations and of Courts, and the necessity of putting an end to legal controversies, and relieving judicial tribunals of the burthen of repeatedly adjudicating the same matters. It is a rule of policy; nor is it unjust. Surely a party has no right to complain of the arbitrament of a forum of his own election. And his complaint would be equally unfounded if a judgment has been rendered against him in consequence of his own neglect or unskilfulness in developing the proper issues for the decision of the Court, or presenting in a proper manner the evidence that was within his reach; exceptions there are to this rule. If a judgment has been obtained against a party by fraud, accident or surprise, or if there be subsequently discovered written testimony, not cumulative, and which could not have been produced by proper diligence and inquiry, this Court will relieve, so far as to afford another trial *de novo*. In reference to this last ground, I said that the newly discovered evidence should be written or docu-

mentary: for this I apprehend to be the correct rule, notwithstanding the case of *Cantey v. the Bank*. It is not pretended, however, that the complainants' case comes under any of these exceptions.

The only question worthy to be considered, is, whether this is a case between the same parties as those in the case of the executors of *Tate v. Cobb*, sheriff, tried at law. Upon this point, as I have already intimated, I have a very decided opinion. The sheriff in that case was merely a nominal party, and the defendant in this case was the real party in interest. The sheriff was simply a stakeholder, without a particle of interest. It mattered not to him which of the claimants recovered the money in his hands. The battle was fought over his shoulders by the real parties. Alexander Hunter was not only the real party, adverse in interest to the complainants, (who were plaintiffs in that case,) but he had notice of the suit, defended it by employing counsel, and paid them their fees and charges. He could not have testified for Cobb, on the ground that he had an interest in the event of the suit; for the judgment of the Court against the claim of the complainants would have given the fund directly to Hunter, there being no other claimant. If, under these circumstances, the verdict had been against Hunter, he could not have renewed the strife by another suit, either against the complainants or the sher-

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iff. If, in such an event, *he had brought an action against the sheriff, for the money which the complainants had recovered against that officer, would the judgment of the court not have been an estoppel? Could the sheriff not have held up that judgment for his protection, and pleaded it in bar to the action? Could he not have said to Hunter, you were the real party defendant in the case; you had notice of the suit, and you defended it?

The defence of the sheriff in the suit at law was not only for the benefit of the defendant, but was founded and was successful upon his right and title. He was represented by Cobb in that suit. His declarations would have been admissible in evidence; and in fact, his agreement with Tate was received as a part of the testimony against him. This could have been allowed upon no other principle than that of having been regarded by the Court as substantially the real party defendant, or of there being such a privity between this defendant and Cobb as made them in interest the same party.

If an agent, acting for his principal, within his powers, is sued by a stranger for the funds of his principal, in his hands, and judgment is awarded against him by a court of competent jurisdiction, I apprehend that the principal cannot revive the litigation against the successful claimant in the same

court, or in this court, except he comes here upon an equity not cognisable at law. If the property levied on by sheriff Cobb, under the Clark execution, had been recovered from him in an action of trover, by a third party, on the strength of his title, the plaintiff in that execution, or his assignee, would have been concluded by the verdict. He would not be entitled to be heard again in this court, on the same grounds, or upon any grounds cognisable at law. The sheriff is the agent of the plaintiff in the execution, and continues to be invested with that character until he collects and pays over the money. As was said in the *Duchess of Kingston's* case, quoted in *Phil. Ev.* from 11 *State Trials*, 251, the court will take notice of the real parties to the suit. Such, also, was the doctrine held in the King's bench, in *Kinnersly v. Orpe*, 2 *Douglass*, 517. That was an action of debt by the owner of a fishery for a penalty of £5, under the Stat. 5 *Geo. 3*, c. 14, for killing fish in his fishery. One Dr. Cotton claimed a right to the fishery in question. An action had been brought against some of his servants by Kinnersly, to try the right, and a verdict was found for the plaintiff. The defendant moved for a new trial, but his motion was refused. Cotton, not being satisfied, gave the plaintiff notice that he would order one of the servants to fish in the same place, with a view of procuring an opportunity to try the right again. He accordingly ordered another of his servants (the defendant Orpe) to do the act for which the action was brought. The plaintiff produced no other evidence than

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the record of *the verdict and judgment in the former case, to show his conclusive right to the fishery. This evidence was objected to, on the part of the defendant, because the former action and this were not causes between the same parties; the name of the former defendant being Thomas Orpe, and that of the present defendant William. The court overruled the objection, and held that the evidence was not only admissible, but conclusive, (both the Orpes having acted under the authority of Cotton, who, though not a party on the record, was the real defendant,) unless fraud or collusion could be shown. There was an appeal, which was dismissed. There were other points in the case. In reference to the former trial. *Buller, Justice*, said that "the record in the former case was admissible, though it was not conclusive." The reason of its not being conclusive, I suppose to be that the record of itself (that being the only evidence introduced) did not show the privity of Cotton in the two actions, and that he was the real defendant, which proof could be supplied by parol. Thus, in this case, the action against the sheriff was *assumpsit*, for money had and received; and the verdict and judgment would not have shown the connection

and privity between the defendant in the action at law and the defendant to this bill. The bill of particulars and parol proof were necessary to be resorted to, to establish that relation.

Upon the whole, I am of opinion that the trial and judgment in the action at law against the sheriff, is a bar to the complainant's bill. And here I might pause, without entering into a discussion of the other questions that have been raised. I am, however, with the defendant, upon the merits of the case. There are a few prominent facts that supersede the consideration of all others, and are, in my judgment, decisive of the rights of the parties, even if the merits of their respective claims were open for discussion. In the first place, I do not perceive the semblance of a reason for supposing that the judgment of Clark v. A. D. Hunter was null and void in its inception, or discharged by the assignment. It was founded upon a full money consideration, the loan of \$1,000, for which amount it was taken. The assignment to the defendant was perfectly bona fide. The assignment was made in consideration of the defendant having become the surety of A. D. Hunter, for this very debt, and an additional loan of \$1,000. And the understanding was, that it was to be held as a collateral security or indemnity to A. Hunter, for this and other liabilities he had incurred, as the surety of A. D. Hunter, the defendant in the execution. I see nothing exceptionable in all this.

Then, as to the allegation that it had been satisfied and discharged by payments; there is, besides other circumstances, one fact which, to my mind, is conclusive upon this

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*point. The execution was lodged August 5, 1839. More than two years afterwards, and but a month before the sale by the sheriff, by which it was satisfied, we find the Clark execution recognized as a valid and subsisting execution, and as due to A. Hunter. This recognition is distinctly made in the agreement of A. Hunter and Enos Tate, of September 12, 1842. This agreement is entered into with the knowledge and consent of A. D. Hunter, the defendant in the execution, without any protest or claim that it was satisfied. —Surely he ought to have known, and must be presumed to have known, whether it was discharged. The parties have also stated in that agreement the conditions on which that judgment was held by A. Hunter, to wit: "as a security to keep himself indemnified in the cases of suretyship before alluded to, and for no other purpose." And these are the terms on which A. Hunter still claims to hold said execution. How is it possible to get over these admissions by all the parties concerned?

After this agreement was drawn, ("on reflection after the above was written,") as the parties express themselves in the instrument,

there was a modification of the contract; which was added by way of appendix to the agreement, before it was executed. By this modification of the contract, A. Hunter stipulated to release the execution, and to cause satisfaction to be entered thereon, as early as convenient, "on condition that his son, A. D. Hunter, does confess a judgment to him, or in his favor, for the amount that he is bound for him as security; the same to be entered up after Mr. Tate's are entered up." This agreement is executory, and was to be performed by A. Hunter, on a condition, namely: the confession of a judgment by A. D. Hunter, for the amount for which his father was liable as his surety. An executory agreement, even where it is not upon a condition, would not, ipso facto, operate as a discharge of an execution. It would serve as a basis for a bill in this Court, for a specific performance, and this Court, in a proper case, would decree satisfaction. In such a case, it would be competent for the defendant to show any just and reasonable ground to induce the Court to withhold its aid. But in a case like the present, where the execution was agreed to be discharged, upon the condition of the defendant in the execution confessing another judgment, how is it possible for the party, in whose favor such a stipulation is made, to claim, in this or any other Court, that the execution should be satisfied without the performance of the condition? If the complainants had filed a bill to carry into effect this agreement, and had failed to show that the condition had been performed, the bill would have been dismissed as a matter of course.

But the complainant relies upon the letter

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of the defendant to sheriff Cobb, dated October 7, 1842. And one of the counsel for the complainant, in his argument, admitted that the claim set forth in the bill must stand or fall upon this letter, and the agreement of September 12, 1842. In reference to the letter, it is to be remarked that it is not an agreement between parties, but a private letter to a person who may, quoad hoc, be regarded as the agent of the writer. As evidence, it was only competent to be offered as an admission or a declaration to a third person. Considered in the light of its containing an admission of a further contract, as to the Clark execution, it is without a consideration. The consideration expressed is, that his son, A. D. Hunter, had delivered up to him three negroes, and relinquished all further claim to them, as also to those in the possession of the sheriff. The three negroes alluded to, and those in the possession of the sheriff, were negroes that had been mortgaged by A. D. Hunter to his father. The mortgage had been forfeited. The mortgagee had demanded the negroes. Some of them had been seized for foreclosure, and were in the hands of the sheriff; and three of them A. D. Hunter had

refused to deliver up. To the whole of them the defendant had an unquestionable title, and A. D. Hunter no shadow of right. Considering the letter as containing an admission of a contract, it was without a consideration, and was nudum pactum.

I think that the true construction of this letter is to consider it as an allusion to the agreement of September 12, 1842, by which the Clark execution was agreed to be released. The letter was penned in the confidence that the agreement would be fulfilled. But when A. Hunter went to demand the negroes under the mortgage, his claim was violently resisted. A. D. Hunter took down his gun, and made such a demonstration of resistance, that the defendant, with his party, went away, and never got possession of the negroes. The precise date of this transaction does not appear. The witness, (Peter Gibert,) without being very positive as to the date, thought it was in September. He was positive it was after the date of the agreement of September 12, and before the sale in November. It is my opinion that the letter to the sheriff was written in the faith that the agreement would be fulfilled; and that the collision that occurred on the demand of the negroes, brought about its subsequent revocation. I cannot believe that the letter to the sheriff could or would have been written after the transactions to which the witness (Gibert) testifies. The defendant, finding his claim to the negroes under the mortgage resisted, countermanded his order to the sheriff.

I consider the former trial, and the verdict in favor of the sheriff, as a bar to any question being again raised by these complainants, as to the validity and efficacy of the

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Clark *judgment, for the purposes and objects for which it was assigned to A. Hunter. Considering the case upon its merits, I come to the conclusion that the said judgment and execution, by virtue of its assignment to A. Hunter, is valid and efficacious for those same objects and purposes, namely: his indemnity on his liabilities as the surety of his son. To these objects its operation must be restricted. The complainants have not prayed for an account, but, under the statements in the bill, and the general prayer for relief, they are entitled to have an account taken. The defendant is entitled to hold the mortgage and the Clark judgment as an indemnity against sums paid for his son, or existing liabilities on his account. The aggregate amount he is entitled to receive, by virtue of the mortgage and the execution; and the balance, if any, should go to the complainants. No debts due by A. D. Hunter to A. Hunter, except those arising from the relation of principal and surety, are to be included in the account; excepting, however, the expenses incident to the foreclosure of the mortgage.

It is ordered and decreed that the Clark ex-

ecution stand good for the purposes designated in this decree. It is also ordered that it be referred to the Commissioner to state an account between the parties, on the principles herein adjudicated; that the defendant be entitled to receive from the hands of the sheriff, the amount that shall be found due to him, and that he be restrained from receiving more than said amount; and that each party pay his own costs.

A. Hunter, defendant, appealed, on the following grounds:

1. That all the matters in the bill of complaint contained, having been fully adjudicated by a competent tribunal, as decided by the Chancellor, his Honor erred in ordering an accounting by defendant.

2. Because the decree establishes that "the complainants are concluded by the trial and judgment of the Court at law," and the question of payment, as to which the account is now ordered, was distinctly made in the trial at law, and adjudicated for the defendant.

3. Because, on the merits, complainants are not entitled to anything. No wrong has been done their testator; there is no equity in the bill; and their remedy, if any they have, is at law, and this Court without jurisdiction.

4. Because the relief granted by the decree is beyond the prayer of the complainants, and the scope and object of the bill.

5. If complainants or their testator ever had any cause of action or suit, either in law or equity, it is barred by the statute of limitations.

6. Because the bill should have been dismissed, and without costs to the defendant.

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*The complainants appealed, on the following grounds:

1st. Because the execution of M. B. Clark v. A. D. Hunter, assigned to A. Hunter, was satisfied, and should have been so declared.

2d. Because his Honor held the proceedings at law embraced the merits of complainants's bill, and that the questions were res adjudicata.

3d. Because his Honor did not limit and restrain the lien of the judgment and execution of M. B. Clark v. A. D. Hunter, to the property exclusive of those slaves known as slaves of A. D. Hunter's wife.

4th. Because his Honor did not carry out and order to be enforced, the agreement between defendant and complainants's testator

Thomson and Fair, complainants's Solicitors.

Perrin, McGowen and Wilson, defendants's Solicitors.

Curia, per CALDWELL, Ch.—The first question is, has the subject matter of the plaintiff's bill been already adjudged in the Court of Law?

The plaintiffs are the executors of Enos Tate: the testator brought an action of assumpsit against James H. Cobb, late sheriff

of Abbeville district, which abated by the plaintiff's death; these plaintiffs, then, instituted a similar suit against Cobb to recover \$1276.59 with interest, for so much money had and received as sheriff out of the proceeds of the property of A. D. Hunter, under execution. The plaintiffs endeavored to establish that this amount ought to be applied to the payment of Enos Tate's judgment v. A. D. Hunter, although it was junior to a judgment of M. B. Clark v. A. D. Hunter, (that had been assigned to Alex. Hunter,) which they insisted was inoperative, or had been satisfied. James H. Cobb was the nominal defendant, Alexander Hunter was personally present at the trial, and sustained Cobb's defence, and "was" (says Justice Withers in his report,) "obviously the party in interest." The letter of the 7th of October, 1842, written by Alexander Hunter, and sent by A. D. Hunter to sheriff Cobb, and the agreement of Alexander Hunter with Tate, were offered and received in evidence; the plaintiffs also offered the declarations of Alexander Hunter in the fall of 1842, as to the amount for which he was then liable for A. D. Hunter—to this defendant objected but the objection was overruled, and the declarations were admitted in evidence.

The defendant, then, went into an account of what he had paid for A. D. Hunter, and also of what he had received from the proceeds of the sales of the mortgaged negroes, which left a balance of about \$1260 due to Alexander Hunter. The report of the cir-

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cuit Judge shows that the various *questions, arising out of the transaction, were discussed and submitted to the jury, who found a verdict for the defendant. On an appeal the case was sent back for a new trial without prejudice, and the attention of the parties particularly directed to enquiries that had been pretermitted on the former trial, and that were supposed to be material to develop the merits of the case. On the second trial the jury found a verdict for the defendant, and the plaintiffs again appealed; and the Court of Appeals, in refusing the motion for a new trial, says, "We are indeed now informed at the bar, that the real and substantial issue was overlooked by the plaintiffs, inasmuch as it has been discovered, too late for the last trial, that the money in controversy was part proceeds of negroes expressly and unconditionally released by Hunter from the lien of his execution in favor of that of Tate, by the terms of their agreement of 12th September, 1842, to wit: that all the negroes that came by the wife of Alexander D. Hunter should be liable to Tate's execution."

The Court then proceeds to say, "this matter is suggested by a portion of an agreement used on both trials—the fact referred to was at all times capable of ascertainment; was indeed as fully and as conveniently accessible to the plaintiffs at one time as another:

we are, therefore, constrained to dismiss this consideration on the present occasion." From a careful comparison of the matters set forth in the plaintiff's bill, with what occurred on the trial at law, it is difficult to perceive any material difference between them. The omission to produce proof at law, in relation to Agnes's negroes, (those that had been mortgaged,) has not been satisfactorily supplied here, and every other point involved in the issue in that Court, seems to be set up only in a new shape in the plaintiff's bill, the result of the case mainly turning upon the question, was Alexander Hunter's execution inoperative, or had it been satisfied?

Alexander Hunter appears, in the proceeding at law, to have stood in a similar condition to one who has been vouched in an action to try the title to property that he had warranted and sold. When the sheriff collected the money he at first might be considered as the stakeholder for the judgment and mortgage creditors, but when he resisted the claim of the plaintiffs, he put himself in the attitude of the defendant's agent, and Alexander Hunter must, therefore, be considered the real defendant, whose better claim to the fund protected the nominal defendant, and prevailed against the plaintiffs. If the plaintiffs had finally succeeded against the sheriff in that case, can there be a doubt that Alexander Hunter could not have come here and set up the same claim to the fund as plaintiff in a bill, when he had been defeated in his defence at law, on the same grounds?

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The sheriff *appears to have stood solely upon the rights of Alexander Hunter, who sustained and directed the defence, and thereby distinctly put in issue his claim to the money, and became a privy to the proceedings. It is very clear that he would have been incompetent to testify as a witness in that case, on account of his certain and immediate interest in the result.—The mere form of the suit, of the use of the names of nominal parties, cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision.¹

The claim of a judgment creditor to funds in the sheriff's hands, collected from the sale of the debtor's property, is frequently asserted by this form of action, which seems to be admirably adapted to unfold the plaintiff's cause of action, and the defendant's grounds of defence.² Although such questions, in a plain case, might be determined on a rule against the sheriff, yet where there is any complexity in the circumstances, and

¹ Allen v. Roundtree [1 Speers, 80] MS. Cases, 1832; Davis v. Wilbourne, 1 Hill L. R. 27, [26 Am. Dec. 154;] Brown v. McMullen, 1b. 29; Davis v. Hunt, 2 Bail. R. 412.

² 2 Bail. R. 412.

the question depends upon testimony of witnesses to establish facts independently of what appears from the executions and returns of the sheriff, the Court generally declines to decide in a summary way by rule, and leaves the parties to pursue their remedies in a due course of law. Of late years, special issues are frequently ordered by the Court of Law, to be made up between the parties, for the purpose of trying their rights to the fund, and the practice seems to be peculiarly proper where the money has been collected by the sheriff under the process of that Court.³

The form of action at law was the most favorable that could have been adopted to try the questions between the parties, and no testimony appears to have been excluded there, that could have been offered here: indeed a suit for money had and received approximates more nearly than any other form the mode of proceeding in this Court, and is essentially an equitable action, in which the plaintiff is entitled to recover money from the defendant which, *ex equo et bono*, he ought not to retain. There was no difficulty in reaching the merits of the case in that tribunal, which was as competent as this Court to decide the case.⁴

Whatever funds defendant received under the mortgage, was a fair subject for proof on that trial, as here, and ought to have been adduced: the plaintiffs's omission to offer evidence on this, or on any other point involved in that suit, brings them within the rule, that not only what the party in a cause has, but whatever he might have, litigated in a Court of competent jurisdiction, shall not be agitated again in a subsequent suit between the same parties. The plaintiffs were bound to establish their claim by evidence,

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and *their failure to do so cannot give this Court jurisdiction: they not only adduced the letter, agreement and declarations of defendant, but went into a full account of what he had received of A. D. Hunter, thereby recognizing him as the real defendant, and making their case turn upon the material point in issue, the validity of the judgment assigned by Clark to him. After all this, it was certainly not *res inter alios acta*.

The proof here has not shed any new light on the subject; nor have the plaintiffs, in any essential part, varied their case from what it was at law; the question must, therefore, be considered as *res adjudicata*, as it arose out of the same subject matter which has heretofore been tried in a competent Court between the same parties, substantially. This case resembles *Aikin v. Peay*, Dec'r.

³ *Dubose v. McClenaghan*, Columbia, Dec'r. 1829; *Wightman v. Sheriff of Charleston*, Mss. December, 1825.

⁴ *Chitty on Cont.* 54; *Bulow v. Goddard*, 1 N. & McC. 45 [9 Am. Dec. 663]; *Moses v. McFarlan*, 2 Bur. 1005.

Term, 1847, Columbia, [5 Strob. 15, 53 Am. Dec. 684,] where the proof extended into the accounts between the respective parties and one Ford, who was their debtor, and turned out to be insolvent: the verdict at law, in favor of Peay, was held to be conclusive, and plaintiff's bill was dismissed.

As we fully concur with the Chancellor who heard the case on the circuit, that it is *res adjudicata*, this view would be sufficient to terminate it, as the plaintiffs cannot sustain their bill against the defendant. But another important question has been raised; does the statute of limitations operate as a bar? This deserves to be considered and determined. The plaintiff's bill was filed on the 19th of April, 1848, and their equity or cause of action must have arisen in October, 1842, when sheriff Cobb received and retained the sum of \$1276.59 to pay the judgment of M. B. Clark, who had assigned it to defendant. If the Courts had concurrent jurisdiction, (about which there can be no doubt,) the plaintiffs have exercised their privilege of choosing their tribunal, whose judgment must be presumed to be just, and with which it would seem they should be content. In cases of concurrent jurisdiction, the same rule as to the statute of limitations prevails in both Courts. In the recent case of *Turnbull v. Gadsden*, 2 Strob. E. R. 14, it was held that the statute of limitations is equally a bar in this as in the Court of Law, where the plaintiff might have prosecuted her cause of action. It seems to be reasonable, consistent and just that the same rule should be applied to legal rights of which the Courts have concurrent jurisdiction. "The statutes of limitations," says Justice Story, "where they are addressed to Courts of Equity, as well as to Courts of Law, as they seem to be in all cases of concurrent jurisdiction at law and in equity, (as for example in matters of account,) to which they directly apply, seem equally obligatory in each Court."⁵

There are other cases in which this Court

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acts upon the *analogy of the statute of limitations at law, and bars the relief in equity. As four years had elapsed between the accruing of the plaintiff's rights, and the filing of their bill, their claim is barred by the statute.

It is, therefore, ordered and decreed that the circuit decree be modified, and that the plaintiffs's bill be dismissed.

DUNKIN and DARGAN, CC., concurred.

JOHNSTON, Ch., absent, from indisposition, at the hearing.

Decree modified.

⁵ 2 Story Eq. Jur. s. 1520—also 1028; *Wilson v. Wilson*, 1 M'Mul. Eq. R. 329; *Van Rhyne v. Vincent's Ex'rs*, 1 McC. Eq. R. 310; *Ex parte Hanks*, Cheves E. R. 203.

3 Strobb. Eq. 149

J. H. KING et al. v. BENJ. P. AUGHTRY
and Wife et al.

(Columbia. Nov. and Dec. Term, 1849.)

[*Limitation of Actions* ¶82.]

A trustee cannot claim the benefit of the statute of limitations as against the personal representative of his deceased cestui que trust until such representative has been appointed; therefore creditors seeking to subject the trust estate to the payment of their debts, and who are entitled to make their claims through such representative, cannot be barred where the bar of the statute is not effectual as against him.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 425; Dec. Dig. ¶82.]

[*Execution* ¶2.]

An assigned execution held good, although the assignees were, at the time they purchased it and took an assignment of it, the executors of one of the defendants in the execution, and had assets in their hands sufficient to satisfy it, after it came to their hands.

[Ed. Note.—Cited in *Thomson v. Palmer*, 3 Rich. Eq. 146.

For other cases, see *Execution*, Cent. Dig. § 2; Dec. Dig. ¶2.]

[This case is cited in *Glenn v. Caldwell*, 4 Rich. Eq. 193, and *Ex parte Ware*, 5 Rich. Eq. 474, as to rights of sureties.]

Before Johnston, Ch. at Newberry, July, 1849.

Johnston, Ch. The bill is to have satisfaction of certain executions held by the plaintiffs, King, Pope and Harrington, out of four negroes, (or their proceeds,) which, it is contended, are bound as the property of the Rev. Benj. S. Ogletree, the execution debtor; and the fundamental question in the case is, whether the negroes are in fact his property, or belong to the defendants, his children by a former marriage.

As far back as 1828 or 1830, Mr. Ogletree lived in Georgia, where he was employed as a Methodist minister. His circumstances were straitened; and his wife, the mother of the children, returned to Newberry, where her relatives lived, and settled upon premises belonging to her brother-in-law, the late Wm. Turpin, jr. Some short time afterwards, Mr. Ogletree (as it had probably been arranged) followed her and settled with her where she lived. They are described as being quite destitute at this time. Mrs. Ogletree had, however, become entitled, by inheritance, to a portion of land in Spartanburg. By means furnished by her friends, aided perhaps by the proceeds of this land, two of the negroes in question were purchased, to wit: Oney and Dorcas; the latter of whom has since become the mother of the

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other two, Nathan and Louisa. *Oney was purchased by Dr. Thos. J. Brazilman, Mrs. Ogletree's brother, from one Robert Lumpkin, who, by deed bearing date the 6th of March, 1830, conveyed her to him, (Brazilman) "for the special use of his sister Mary Louisa G. Ogletree, now of the District of

Newberry, State aforesaid; and to be subject to no other use or purpose, than for her immediate and special use, whatever, during her natural life; with the same use of the increase of the said negro, for the time aforesaid; and, after the death of the aforesaid Mary Louisa G. Ogletree, to the heirs of her body—to them, and them only," &c.

On the 15th of March, 1831, one George Wilson sold and conveyed Dorcas to Dr. Burwell Chick; and it is declared in the conveyance that "said Chick hath purchased for the benefit of Wm. Turpin, jr." And Mr. Turpin, by endorsement upon this instrument, executed the succeeding day, (16th March, 1831.) "transferred all his right, title, interest and claim to the within named negro woman Dorcas, with her future increase, in trust, to Benjamin S. Ogletree, for the only use and benefit of his wife, Louisa Graff Ogletree, and the heirs of her body after her death."

Mr. Ogletree was thenceforward in possession of the negroes.

His wife died in 1834, leaving as her only issue four children, who are defendants in this suit; to wit: Mary, (now wife of the defendant Benj. P. Aughtry,) Caroline, (now wife of the defendant Wm. P. Beard,) Ann, still unmarried, and John, still an infant, and answering by Mr. Robt. G. Gillam, his guardian ad litem. These children were all infants at their mother's death, and resided with their father.

The father married again and became possessed of a considerable property, consisting partly of negroes; and removed to other land, which he cultivated with the new and the old stock of negroes in common. He, however, never claimed the former as his own, but always, even while he was poor, and before he acquired the second set, held them out as the separate property of his first wife and her children. And after he became possessed of the second set by marriage, while working both sets together, under overseers, he made a distinction in their discipline; conforming it to the wishes of his second wife, as to the negroes she had brought him; but exercising more of his own discretion in relation to the negroes in question in this suit, which he stated belonged to his first wife's children, and offering this as the reason of the distinction in discipline which he directed the overseers to adopt. This was the uniform tenor of his conversation respecting these negroes. He constantly held them out as not belonging to himself, but to his wife and to her children.

Mrs. Brazilman, the mother of his first

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wife, died; and his *children became entitled to shares in her estate, which was sold for partition. Upon petitions, setting forth that they were interested in her estate, and had no guardians to take charge of their shares, he was appointed their guardian, in

May, 1839. Neither in the petitions nor in his returns, as guardian, is any allusion made to these negroes, as belonging to his wards; the only reference being to the funds derived from Mrs. Brazilman's estate; and this is the only instance, where an opportunity naturally arose for doing so, that he omitted to recognise the rights of his children in the negroes.

He became indebted. His creditors sued him and obtained judgment. On the 1st of March, 1841, he borrowed \$1,200 from the executors of Pratt, for which he gave them his note, with George B. Calmes and Dan. B. Chapman as sureties. These executors obtained judgment on this note against himself and his sureties, the 18th of April, 1843; and on the same day lodged execution for the debt and interest and costs. At the same term the plaintiff, Dr. King, obtained a sum. pro. decree against him for \$31.21, with interest from the 21st of the preceding January, and costs; upon which execution was lodged the 29th of April, 1843.

His creditors levied on his property. There were two levies, both made in 1843. The sheriff's deputy says that when he made the first levy, Mr. Ogletree pointed out the negroes owned by himself, and said that in one of the cabins, which he indicated, were negroes belonging to his children. The former were levied on, and the latter left untouched. All his other property was levied on; and on sale day, December, 1843, he was sold out, leaving him still indebted, and (irrespective of these four slaves) insolvent. Neither the execution of Dr. King nor that of Pratt's executors was reached.

Clarke and Hancock, two of his creditors, were dissatisfied that these slaves had not been levied on; and at their instance an additional levy (which was the second levy spoken of) was made on them. Miss Ann Ogletree, who was just of age, was at her father's the night this was done, and remonstrated against the proceeding, claiming the property as belonging to her and her brother and sisters; and in this statement her father concurred, and refused to give bond for the delivery of the slaves levied on. They were therefore taken off by the sheriff's officer and detained and advertised for sale the 1st Monday in January, 1844. But as the sale was forbidden, and no creditor would indemnify the sheriff for proceeding, he gave them up to the children on that day.

On the 3d of January, 1844, Beard and wife, Aughtry and wife, and Ann Ogletree filed their bill against the infant John Ogletree, for the partition of the slaves thus re-delivered to them, and obtained a decree directing a sale for partition, under which Mr. Jones, the commissioner of this Court,

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sold *them the sale day following, (February, 1844.) for \$1,097. The larger portion of this sum he has, as the bill alleges collected and paid out to the parties. But there re-

mains due on the bond of Miss Ogletree, who purchased Nathan and Louisa, a balance of between one and two hundred dollars.

By the failure of the creditors, to indemnify the sheriff, and his redelivery of the slaves to the children of Mr. Ogletree, it resulted that no means remained of satisfying the execution of Dr. King and Mr. Pratt's executors. The former was returned with nulla bona, and the sureties to the latter were left to pay it. Under these circumstances, Calmes, one of these sureties, obtained the executors' leave to control their execution by sending it into the district where Chapman, the other surety, lived, for the purpose of raising one-half of the money out of him. The execution was sent accordingly, and Chapman paid the half of the debt and costs, as required. It appears that Chapman was good for the balance, had he been pressed. He has since removed out of the State.

Calmes, who was bound for the residue of the execution, died without having settled it. The plaintiffs, Thos. H. Pope, and Dr. William H. Harrington, are his executors; having been appointed and qualified in 1844.

Under these circumstances they came to an arrangement with the executors of Pratt, and procured an assignment of the residue of the execution to be made to them, in their individual names, the 6th of January, 1845. For this assignment they gave their notes, with the principal legatees of their testator as sureties, which was taken and accepted as payment; and the execution assigned to them accordingly.

This bill was then filed, in which the plaintiffs set forth that they have no means of obtaining satisfaction of the executions, without resorting to the four slaves in question; which they contend are the property of Mr. Ogletree, their debtor. Yet, expressing an unwillingness to disturb the sale which has been made of them, and a willingness to accept the proceeds of it, in lieu of the slaves so sold, and to confirm the purchasers' titles, upon having said proceeds declared liable to the executions, they pray that the defendants, the children of Mr. Ogletree, and their husbands, be decreed to apply so much of the said proceeds as they have received, and the commissioner to apply so much of the residue of said proceeds as yet remains within his control—so far as may be necessary—to satisfy the said executions of the plaintiffs; and for general relief.

I have seldom had more strongly impressed upon me a conviction of the justice of any claim, than I have of the justice of the defendants' claim to this property. That the

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*friends of their mother bought it for the sole benefit of herself and her children, and that they attempted, in the best manner known to them, to settle it for those pur-

poses, cannot admit of a doubt. That it was never claimed by Mr. Ogletree, nor held out by him as his own, for the deception of his creditors, is clear. And, if I be compelled to decree it away from the children, for whom the benevolent donors intended it, and to creditors who cannot reasonably be supposed to have trusted to it, when they extended their confidence, it will be with a degree of regret inexpressibly painful.

After attentive perusals of the instruments of conveyance, which I have repeated again and again, with a view to discover some construction conformable to the justice of the case, and sustainable by the rules of law, I am compelled to admit that I can find none which secures the property, as fully as I think it ought to be secured, to the defendants.

I think it too clear to admit of much doubt, that the attempted limitation to the children is ineffectual in law. By the rule in Shelley's case, however contrary to the particular intention of the draftsmen of these conveyances, the whole title to the property vested in Mrs. Ogletree. I need not repeat the view I exhibited in the case of Hull and Hull, 2 Strob. Eq. 189, 190. A conveyance to one, and the heirs of his body; or to one, and after his death, to the heirs of his body; or to one for life, and after his death to the heirs of his body, vests the whole title in the first taker. And this is a rule of property, and not of construction: a rule which overrules the intention; and must be obeyed, irrespective of intention. The rule is intended to prevent the granting out inheritable estates, and yet annexing to them the qualities of estates not inheritable—to prevent those who succeed to them, and who, from the inherent qualities of the estates themselves, must take whatever interests they do take in them as heirs—(that is to say through the grantee,)—from claiming as purchasers, and holding immediately under the grantor. Nothing, therefore can prevent persons described as heirs, or heirs of the body, from taking as heirs, unless there is something in the context to show that they could not have been intended to take by inheritance; as, for instance, if they are set out as a new stock, or otherwise individualized, so as necessarily to deprive them of the qualities of heirs, and designate them as purchasers.

Nothing of this kind occurs in the deed for Dorcas, which covers three of the slaves.

In the deed for Oney, there is, indeed, a division between the life interest of Mrs. Ogletree and the remainder attempted to be created. But the remainder is to heirs of her body, and they must take as heirs—that is by inheritance, and not by purchase—for the rule is that whoever can take by inheritance, is thereby excluded from taking by

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purchase, and must take by inheritance alone. The words of this deed, therefore, giving this negro to Mrs. Ogletree during her

natural life, and after her death to the heirs of her body, vest the entire interest in Mrs. Ogletree. It is supposed, however, that the superadded words "to them and them only," are sufficient to obviate this effect. If these words refer to the mother as well as to her issue, they are simply nugatory; because, very clearly, no other cestui que trusts could possibly take, even if they were omitted. If, however, the words refer only to the heirs of the body who are intended to take after Mrs. Ogletree's death, they can have no effect to change the construction of the deed. Their obvious and only meaning is, not to designate what heirs of the body shall take, but to declare that heirs of the body, and none but heirs of the body, shall take; and this only gives emphasis to the rule that they shall take by inheritance.

But admitting, as I am compelled to admit, that the rule in Shelley's case unites the remainder to the life interest in this case, and vests the whole in Mrs. Ogletree; I am, nevertheless, of opinion that the words of the instruments before me are sufficient to make it a separate property in her. Oney is to be held for her special use—her immediate and special use, and none other; and Dorcas, for her only use and benefit. It appears to me unnecessary to ransack cases for the construction of words so plain. The words sole and separate use and behoof could not import an intention to create a separate estate more clearly. In the case of Dorcas, the distinctness of the wife's interest is rendered more conspicuous and indisputable, by the fact that the husband was constituted her trustee.

If this property was the separate property of Mrs. Ogletree, it became distributable, at her death, between her husband and children; and the third part, to which the husband became entitled, must be subject to his creditors. But to the distribution for this purpose, Mrs. Ogletree's personal representative would be a necessary party.

The plaintiffs will be entitled to a decree to this extent, and upon these terms, unless some of the subordinate defences set up should prevail. Let us, therefore, proceed to consider these minor points.

The jurisdiction of the Court is objected to. But the process of partition and distribution, for the purposes just indicated, brings the plaintiffs' bill within this jurisdiction, so far as it may be necessary to administer a remedy out of the specific property. In respect to the fund in court, the well considered case of Bowden v. Schatzell, Bail. Eq. 360, [23 Am. Dec. 170.] upholds the jurisdiction.

The statute of limitations is pleaded, but the plea cannot avail. Before the levy, the

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possession of Mr. Ogletree was *consistent with the common interests of himself and his children. What the children need is an exclusive possession in themselves; but certainly the possession of Mr. Ogletree cannot

operate as a possession in the children, in exclusion of himself, the party having the actual custody. The levy transferred that possession to the sheriff; and the children never obtained an exclusive possession, until the sheriff delivered up the property to them. The statute then began to run. But this delivery was made the 2d or 3d of January, 1844; and the statutory period had not run out on the 28th of December, 1847, when the bill was filed.

Another objection is, that it was laches not to enforce payment from Chapman, who was able to pay. But, so far as Mr. Ogletree has an interest in this property, it is equally liable at law with Chapman's property; and in equity it is more liable; Mr. Ogletree being the principal debtor, and Chapman only his surety.

Another objection is, that there are remaining open other executions still older than those of the plaintiffs, to which this property will still be exposed, if the plaintiffs are allowed to come in by themselves and claim relief out of it. If the defendants had indicated, by plea, who these other creditors are, and established, by proof, not only that their executions are open, but still unsatisfied, the Court would have ordered them to be made parties. As it is, the Court perceives in the list of executions, one in favor of Clark & Hancock, which is older than the plaintiffs', and which appears to be partially open. But these were the creditors whose execution was levied on the negroes in 1843, under which the slaves were re-delivered. If this execution has not been satisfied, which it probably was by a by-sale of Mr. Ogletree's growing crop, the creditors are, nevertheless, bound by the statute of limitations; and, I apprehend, the defendants themselves do not desire to call them in. However, if the defendants desire it, after the bill shall have been amended as I shall direct, they may move for an order calling all execution creditors before the Commissioner to present and establish their demands.

The last objection is, that the executions of the plaintiffs have been paid off, and satisfied or extinguished in law.

It is proved that the execution of Dr. King has been paid; and it is ordered that the bill in respect to it be dismissed. The Doctor appears to have been surprised, when told that his name was made use of in the bill.

With respect to the execution now held by the executors of Calmes, there is much difficulty. The gentlemen who now hold it, were, at the time they purchased it and took an assignment of it, the executors of one of the defendants in the execution, and had assets

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in their hands sufficient to satisfy it, after it came to their hands. Was the purchase of the execution a payment and satisfaction of it in law, in the hands of the original owners? If so, the assignment was nugatory and carried nothing. In *Richbourn v. West*, 1

Hill, 309, it was held, even at law, that a bail paying the money and directing the execution to be kept open, is entitled to enforce it against his principal.

But the case of a surety is in this Court uniformly regarded with favor. In *Copis v. Middleton*, 11 Eng. Con. Ch. Rep. 128, we have, indeed, the high authority of Lord Eldon for the doctrine, that if a surety pays the debt, it is distinguished as against his principal; and his demand, in respect of the payment, becomes a simple contract debt against the principal for the money paid—unless, says that great judge, there be a mortgage securing the debt, and which requires a reconveyance. The contrivance, he says, was to procure an assignment of the mortgage to some friend for the surety's benefit. But the case of *Hotham v. Stone*, reported in a note to the same case, was ruled the other way. In our own Courts, so far have sureties been helped, that in the case of [*Perkins v. Kershaw*] 1 Hill Eq. 344-5, cited by Chancellor DeSaussure, in *Pride v. Boyce*, Rice Eq. 283-4, [33 Am. Dec. 78.] a surety who paid the debt was remitted to the lien he had satisfied, and the satisfaction (which had been entered) was vacated.

The case of *Copis v. Middleton*, is noticed by Chancellor Harper in *Pride v. Boyce*, Rice Eq. 286, [33 Am. Dec. 78.] and a seeming preference given to *James v. Davids*, 4 Russ. 277, (3 Eng. Con. Ch. Rep. 665,) which is contrary to it.

The general doctrine that a surety, upon paying the debt of his principal, is, in equity, entitled to an assignment of all the securities and remedies in the hands of the creditor, would seem to require that equity should set up this execution, even though according to the forms of law it be satisfied. And so I adjudge and decree in this case, though with much hesitation.

It is ordered that the plaintiffs have leave to make a party of the personal representative of Mrs. Ogletree. When this is done, they may apply for a final decree; unless the defendants shall, in writing, filed with the Commissioner, require that the execution creditors of Mr. Ogletree be called in, to present and establish their demands; in which case it is ordered, that the Commissioner do advertise for them to come in and do so, by a day to be fixed by him.

The question of costs reserved; with an inclination, however, to divide them equally between the parties, plaintiffs and defendants.

The complainants appealed from the decree, and moved the Court of Appeals to modify the same, upon the following grounds.

1st. That his Honor erred in stating that

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Benjamin S. *Ogletree constantly held out the slaves in question as not belonging to him, but to his wife and her children; whereas, according to the evidence, he never so held them out until the time when he became insolvent, except on a few occasions; but, on

the contrary, by his own uninterrupted possession of the slaves for many years after the death of his wife, without making any mention of them in his returns, as guardian of his children, he claimed them as his own property.

2d. That his Honor erred in decreeing that Mrs. L. G. Ogletree took a separate property in the slaves, under the deeds mentioned in the decree.

3d. That his Honor erred in giving to the defendants leave to move for an order to call in all the execution creditors of Benjamin S. Ogletree, to present and establish their demands.

4th. That his Honor ought to have ordered the defendants to pay to the complainants the amount remaining due on the execution which has been assigned by the executors of Pratt to the complainants.

The defendants appealed from so much of the decree as sustains the right of the complainants to distribution in the proceeds of the slaves described in the bill, and moved to reverse the same.

1st. Because his Honor erred in overruling the plea of the statute of limitations, inasmuch as it was established by the proof that one of the defendants, to wit: Miss Ann Ogletree, asserted her right (in behalf of herself and co-defendants) to the slaves in question, and at the time was in the actual possession of them, and which was acknowledged by the said Benjamin S. Ogletree more than four years before the filing of the bill.

2d. Because his Honor erred in deciding that Benjamin S. Ogletree was entitled to distribution of the separate property of his wife, (Louisa G. Ogletree) which had been conveyed to her separate use during life, and at her death, "to the heirs of her body, and to them, and nobody else;" when it was apparent, by the superadded words, "to the heirs of her body, and to them and them only," that her children were meant, and that they took the whole estate as purchasers.

3d. Because his Honor erred in deciding that the complainants, who were the executors of the defendant in the judgment, having paid the plaintiffs the amount due them, did not operate as a satisfaction; and that taking an assignment to themselves, in their own names, preserved the lien of the judgment and execution on said slaves.

Caldwell, Pope, complainants' solicitors.
Fair, defendants' solicitor.

Curia, per JOHNSTON, Ch. In affirming the decree of the Circuit Court in this case, it

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may be proper to say that the question, whether the property covered by the two deeds was the separate property of Mrs. Ogletree, is not necessarily involved. It is sufficient to observe that the title was in

the two trustees; and that the interests of Mrs. Ogletree were merely equitable. Upon her death, the right to demand an execution of the trust, with a view to distribution between her husband and children, devolved upon her personal representative. The possession of a portion of the slaves by Mr. Ogletree was referable to his character as trustee; and his possession of the others was as *cestui que trust*, by permission of the trustee, and must, therefore, be regarded as the possession of that trustee. Neither of these trustees can claim the benefit of the statute of limitations, as against the personal representative of Mrs. Ogletree, to whom alone they are responsible for the execution of the trust, until such representative is appointed. By the decree, the plaintiffs are entitled to bring in this administrator, when appointed, and make their claim through him; and, therefore, they cannot be barred where the bar of the statute is not effectual as against him.

This view, in which the interests of Mr. Ogletree, intended to be made subject to his debts, are regarded as equitable, renders it proper to enlarge the order for calling in his creditors, by extending it to all his creditors, whether holding liens or not. And it is ordered, accordingly, that the Commissioner do, by the usual publication, call them in by a day to be fixed by him, to render their demands, upon oath, and establish them by the necessary proof. Also, that the Commissioner do report the proportions to which the different creditors are entitled. Whether any preference is to be allowed among the creditors, in respect to liens or otherwise, is a question now reserved. It may be made upon the reference, and brought up by way of exception to the Commissioner's report.

In all other respects the decree is affirmed, and the appeal dismissed; and it is so ordered.

DUNKIN and DARGAN, CC., concurred.
Decree affirmed.

3 Strob. Eq. *159

*C. H. DURANT and Wife v. JOHN J. SALLEY, Adm'r.

(Columbia. Nov. and Dec. Term, 1849.)

[*Husband and Wife* ⚭11.]

Where the slaves of an intestate estate, of which the mother was administratrix and her daughter and herself co-distributes, had, after the marriage of the daughter, been worked in common by the mother and her son-in-law, (who with his wife continued to live with the mother,) until his death, and there was no evidence that there had been any formal partition, either by process of law, or by the agreement, expressed or implied, of the parties; the Court held that there had been no reduction into his possession, and therefore the marital rights of the husband had not attached to the wife's distributive share in the slaves.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 51; Dec. Dig. ⚭11.]

[*Husband and Wife* ⚭10.]

The marital rights do not attach to exclude the right of the wife who survives, or of her next of kin, if she dies before her husband, where there has been no partition of the property, (in the lifetime of the husband and wife,) in which she is entitled to a distributive share.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 23, 34, 35, 38-46, 396, 398; Dec. Dig. ⚭10.]

Before Caldwell, Ch., at Orangeburgh, February, 1849.

The decree explains the facts of the case. Caldwell, Ch. The question is: were the negroes of the intestate estate of Roderick Murchison partitioned between Eliza C. Murchison, his widow and administratrix, and Kenneth Murchison, who intermarried with her daughter, (now Mrs. Durant, one of the plaintiffs) in his life-time, and did his marital rights attach?

There is no evidence that there was any formal partition, either by process of law, or by the agreement, expressed or implied, of the parties. Some slight circumstances have been relied on to raise a presumption of partition, but this has been rebutted by the most positive denial of the fact, on the examination of the mother as a witness. When Kenneth Murchison was about to marry her daughter, a marriage settlement was proposed; at first he assented to it, but finally declined to make it, and his conduct may have induced her not to make partition of the negroes with him and his wife during his life time. On his intermarriage, he removed to and resided (with his wife) at her mother's, with whom she lived, where they continued to remain the rest of that year. During this time there was certainly no claim set up by him to any exclusive possession of any of the negroes. Indeed he could not have been considered in possession of them any more than any other person that might have lived in the family. The next year the family removed over the river; and all the negroes of the mother-in-law were worked in common on the plantation, without any stipulation for hire on the one hand, or for her board on the other. From her testimony, there was no agreement between them as to what should be paid; his possession of the slaves was as a mere bailee or agent of his mother-in-law, and subordi-

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nate to her, *as he does not appear at any time to have set up a claim to the negroes, in the character of husband of her daughter. Some inferences were relied on, from the tax returns, to raise a presumption that the parties had partitioned the property. Such evidence has been ruled incompetent in a Court of law, and if even admitted here, would, under the circumstances, have been entirely too slight to warrant any such conclusion. Another circumstance has been brought forward as entitled to some weight, the recovery of the hire of Sam by Mrs.

Murchison against the administrator of Kenneth Murchison, on the testimony of his widow, that Sam belonged to her mother, and her husband was therefore not entitled to his hire. This must have been true, unless there had been a partition of the negroes, and Sam had been assigned to her husband. Eliza Murchison, the mother, was administratrix of her husband, and until a partition of the property and a settlement with the distributees, she had a right to receive the hire of the negroes, and if her son-in-law received it, he was liable to pay it to her, although on a settlement she would have been bound to account for the assets of the intestate.

The cases of *Byrne v. Stewart*, [3 Desaus. 135,]; *Elms v. Hughes*, [3 Desaus. 155,]; *Bunch v. Hurst*, [3 Desaus. 273, 5 Am. Dec. 551,] and the recent case of *Verdier v. Hyrne*, [4 Strob. 463,] have settled the principle that the marital rights do not attach to exclude the right of the wife, who survives, or of her next of kin, if she dies before her husband, where there has been no partition of the property, (during the life time of the husband and wife,) in which she is entitled to a distributive share. 12 Ves. 497. 5 Johnson C. R. 196; [Spann v. Stewart,] 1 Hill Eq. R. 332. If the husband himself had been the administrator of her father's estate, he could not, under the circumstances, have set up any such claim, and his qualified possession, under the administratrix, clearly excludes him from standing upon a better footing than that: Neither can the lapse of time have any weight to raise the presumption that the husband's possession was exclusive and adverse to the administratrix, for upon that view he might claim all her negroes that she put under his management. The husband's possession was not *jure mariti*, but in consequence of the mere permission of his mother-in-law; but if at any period of their residing together, there had been an agreement, even by parol, that he and his wife should take particular negroes, and hold them as their own, either by way of gift or partition, it would perhaps have been sufficient. But none of them having been specifically set apart for such purpose, it would be both against law and fact to come to a contrary conclusion; the rights of the parties must therefore have remained in statu quo, as they were on the marriage, which of itself could not operate as a reduction into possession, and the survivorship and discovery of his wife entitled her to assert her

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claim *as a distributee, and to make the partition of the negroes with her mother, as set forth in the pleadings. The administrator of Kenneth Murchison has no higher rights than his intestate had in his life-time, which he permitted to remain inchoate, by not having a partition and reducing his

wife's part to possession during the coverture: but the administrator has apparently acted with prudence in resisting this part of the plaintiff's claim until they have established it, while he has, as to the other branch of the case, with propriety, offered to account for his administration.

It is therefore ordered and decreed, that the negro slaves mentioned in the pleadings be delivered up to the plaintiffs, who are entitled to them under the partition made on the first of May, A. D. 1845; and that John J. Salley, the administrator of Kenneth Murchison, do account for their hire, and for his administration of the said estate, to the plaintiffs, and that the matters of account arising therefrom be referred to the Commissioner, to ascertain and report the same. Costs to be paid out of the estate.

The defendant moved to reverse so much of the Chancellor's decretal order as orders the defendant to deliver up the negro slaves, and to account for their hire, on the following grounds:

1st. Because Mrs. Eliza Murchison was an incompetent witness.

2nd. Because it is respectfully submitted that the testimony established a partition in the life-time of Kenneth Murchison, and that the marital rights of the defendant's intestate attached.

T. W. Glover, for the motion,
Ellis & Brewster, contra.

PER CURIAM.—This Court concurs in the decree of the Chancellor; and it is ordered that the same be affirmed, and the appeal dismissed.

DARGAN, Ch., absent at the hearing.

Decree affirmed.

3 Strob. Eq. 161

MORTON & COURTENY et al. v. J. P. CALDWELL, Administrator.

(Columbia, Nov. and Dec. Term, 1849.)

[*Executors and Administrators* ⇨ 418.]

The proper mode of determining the proportions of assets liable to the respective creditors of a deceased debtor, is to assign them according to the amount of the debts as they existed at his death. If upon any of the demands thus taken into consideration, any payments have been subsequently made by a third party, that does not release the proportion of the deceased's assets originally liable to the creditor, if there still remains due on the demand a balance requiring that proportion to satisfy it.

[*Ed. Note.* Cited in *Moffatt v. Thomson*, 5 Rich. Eq. 158; *Ex parte Ware, Id.*, 473; *Wilson v. McConnell's Adm'rs*, 9 Rich. Eq. 519; *Gillam v. Caldwell*, 11 Rich. Eq. 81; *Edwards v. Sanders*, 6 S. C. 333; *Wilson v. Kelly*, 19 S. C. 167; *McLure v. Melton*, 24 S. C. 572, 58 Am. Rep. 272; *Wheat v. Dingle*, 32 S. C. 478, 479, 11 S. E. 394, 8 L. R. A. 375.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1655; Dec. Dig. ⇨ 418.]

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*Before Johnston, Ch., at Newberry, July, 1849.

Johnston, Ch.—I am very grateful to the counsel engaged in this cause, for being permitted to reconsider the decision made by me on the 9th inst. which, very shortly after it was delivered, became unsatisfactory to myself.

The principles involved are of much practical importance, and I think deserved a fuller consideration than I, at the time, supposed, or was able to bestow.

The case came up upon a report of the Commissioner, and an exception put in by the plaintiffs.

It may be proper to make a statement of the facts out of which the questions arise:

Taplow Harriss, the intestate of the defendant, Caldwell, was, in his lifetime, connected with Ledford L. Swindler, in a mercantile concern, trading under the style of Swindler & Harriss. The plaintiffs are creditors of that firm; having obtained judgments either during the joint lives of the partners, or against Swindler, as survivor, after Harriss's death. Swindler became insolvent, and has left the State, and is now resident in foreign parts. Under these circumstances, which are stated in the bill, this suit was brought by the plaintiffs against Caldwell, the administrator of Harriss, the deceased partner, to obtain satisfaction of their demands out of his estate.

Caldwell himself is a creditor of his intestate, and of the firm of Swindler & Harriss, and also of Swindler, under the following circumstances:

During the life of Harriss, a note for about 3000 dollars was drawn by Swindler, and endorsed by Harriss, intended to be discounted for the benefit of the firm, at the Branch Bank in Columbia. Upon this note Caldwell put his name as second endorser. The note was discounted, and the firm received the money. Caldwell was sued by the bank, as administrator of Harriss, and judgment obtained against him; and he has been obliged, on behalf of his intestate's estate, and on his own behalf, to settle the demand. But before he did so, he took steps towards saving himself harmless. After Harriss's death, but shortly before becoming his administrator, having suspicions (subsequently verified) that his estate might not be able to meet all its liabilities, and of course not able to indemnify him in respect to this bank debt, he called on Swindler, who, it will be remembered, was legally bound as maker of the note, and equitably as survivor of the firm which received its benefit, and obtained from him as assignment of a considerable number of choses, purporting to belong to Swindler, but embracing among them some which, in fact belonged to the firm.

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*This transfer does not purport to have been made or received absolutely or in payment of Caldwell; but as collateral, to indemnify him as the endorser of Swindler.

Upon these choses Caldwell has collected about 1400 dollars. How much of this sum was collected on the individual choses of Swindler, and how much on the choses of the firm, does not appear; nor, as respects the principal questions presented, is it perhaps necessary to know. From the character of the assigned assets, it is very doubtful whether much more can be realized from them than the \$1400 already collected. Certainly not enough to pay Caldwell's demand, without resorting to Harriss's estate.

There was a general reference of the accounts to the Commissioner, without specific directions, or the adjudication of any point in the case.

On the reference, Caldwell's claim, as well as those of the plaintiffs, was taken into consideration among the liabilities of Harriss's estate; and as it appeared that the assets were insufficient to pay the demands, (being in fact good for only 31% cents in the dollar,) a question arose as to the apportionment proper to be made under the circumstances.

Caldwell's demand, as it existed at Harriss's death, was for 3000 dollars, with the interest which had, then, accrued; making in all about 3735 dollars. He contended that assets of the estate, proportioned to that sum, were subject to his demand, and should be applied to its extinguishment, if after deducting what he had already realized from Swindler's assignment, it appeared, as it did, that there still remained due upon the debt a sum sufficient to absorb them. If, however, the balance still due was less than the proportion distributable to the demand, as it stood at the intestate's death, then he conceded that only so much of that proportion as was necessary to extinguish that balance should be actually applied to his demand.

The plaintiffs contended, on the other hand, that the assets distributable to this claim must be proportioned to the amount actually remaining due on it when presented; that the sum received, in virtue of Swindler's assignment, must be first deducted, and the proportion of assets accommodated to the balance actually remaining unpaid.

The Commissioner decided the point against the plaintiffs, and in conformity to Caldwell's view; and the plaintiffs renewed their objection by way of exception to his report. I sustained the exception. I now think my decision was hasty and erroneous, and take pleasure in reversing it.

It is, therefore, ordered that the order of the 9th of July, 1849, made in this cause, upon the Commissioner's report, and the ex-

ceptions taken thereto, be set aside and annulled.

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*The Statute of 1789, 5 Stat. 111 (sect. 24,) while it abolishes preferences among creditors of equal rank, and virtually entitles each creditor, in case of deficient assets, to a claim on the estate of his deceased debtor, proportioned to his demand, does not, in terms, settle any point of time, in reference to which the respective demands must be examined, in order to determine the relative portions of assets liable to their payment.

But still it is a fundamental idea in the statute,—a disregard of which must render its due administration intolerably perplexing, if not impracticable,—that the juncture for the purposes of such a calculation is the death of the debtor. It is then the remedy of the creditor ceases as to the person, and is restricted to the effects of the party indebted.

From this time forward, so completely are these effects appropriated, in the eye of the law, to the satisfaction of the decedent's debts, that any unauthorized meddling with them is a trespass, for which the wrongdoer is liable to the creditor, as a party injured; and if the interference be by one duly authorized as executor or administrator, he becomes immediately responsible to the extent of the assets in his hands. These rights vest in the creditor, immediately upon the death of the debtor; and he might enforce them forthwith, were he not restrained by statutory impediments of a merely forensic character, which, for reasons of convenience, delay his remedy.¹

It would seem that the very end for which the law authorizes the creditor to follow so constantly the goods of his debtor, into whosoever hands they may come—to wit: the securing of his demands—necessarily implies that cognisance must be taken of the nature, validity and extent of the demand itself, contemporaneously—strictly so—with the springing up of those rights intended for its vindication; that is, at the death of the debtor.

Upon the death of a party, possessed of real or personal estate, the law, eo instanti, vests a right of succession, defined and fixed as to its character and extent, in his distributees, legatees or devisees—in the case of realty, directly—in the case of personalty, mediately, through the personal representative. These interests are all recognized ab initio, and whenever the value of the estate is ascertained, their value bears a fixed proportion to it.

Out of these rights of legatees and distributees arises an argument which seems to be conclusive on the point under discussion. The rights of legatees and distributees are subordinate to and dependent upon those of

¹ Stat. 1789, s. 27; 5 Coop. 111, s. 12.

creditors, inasmuch as they cannot take effect until the latter are satisfied; and if the former are fixed by the state of circumstances existing at the death of the intestate

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or testator, it would seem that *the rights of his creditors must be equally settled at the same time.

Some given time must be assigned for ascertaining the extent of creditors's claims upon the estate of their debtor. General principles seem to fix that time at his death; and so far as I know, this conforms to uniform practice.

If a period be assigned for this purpose, it must be adopted in all cases. It would be attended with infinite perplexity, and much injustice, were Courts, fluctuating in their practice, to assign different periods for different creditors.—This is manifest. It would lead to the same perplexity and injustice, though perhaps in an inferior degree, should the period, with respect to a specific creditor, be varied according to circumstances. In the case before us, if Caldwell's claim be dealt with as proposed by the plaintiffs, he will be worse off for having a claim on Swindler as well as on Harriss, than if his claim were on Harriss alone. Worse off, at least, in consequence of having accidentally realized part of his demand from Swindler before presenting it against Harriss's assets. If he had thus presented it before getting the money under Swindler's assignment, he would have been entitled to 31½ per cent. upon his whole demand out of Harriss's estate; and, in that case, it is conceded he would have been entitled to receive—afterwards—the 38 per cent. which he got from Swindler.

But while it is conceded that, by this course, he might have saved 70 per ct. of his debt, it is contended that in consequence of his having received part payment from Swindler before presenting his demand against Harriss, he has accidentally set over for the benefit of Harriss's other creditors nearly 450 dollars of assets to which he was originally entitled; thus increasing his loss to nearly 44 per cent. and realizing but little over 56 per cent. of his demand. Can a rule attended with such consequences, and founded upon no better grounds than the mere contingency of the collateral payments being made before or after the presentation, be the rule of law? Can that be the rule which puts it in the power of any third party who chances to be surety for a debt, by a partial payment, however capriciously or collusively made, to reduce the amount recoverable from the estate of his deceased principal, to the disappointment and loss of the fair creditor?

I have said that the rule contended for stood upon no better ground than the mere contingency, whether the collateral payment happened to be made before or after the demand was presented as against the estate of the deceased. To this it may be answered,

that the ground is just as good, and the contingency no greater, than if the collateral payment had happened to have been made

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(as by one, for instance, to *whom the deceased was only surety) before and not after the death of the deceased; in which case the assets of the deceased would only be liable to the creditor in proportion to the balance of the debt remaining open. The effect of such a payment would be clearly as has been stated. There is a clear distinction, however, between the two cases—we are speaking now of debts due by an estate. In the former case the estate was never debtor beyond the balance left after payment. In the latter case it was indebted for the whole demand; and the executor having received assets, became himself the debtor to the extent of their value. Shall he claim exemption from his own debt, upon the mere fetch of its having been partially paid before calling on him? And shall his claim of exemption be effectual, while he has funds in his hands sufficient to pay the balance? If the creditor would be an equal sufferer in both cases, the injury in the former case is one which no rule could avert. Not so in the latter case.

A case which may well occur, and probably often does occur, may be put to illustrate the working of the rule contended for. Suppose two persons jointly and severally bound to the same creditor for a specific sum. Both have died, each leaving an estate able, by due apportionment, to pay exactly one half of the debt. It is barely imaginable that payment should be made to the creditors by the representatives of the two estates at the same juncture of time. And if the payment by one should precede that of the other, the consequence, by the rule contended for, would be that the creditor would be deprived of one-fourth of his debt, though the assets were sufficient conjointly to pay it in full, and the executor of each stood chargeable with assets for one-half of it.

In all the cases I have observed upon, it is impossible to conceive what injury the collateral payment has worked to the estate of the deceased debtor, or to his other creditors.—On what ground of justice, then, or of common sense, should the creditor be deprived of his original claim upon the assets of the deceased, so far as it may be necessary on his part to insist on it?

It is at the death of a party that the value of his estate is ascertained with a view to partition, and all advancements made by him are estimated with reference to their value at that time.² How can the clear value of his estate distributable be determined, without taking into consideration and deducting his debts as then existing?

It would appear from all these views that the proper mode for determining the propor-

² *McCaw v. Blewit*, 2 McC. Eq. 90, 91.

tions of assets liable to the respective creditors of a deceased debtor, is to assign them

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accord*ing to the amount of the debts as they exist at his death. If upon any of the demands thus taken into consideration, any payments have been subsequently made by a third party, that does not release the proportion of the deceased's assets originally liable to the creditor, if there still remains due on the demand a balance requiring that proportion to satisfy it. If, however, the balance thus left does not absorb the proportion, whatever of it remains becomes the subject of further consideration. If the party who made the payment was only surety for the debt, I suppose he will become entitled, by way of reimbursement, to an assignment of the residue of the proportion liable to the debt on which his payment was made. If, however, he himself was primarily liable for the debt, and of course not entitled to such assignment, the residue of the proportion must become the subject of a new apportionment among the other creditors of the deceased.

This appears to be a proper place to consider an argument presented by the plaintiffs's counsel. It was said that where part of the debt has been discharged by a third party, subsequent to the death of the deceased debtor, the balance is the debt really presentable from thenceforth, inasmuch as nothing beyond that balance is recoverable from the estate; and that, when presented, the proportion of assets liable to it must correspond to its then existing amount. No doubt this balance is all that can be recovered. Judgment, as for the debt, cannot be given for anything beyond it. But the judgment for the debt is one thing, and the judgment against the executor, on the plea of plene administravit præter, in respect to assets in his hands, bound for the debt, is another.—And how does it appear that the quantum of assets liable to the debt, as it stood chargeable on the debtor's estate at his death, does not still remain liable to the balance that yet remains due on it? How does it appear that, being liable for the whole, it is not liable for a part?

The argument—that because the balance now due is all that can be recovered, therefore the assets liable must be proportioned to that balance—proves too much. According to that argument, it can make no sort of difference as to the residue of assets liable whether the partial payments were made by a third party or by the personal representative himself. The judgment for the balance due on the debt, it is said, must govern as to the proportion of assets in respect to which the representative is to be personally liable. Now suppose the executor to have had originally in his hands assets equal to three-fourths of the creditor's demand, and to have made a payment equal to one-fourth of it.

Thus: suppose the demand to be 8000 dollars at the death of the testator, and the assets in the hands of the executor equal to

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6000 *dollars. Before taking an exact account of the liabilities of the estate, he ventures to pay on this demand 2000 dollars. The balance on the debt is thus reduced to 6000 dollars, and he has yet in hand 4000 dollars. Now this balance of the debt (6000 dollars) is what the creditor is entitled to judgment for. If the assets liable to this recovery be in the proportion of three-fourths, his judgment will be conclusive on the executor as to assets to the extent of 4500 dollars—500 dollars beyond the balance of assets in his hands. To this the executor certainly would object. Or the judgment in respect to assets might be for three-fourths of the 4000 dollars in the executor's hands; by which the creditor would lose 1000 dollars more of his debt, while there were assets to pay it—and he as certainly would object. The only way to escape these consequences, so far as I can see, would be to apportion the assets according to the amount of the debt at the death of the testator, and charge the executor accordingly; which it would be just to do, he having the assets in hand, and being properly chargeable in respect to them; at the same time giving him credit for the amount paid out of them to the creditor entitled. But this is precisely the rule to which the plaintiffs object, when they say that the balance due on the debt at the time suit is brought, is to be the measure of the judgment as to assets, because it is the amount the creditor is entitled to recover as the debt due him.

The truth is, and these considerations prove it, that the judgment for the debt has nothing to do in fixing the amount of assets to which it is entitled. The principal judgment, in relation to the debt, is entirely distinct from that which is given upon the plea of plene administravit præter. The former goes only for the balance of debt due; the latter for the assets which have come to the executor's hands, distributable to the particular creditor, and not already paid over to him. When, therefore, an executor pleads plene administravit præter, he should have reference to the state of the assets and the liabilities at the death of his testator, and assign the just proportion to each creditor at that time; and if he has made payments to the suing creditor, he should take credit out of his proportion of assets thus assigned.

This extended consideration of the subject, it appears to me, would have been unnecessary, and the question rendered very plain, if Caldwell had administered on Harriss's estate, and become entitled to its assets before he received the money from Swindler. He could not have retained for his whole demand, as a preferred debt; but he certainly could have retained for his due proportion;

and, indeed, that amount would have been regarded as actually paid to him, according to our decided cases. As it is, it would not be

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straining the facts of the case, or the legal principle arising from them, to say that he had such right of retainer, and had actually received payment out of Harriss's assets before he received payment from Swindler, for this latter money was not collected under the assignment until after administration; and the assignment was not payment, nor taken as such, but only as collateral security.

On the whole, I am satisfied the view of the commissioner was correct; and, therefore, it is ordered that the exceptions be overruled, and the report confirmed; and that the debts be paid accordingly. The costs to be first deducted.

If it be desired to have an account of the partnership assets assigned to Caldwell, beyond the amount already realized by him, and set down in the report, this can be effected only by making Swindler a party. The same observation occurs, if it be desired, by way of contribution or indemnity to Harriss's estate, to have an account of Swindler's own assets included in the assignment. He must also be made a party, if it be desired to have an account of the partnership assets not included in the assignment, or to obtain any decree against himself, as individually responsible, either in his capacity of survivor or otherwise.

In all these respects both parties have an interest in making him a party; and leave is given to make him a party, either by amendment or supplementary bill, or cross bill, as they may be advised.

I had some doubts whether even the decree which I have made in favor of the plaintiffs, as against Harriss's estate, could be properly made without making Swindler

a party, and having an account of the partnership; Harriss's estate not being liable to them, as partnership creditors, until the partnership assets are exhausted. But as it is alleged that Swindler is insolvent, I have assumed that the partnership assets in his hands are wasted, especially as neither party has raised any objection contrary to such assumption.

The plaintiffs appealed, on the following grounds:

1st. That his Honor, the presiding Chancellor, erred in overruling the exception put in by the plaintiffs to the Commissioner's report.

2d. That the \$1408.31, collected by Caldwell out of the effects assigned to him, was, in effect, so much money paid by Swindler on the note, and operated to extinguish the demand pro tanto; and Caldwell ought to be considered as a creditor of Harriss's estate to the amount of the balance of the demand only, in fixing the share of the assets to which he is entitled as creditor.

3d. That his Honor ought at least to have decreed to the plaintiffs, the creditors of Harriss, so much of the assigned effects as shall remain after the note shall have been paid.

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*4th. That his Honor erred in holding it to be necessary to make Swindler a party—seeing that he has departed from the State, and is insolvent.

Pope, for the motion.
Garlington, contra.

PER CURIAM.—This Court concurs in the decree of the Chancellor; and deems it unnecessary to add anything to his observations. It is, therefore, ordered that the decree be affirmed, and the appeal dismissed.

Decree affirmed.

CASES IN EQUITY,¹

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON, JANUARY, 1849.

ALL THE CHANCELLORS PRESENT.

3 Strob. Eq. *171

*JOHN S. MANER v. W. WASHINGTON
and Wife et al.

(Charleston. Jan., 1849.)

[*Cancellation of Instruments* ⚡7.]

Complainant bought a tract of land, and, under the advice of counsel, took a title, (with warranty,) which he believed to be good, and paid the purchase money. After ten years possession, being advised by other counsel that the title would be defeasible by the happening of a future contingency, he filed a bill for confirmation of the title, &c. or for a rescission of the contract of sale. The Court refused to grant relief.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. § 6; Dec. Dig. ⚡7.]

[*Cancellation of Instruments* ⚡7.]

Where a purchaser takes possession of the land, pays the purchase money, accepts a deed of conveyance and executes the contract, he cannot call upon Equity, except upon the ground of fraud, to rescind it but must rely upon the covenants of his deed for redress.

[Ed. Note.—Cited in *Mitchell v. Pinckney*, 13 S. C. 213.

For other cases, see *Cancellation of Instruments*, Dec. Dig. ⚡7; *Deeds*, Cent. Dig. § 210.]

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*Before Dargan, Ch., at Gillisonville, February, 1848.

James E. McPherson, late of Prince William's parish, by his last will and testament, which he left unrevoked, inter alia, devised and bequeathed as follows: "I give and bequeath to my son James McPherson, and his heirs, my plantation on Black Swamp, in St. Peter's parish, which I purchased of Mr. Lynes; also twenty-five negroes on said plantation, and their families; in trust for my daughter Theodosia Narcissa Washington, and her heirs, forever, to her sole and separate use, not liable to the debts

of her present or any future husband. But in case my said daughter Theodosia Narcissa should die leaving issue, then I give the whole of the plantation and negroes aforesaid to her children, or issue, to vest, at her decease, in the said issue absolutely, as if they took by intestacy; provided, nevertheless, that if my said daughter should die in the lifetime of her husband, William Washington, esqr. leaving issue, it shall and may be lawful for the said William Washington, notwithstanding the legal estate will have vested in his children, to take and receive the income and profits of the said estate, real and personal, for the joint benefit of himself and the children, during his natural life."

Shortly after the execution of this will, James E. McPherson died, and Elizabeth McPherson, his wife, and James S. McPherson, his son, nominated as executrix and executor, duly took upon themselves the burthen of execution, and James S. McPherson, with the assent and approbation of Elizabeth McPherson, took possession, as trustee, of the estate, real and personal, given to him by his father's will, in trust for Mrs. Washington, as above stated. On the 7th March, 1838, James S. McPherson, Wm. Washington, and his wife Theodosia N. Washington, by their joint deed, duly executed and delivered, conveyed the Black Swamp plantation to the complainant, in fee, for the sum of four thousand dollars, one thousand dollars of which was paid at the execution of the deed, and three thousand dollars shortly afterwards, into the hands of William Washington, with the assent and permission of James S. McPherson, the trustee, and afterwards Mrs. Washington regularly executed a renunciation of her inheritance and estate in the plantation conveyed in the deed.

The complainant states that when he purchased the land and consummated the con-

¹ These cases should have been first in this volume, but, by some mistake, the necessary papers could not be obtained from the Clerk in time.—REPORTER.

tract, he did so under the advice of counsel learned in the law, who advised him that the title he received was good, which he then believed; but since, other counsel, also learned in the law, have expressed a different opinion, and that the children which Mrs. Washington may leave will have an interest or estate in the land, which will not be barred or defeated by the deed. He

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also states that *James S. McPherson has departed this life, leaving his widow and an infant, John James McPherson, his only heirs at law, who, together with William Washington, Mrs. Washington, and their three infant children, McPherson Washington, Martha Washington, and Elizabeth Washington, are made parties defendants to the bill.

The bill prays that it may be "decreed that the said tract of land was well sold to complainant for the benefit and advantage of the trust estate, and the title thereto confirmed against the contingent right in remainder of the issue of Mrs. Washington; and that the estate, both real and personal, devised by James E. McPherson to James S. McPherson, in trust for Mrs. Washington and her issue, may be bound and declared liable in the hands of the heirs at law of the said James S. McPherson, and in the hands of any other trustee who may be substituted in their stead, and in the hands of the issue of Mrs. Washington, who may survive her, by all and for all and singular the covenants contained in the said deed of conveyance; or that the said contract of bargain and sale may be rescinded and cancelled, and that the said William Washington and wife and infant children, and Mrs. Cornelia McPherson and John J. McPherson, be ordered and decreed to refund to the complainant the full amount of the purchase money paid by him, from the trust estate, and that until the same be fully paid that complainant may have a decree against the estate of the said James S. McPherson for the said purchase money, with leave to enforce the decree against the assets or lands of the said James S. McPherson," &c.

To this bill, the defendants, William Washington and wife, have filed a joint answer, in which admitting the facts stated in the bill, they contend that the title which the complainant has is good and sufficient, and if by this Court held otherwise, they say they are ready and willing to convey the lands to the complainant by feofment, or in any other mode by which his title may be perfected. They also object, that the plaintiff has adequate remedy at law, and is not entitled to relief in Equity. Mrs. Cornelia McPherson answers, admitting the deed of conveyance and the circumstances attending it, as stated in the bill, she contends that the complainant's title is good, and if not, that his remedy is in a Court of Law and not in this

Court. John J. McPherson and the three infant children of Mrs. Washington, have, by their guardian, ad litem, answered formally, neither admitting nor denying the complainant's claim to relief, and submitting their rights to the protection of the Court. It was admitted, on the argument, that Mrs. McPherson, administratrix of James E. McPherson, has administered all the assets that have come into her hands, though she did not set up the plea of *plene administravit*.

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*William Washington is not responsible, in a pecuniary point of view, and the money received by him, as the price of the land, cannot be recovered.

Such are the facts, and such the state of the pleadings in this case.

Decree.

Dargan, Ch. The first question which addresses itself for my consideration and judgment is, what estate did Mrs. Washington take by her father's will? It will be borne in mind that Mr. and Mrs. Washington, by their answer, tender to the complainant a conveyance by feofment, and they seem to entertain the opinion that if Mrs. Washington takes by the will an estate for life, with contingent remainders to her children, that this ancient mode of conveyance would bar the contingent remainders, and make the title of the complainant perfect. And I have no doubt, that where the tenant for life is seized of the legal estate such would be the effect.

The conveyance by feofment is one of the ancient common law modes of conveyance, and always had the effect of barring contingent remainders. In practice it is superseded in England by those modes of conveyance called bargain and sale, lease and release, &c. growing out of the statute of uses, and in South Carolina by the form of conveyances prescribed by the Act of 1795.² But that Act expressly provides, that it shall not be held to invalidate the forms heretofore of use in this State. This leaves the mode of conveyance by feofment in full force and effect; and such was the judgment of the Court in *Middleton v. Kinloch*, Dud. Eq. 115. But, by the principles of the common law, where the tenant for life was not seized of the legal estate, but only a *cestui que trust*, the effect of a feofment would not be to bar the contingent remainders dependent upon the life estate.³ It is true, that if the trustee were to join the *cestui que trust* in the feofment, the contingent remainders would be barred. But in this case, though the trustee, James S. McPherson, has united with the *cestui que trust* tenants for life in the statutory mode of conveyance, he has made no offer to join in the feofment for the purpose of perfecting

² 1 P. L. 382. 1 Brev. Dig. 172.

³ *Fearne on Con. Rem.* 231.

the title of the complainant. And if he did, it would not alter the result; for, in the case of *Middleton v. Kinloch*, the Court of Appeals, concurring with Chancellor Harper in his views as to the effect of a feofment in cutting off contingent remainders, were of the opinion that the Court of Equity "ought not to interfere to aid tenants for life in defeating the remainders, or to compel the vendees to accept such titles." It comes to this, then, on this part of the case; if Mrs. Washington is held to take a life estate, under the will, with contingent remainders to her children, and she, with her husband and the trustee, are disposed to execute a feofment, and the complainant is willing to accept such

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a *title, the title of the complainant can be perfected without the aid or interference of this Court. But this Court will not lend its sanction to such attempts upon the integrity of the remainders, and will not exercise its jurisdiction in compelling the vendor to make, or the vendee to accept, such a title. But I am of the opinion that Mrs. Washington takes more than a life estate under the will. The devise is to James S. McPherson, "in trust for my daughter Theodosia Narcissa Washington, and her heirs forever." Here are words both of perpetuity and inheritance. The children cannot take by way of remainder, because a remainder cannot be limited on a fee, not even in the case of a base or qualified fee. Thus Lord Coke says "if lands be given to A and his heirs, so as B has heirs of his body, remainder over in fee, the remainder is void."⁴ True that since the statute de donis, a remainder in England may be limited after an estate tail, but that statute has never been of force in this State. Such was the jealousy of our republican ancestors in regard to aristocratic institutions, which it was the object of that Act to strengthen, that by the Act of 1712, enumerating certain British statutes to be made of force, and in which the statute de donis was not included, they committed the supererogation of declaring that this law, so famous in the annals of English legislation and jurisprudence, was not to be of force. The law, in this regard, then, stands as the common law stood prior to the Statute 2 Westminster. A remainder cannot be limited, either after a qualified fee or a fee conditional. *Edwards v. Barksdale*, 2 Hill's Eq. 187; *Bailey v. Seabrook*, [Rich. Eq. Cas. 419,] *Bedon v. Bedon*, 2 Bailey's L. R. 231.

Did Mrs. Washington take under the will of her father a fee conditional? I think not. If she did take a fee conditional, the title of the complainant is perfect, so far as regards the rights of the children. For the condition having been performed, to wit, the birth of children capable of inheriting the estate, the tenant in fee conditional acquires the right

to alienate the estate, and thus to defeat the rights of the issue, and prevent the descent of the estate upon them. It is only in the event of the tenant in fee conditional under these circumstances failing to alien, that the gift to the issue takes effect per formam doni. In a fee conditional, on failure of the issue, who by the terms of the gift are to take, there is a reverter to the donor or testator. But in the case of James E. McPherson's will, there can be no reverter; there is no remnant of his estate in these lands, in regard to which he died intestate. He gives it to Mrs. Washington and her heirs forever. He disposes of his entire estate, and, wherever it may have gone, there is no part of it that was left to descend to his heirs at law.

Mr. McPherson gives the estate to Mrs. Washington and her heirs forever. This, un-

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qualified, would give a fee simple absolute. But a larger estate created in the first part of a deed or will, may be controlled, restricted and qualified by subsequent words, showing an intention to create a less estate. He gives to Mrs. Washington the estate, to her and her heirs forever; that is to say, he gives her a fee simple. But if she "should die leaving issue" then he gives it "to her children or issue, to vest at her decease in such issue absolutely, as if they took by intestacy." The meaning of which is, that on the condition of her leaving issue at her death, the fee that he had devised to her and her heirs, should be divested, and vest absolutely in her children. If she left no issue, by the clearest implication, if not by express words, the estate, on the death of Mrs. Washington, was to remain where the devise of the testator placed it; in her heirs at law. What is this but a fee simple, defeasible upon a condition subsequent, created by way of executory devise, by which mode it is competent to create such estates; provided they do not come into conflict with the rules of law against perpetuities. *En passim*. I will say that no question as to remoteness can be raised here, as the condition on which Mrs. Washington's estate is to be divested, must happen, if it ever happens, inevitably, at her death. The interest given to Mrs. Washington comes within all the legal definitions of the kind of estate which I have assumed it to be. It is an estate in fee, to be divested on a lawful and possible condition, which must happen within the legal boundaries of remoteness, and created by executory devise. "A condition" as defined by Lord Coke, "is a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does, or does not, happen; or in case the grantor or grantee does, or omits, a particular act, an estate shall commence, be enlarged, or defeated."⁵ The condition on which the estate in fee devised to

⁴ 1 Inst. 18, a. 10 Rep. 97. 6.

⁵ 1 Inst. 201, a.

Mrs. Washington is to be defeated or divested, is her having issue living at her death, an event which yet remains contingent.

This, then is a fee defeasible upon a condition subsequent, by way of executory devise, a species of limitation unknown to the early common law, and which has sprung up since the Statute of Uses, and of wills. The object was to support and carry into effect the will of the testator. For when it was manifest that he intended to create a contingent remainder, which could not operate as such by the strict rules of the common law, the limitation was then, out of indulgence to wills, held to be good as an executory devise; a rule, however, which has been subjected to the wholesome restraints which the law imposes against the creation of perpetuities or unalienable estates. The principle was at first cautiously admitted until the leading case of *Pells v. Brown*, Cro. Jac. 590, by which it was firmly established as a

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part of the English law, *and by which it was decided that a fee might be limited upon a fee, by way of executory devise. And now the doctrine is well settled, that an executory devise cannot be defeated or barred, either by a feofment or a common recovery. There are two kinds of executory devises relative to estates in lands. A definition of the first (according to Powell, J. in *J. Scatterwood v. Edge*, 1 Salk. Rep. 229, quoted by Fearn) is where the devisor parts with the whole estate, but upon some contingency qualifies the disposition of it, and limits an estate on that contingency. Under this first class, comes the devise to Mrs. Washington and her children.

This view of the case is in accordance with the recognized doctrine of this Court in *Bedon v. Bedon*. There Josiah Bedon devised lands to his son Stobo, (without words of inheritance) but if his son should die without being married and leaving issue a son, then over to another son of the testator, with remainder over, &c. It was held that Stobo took a fee defeasible on his dying unmarried, and leaving no issue male living at his death, or born within a competent period afterwards, and that the estate became indefeasible in his heirs, on the birth of a posthumous son, although he died in early infancy. Thus also in *Adams v. Chaplin*, 1 Hill's Eq. 265, where Benjamin Chaplin devised a tract of land to his son John, to him, his heirs and assigns forever; but if he should die without lawful heirs, or before he is twenty one years old, then to go to his son William, his heirs and assigns forever. The word "or" was construed "and," and it was held that John took an estate in fee, defeasible on his dying without issue. To the same effect is the more recent case, *Vidal v. Verdier*, 1 Speer's Eq. 402. I think it would be difficult for the most skilful and practised dialectician to distinguish these

cases from that arising under the devise to Mrs. Washington. The only difference is that in the case last quoted, the fee was made defeasible on the first taker dying without issue; and in the devise to Mrs. Washington the fee is to be defeated on her dying and leaving issue, (which issue are the persons to take,) a difference which can have no effect in the application of the principle.

It was contended in the argument, that the words of the will, directing that the children were to take "as in cases of intestacy" would qualify the construction. But I attach no importance whatever to these words; on the question that I have been considering, it is impossible that the testator should have used the word "intestacy" in its technical sense. Intestacy, from whom? From himself or Mrs. Washington? If from himself, then a case of intestacy would let in his other heirs at law; and if from Mrs. Washington it would imply that she was to take an unqualified fee, and that they were to inherit from her. Either supposition is

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entirely *inconsistent with the provisions of the will. He used the words in another than the technical sense, and simply meant that on the children's taking, they were to take per capita, with the *jus representationis* in favor of the issue of any that might not be living, according to the Act of distributions.

The complainant, then, has not obtained a perfect title, but has one that is likely to be defeated by the very probable contingency of Mrs. Washington's dying and leaving issue. Framing his bill with a double aspect, he then asks, in this view of the case, for a rescission of the contract, and that this Court would decree a restitution of the purchase money, to be paid out of the separate estate of Mrs. Washington in the possession of the trustee of Mr. and Mrs. Washington, and even out of the estate of the unconscious children, guiltless as they are of any participation in the transition of the estate. Surely he does not mean to lose any thing by not asking enough. As to the proposition to subject the separate estate of Mrs. Washington, and the remainder of her children, to the repayment of the purchase money, I will not pause to consider it, but pass it over as too plain to be discussed. But is the trustee, James S. McPherson, and William Washington, who joined in the conveyance, liable to the repayment of the purchase money? There has been no fraud or imposition upon the complainant. He knew as much of the title as they did. They submitted it to him, and by him it was submitted to the inspection of counsel who deliberately gave his opinion on it. He is in the possession and enjoyment of the estate, and has been from the day of the execution of the deed, which has now been some ten years. I do not think that under these circumstances he is entitled to a rescission of the contract.

It is the case of *Stuckey* ads. *Whitworth*. 1 Rich. Eq. 404, I subscribed heartily to the reasoning of Chancellor Harper in that case, (on the question as to what relief the vendee is entitled to under these circumstances,) which is well sustained by the authorities. What pretence can the vendee have to claim the interference of this Court, when he rushed into the difficulty with a full knowledge of the vendor's title, and without fraud or circumvention having been practiced against him? In such case he must rely on his covenant of warranty at law.

But the complainant claims to be relieved on the ground of his ignorance of law, for ignorance of fact it certainly was not. Certainly, as a general rule, ignorance of law does not excuse or entitle one to relief. There are some exceptions, where ignorance of law and ignorance of matters of fact are mixed up, in which parties have been held entitled to relief. And a distinction has been taken between ignorance of law and a mistake of law; *Lawrence v. Beaubien*, 2 Bailey, 623, [23 Am. Dec. 155;] *Lowndes v. Chisolm*, 2 McC. Eq. R. 455, [16 Am. Dec. 667;] *Tunno v. Fludd*, [1 McCord. 121;] and

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the latter held, under the circumstances of the case first cited, to entitle the party to relief. The distinction there drawn is exceedingly nice and metaphysical. I cannot say that the conviction of my judgment fully acquiesces in the result of the reasoning in that case. Be that as it may, the case is no parallel to this. It certainly would not do to apply the doctrine of *Lawrence v. Beaubien* to a case like the present, where the difficulty has arisen from the erroneous construction of a will. It would be mischievous in the highest degree for this Court to decide that an ignorance of the law, founded on the improper or erroneous construction of a deed or will, would entitle a party to be relieved from his contracts, made in conformity with such erroneous construction. It surely would be a novel and startling doctrine, that a party should be allowed to come into this Court, and say, I made a contract, on the supposition that the deed (which I saw,) would admit of another than what turns out to be the true construction; my lawyer thought thus, and so, I have acted on his advice and have thus got into a difficulty, and am entitled to be relieved. I need not pursue this theme further. In no point of view, in which the complainant's case can be viewed, is he entitled to the interposition and aid of this Court.

The bill is dismissed, with costs.

Grounds of Appeal.

From this decree the complainant appealed:

1. Because it was not only proved, but admitted, that the complainant purchased the land described in the bill, only after he had been deliberately advised, by counsel learn-

ed in the law, that the defendants William Washington and his wife, and the trustee, James S. McPherson, had the power to sell the said land, and could convey an indefeasible right thereto. Therefore, the complainant acted under a mistake of law, and was entitled to be relieved by a decree, at least against the estate of the trustee, and against the defendant William Washington.

2. Because the decree was, in other respects, erroneous, and ought to be reversed.

R. De Treville, for the motion.

W. F. Hutson, contra.

Curia, per CALDWELL, Ch. While we are not inclined to disturb the principle that "a mistake of law is a ground of relief from the obligations of a contract, by which one party acquired nothing, and the other party neither parted with any right, nor suffered any loss, and which *ex equo et bono*, ought not to be binding," we cannot perceive the propriety of applying it to the case under consideration. The contracts in the cases of *Lowndes v. Chisolm*, 2 McCord's Eq. R. 455, [16 Am. Dec. 667,] and of *Lawrence v. Beaubien*, in which this principle was rec-

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ognized, were executory, and the plaintiff applied for relief in the former, and the defendant relied on this ground of defence in the latter case, before the contracts were executed; in this respect they materially differ from this case; and the question is, shall the principle be extended to executed contracts? Where neither payment has been made of the purchase money by the one party, or possession given by the other, a defect in the title to the land bargained and sold, has always been held a good ground to resist the specific performance of the contract, or to entitle the purchaser to an abatement of the price pro tanto, or to a rescission of the contract. The warranty of a deed conveying the land would often be an insufficient indemnity for the purchase money if the vendee complied with his contract and was afterwards compelled to give up possession to an outstanding paramount title; but if a party, notwithstanding his being informed of the defect, should persist in the completion of his contract, pay the purchase money, accept a deed and take possession of the land, he will then be left to his legal remedy in the covenants of his deed, and Equity will not relieve him. Even in executory contracts a purchaser may do acts that amount to a waiver of his right to raise objections to the title, and may be compelled to take such title as the vendor can make, without enquiry as to its validity. A bill for the rescission of an executed contract stands upon a very different footing from one either for the rescission or for the specific performance of an executory contract; for it by no means follows that in every case where the purchaser might resist the payment of the purchase money, he would be

entitled, after having taken possession of the land, to rescind an executed contract, and recover the purchase money which he had paid. I can find no case in which this Court has entertained a bill to rescind a contract, (except on the ground of fraud,) where the parties have executed it, leaving nothing in fieri, and the purchaser is in the quiet enjoyment of the land.—⁶ *Urmston v. Pate* ⁷ bears a strong resemblance to this case in several points; there William Davy devised the estate in question to Sir Robert Ladbroke and Lyde Brown as tenants in common in fee, and the residue of his real estate to his brother William Pate, in fee; Sir Robert Ladbroke died in testator's lifetime; and afterwards, Wm. Pate, the residuary devisee, died, after devising his estate to Robert Pate, who thought himself entitled to the moiety devised to Sir Robert Ladbroke, which had lapsed by his death, and (as he supposed) had passed to the residuary devisee, as in cases of personal property; and he accordingly joined with the persons entitled to the moiety devised to Lyde Brown in selling the estate to the plaintiff. The conveyance recited the will of William Davy, and all the subsequent instruments; and a covenant was inserted for the title notwithstanding any

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act done by *Robert Pate or his ancestors, or any claiming under him or them. After the contract was completed, the purchaser discovered that Robert Pate had no title to the moiety over which he had assumed a power of disposition, but that it had descended to the heir at law of William Davy, which important point had been overlooked by the counsel of the purchaser, who must have misapprehended the law; and it is clear that his client must have bargained on his mistake; the purchaser filed his bill praying that the purchase money might be restored to him, to which the defendant Robert Pate demurred for the want of equity, and the demurrer was sustained. In that case there was as clearly a mistake in law as in the present case, but the circumstances there constituted a much stronger ground for relief than they do here; there, the heirs at law of the testator had a permanent title to a moiety of the land at the filing of the plaintiff's bill, but here the contingency may never happen upon which the title of the purchaser may be defeated. Although contracts have been rescinded on the ground of mistake, it was said in *Whitworth v. Stuckey*, that "they are not rescinded on the ground of mistake in relation to an outstanding title, when there has been no eviction of the purchaser; and it would seem, that he would be much less

entitled to a rescission when he was not liable to an eviction."⁸

The difficulty in affording the plaintiff relief is greatly increased by there not only being now no breach of the covenants of the deed, but by the contingency that there never may be; his future right to recover damages depends upon Mrs. Washington's dying leaving issue; if this event never happens he will have no ground of complaint.

This case cannot be assimilated to a bill *quia timet*, as it is impossible to bring the parties who may hereafter have the paramount title, now, before the Court; there is no one who can represent the children that may hereafter be born and take under the will, and to apply a remedy to such a case, would be extending the doctrine of precautionary justice beyond all precedent. This remedy appears to have been adopted in this Court for the protection of equitable rights, in analogy to certain writs used at common law, whose objects were of a similar nature. "In regard to legal property," says Justice Story, "It is obvious that where the right of enjoyment is present, the legal remedies will be found sufficient for the protection and vindication of that right, but where the right is future or contingent, the party entitled is often without any adequate remedy at law for any injury which he may in the meantime sustain by the loss, destruction or deterioration of the property in the hands of the party who is entitled to the present possession of it."⁹ Here, however, the purchaser has the quiet enjoyment of the land, in which he may never be interrupted; but if that con-

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tingency should occur, there will be *a plain and adequate remedy at law against the vendor for the breach of his covenant; and the possibility or even probability of his being unable to pay the damages at a future time, cannot create such an equity in favor of the plaintiff as to bring his case within the principles of a bill *quia timet*. Wherever the purchaser anticipates the insolvency of the vendor he may stipulate for sureties to the warranty, but where he takes possession of the land, pays the purchase money, accepts a deed of conveyance, and executes the contract, he cannot call upon equity, except upon the ground of fraud, to rescind it, but must rely upon the covenants of his deed for redress.

It is therefore ordered and decreed, that the appeal be dismissed and the Circuit decree be affirmed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch., absent at the hearing.

Decree affirmed.

⁶ *Margravine of Anspach v. Noel*, 1 Mad. Ch. Reps. 318; *Burroughs v. Oakley*, 3 Saund. 170; *Fleetwood v. Green*, 15 Ves. 596; *Bumpers v. Platner*, 1 John. C. R. 219; *Abbott v. Allen*, 2 John. C. R. 523.

⁷ *Sug. on Vend.* 346; 3 Vesey, 235; 4 Com. Dig.

⁸ *Vanlew v. Parr et al.* 2 Rich. Eq. 321.

⁹ *E. J.* 140.

3 Strob. Eq. 182

ELIZABETH CHAPLIN v. CHARLES H. HOPKINS.

(Charleston. Jan., 1849.)

[Executors and Administrators ◊544.]

Complainant filed her bill, seeking to charge the defendant as Executor de son tort, whilst the assets of the intestate were in his hands; subsequently, after the greater part of the estate had passed into the hands of a regular administrator, who was no party to the suit, and had, for some time, been administered by him, a decretal order was made, directing that the sum found to be due complainant, with interest, should be levied on all the assets of the intestate which were in the hands of the defendant at the commencement of the suit, if they should be sufficient, otherwise, upon the proper goods and chattels of the defendant. On appeal, it was ordered that so much of the decree as authorized a levy on any other assets than those which were in the hands of the defendant at the rendition of the decree, be set aside—and that the complainant have leave to amend the proceedings by making the administrator a party defendant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2598; Dec. Dig. ◊544.]

Before Dargan, Ch., at Gillisonville, February, 1848.

Charles Givens died in October, 1843, leaving considerable real and personal estate, but no will; and the defendant, Charles H. Hopkins, having possessed himself thereof without administration, became executor in his own wrong, and continued such until the latter part of the year 1845, when the Ordinary of the district dispossessed him of the personal estate, and took it into his own custody as a derelict estate, inventoried and appraised it, and after administering it for some six months, in 1846 committed the ad-

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ministration to *Edmund Rhett, the present regular administrator, who has, by permission of the Ordinary, from time to time, sold a considerable portion of the personal estate for payment of debts.

In February, 1845, and while the estate was in the hands of Charles H. Hopkins, the bill in this case was filed, seeking to charge him, as executor in his own wrong, with a debt of the intestate. At February Sittings, 1848, the Commissioner made his report, bringing the estate in debt to the petitioner \$1012.10; and exceptions were filed by the defendant, on hearing which his Honor made the following decree.

Dargan, Ch. On hearing the Commissioner's report in this case, and the defendant's exceptions thereto, it is ordered that the said exceptions be overruled, and the report confirmed and made the decree of this court. It is further ordered, that the complainant have leave to take out execution, to be levied for the amount of the said decree, and interest thereon from this date, of all and singular the assets of the said Charles Givens, which were in the hands of the de-

fendant at the commencement of this suit, if the same should be sufficient for that purpose, otherwise, then that the said decree and interest be levied from the proper goods and chattels of the said Hopkins.

From this decree the defendant appealed, on the following grounds.

1st. Because his Honor decreed that the petitioner should have her execution against the assets of Charles Givens, deceased, which were in the defendant's possession at the commencement of her suit, whereas, it is respectfully submitted that his Honor erred in so decreeing, the assets having subsequently to the commencement of her suit, and long before the decree, passed into the hands of the regular administrator, by the authority of the Ordinary, and been, in part, sold to purchasers for valuable consideration, in payment of the liabilities of the intestate.

2d. Because, under his Honor's decree, every derelict estate, instead of being protected by the Court of Equity, for the benefit of the parties interested therein, is virtually abandoned, without respect to the rights of either heirs or creditors, to the mercy of the first person who chooses to commence suit on a fraudulent claim, against any intruder who may consent to be treated as executor in his own wrong.

3d. Because the decree being against the defendant as executor, and against all the assets of whatever kind in his hands at the commencement of the suit—the petitioner is, in effect, in a better condition by suing the executor in his own wrong, than

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if she had sued the regular appointed *administrator, inasmuch as she has her execution against both the real and personal estates of the intestate.

4th. Because his Honor's decree is, in other respects, contrary to law and equity.

E. & H. Rhett, for the motion.

Curia, per DUNKIN, Ch. In the determination of the question submitted by this appeal, the Court can derive no light from the Chancery practice in Westminster Hall. Decrees are there enforced by proceedings against the person of the defendant. But the Act of Assembly in this State gives the party the process of fieri facias in addition to the ordinary remedy. Adopting the common law process, this Court would proceed on the same principles. Where the executor de son tort makes no defence, the judgment is, that the plaintiff do recover the debt and costs, to be levied out of the assets of the intestate, if the defendant have so much, if not, then out of the defendant's own goods. The decretal order in this case directs that "the decree and interest should be levied on all and singular the assets of the intestate, which were in the hands of defendant at the commencement of this suit, if the same

should be sufficient," otherwise, then of the proper goods and chattels of the defendant. This varies, both in form and substance, the common law execution. It is a part of the case that, after the suit was instituted against the defendant, the estate, or the principal part of it, passed into the hands of Edmund Rhett, Esq. who had, in the interim, taken out letters of administration, had sold part of the assets, and was distributing the same in due course of law. The decree was pronounced eighteen months or two years after he became administrator, and he was no party to the proceedings. The decretal order authorizes a levy on all the assets which were in the hands of the defendant at the institution of the suit, and which may, nevertheless, have since come to the hands of the rightful administrator. It is insisted on the part of the complainant, that the defendant, Hopkins, has left the State, and that the only fund on which she can rely for payment, is the estate of Givens, the original debtor. But the complainant should have made the rightful administrator a party before final decree, if she desired to reach the assets in his hands. As the practice is not well settled, it will be the object of the Court to aid her, so far as it can be effected without prejudice to the rights of others.¹

It is ordered and decreed that so much of the decretal order as authorizes a levy on any other assets than those which were in the hands of the defendant at the rendition of the decree, be set aside. It is fur-

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ther ordered, that the *complainant have leave, if she be so advised, to amend the proceedings, by making the administrator of Charles Givens, deceased, a party defendant, and to establish her claim against the estate in the usual form.

JOHNSTON and CALDWELL, CC., concurred.

DARGAN, Ch., absent at the hearing.

¹ 1 Saund. 336, note 10; Hubbell v. Fogartie, 1 Hill R. 167, [26 Am. Dec. 163.] See also, Kinard v. Young, 2 Rich. Eq. 247.

3 Strob. Eq. 185

JAMES COONER et al. v. JOHN and ROBERT MAY, Adm'rs.

(Charleston. Jan., 1849.)

[Descent and Distribution ¶96.]

Money expended on the education of a child, whether professional or general, is no advancement.

[Ed. Note.—Cited in Rees v. Rees, 11 Rich. Eq. 108; Rickenbacker v. Zimmerman, 10 S. C. 119; White v. Moore, 23 S. C. 456, 460; Ketchin v. Rion, 68 S. C. 270, 47 S. E. 376.]

For other cases, see Descent and Distribution, Cent. Dig. § 335; Dec. Dig. ¶96.]

Before Dargan, Ch., at Walterborough, February, 1848.

Dargan, Ch. On the hearing of this cause the only question submitted to me was one as to advancements. The intestate had four children, two sons, the defendants, and two daughters, the wives of the complainants. One of his sons, John May, being feeble in constitution, and his other children healthy and robust, the intestate resolved to give John May a professional education, while the others received but an elementary education. In the education of John May at academies and at the Medical College in Charleston, the intestate expended the sum of \$1,755, of which he kept an account in a pocket book headed thus, "amount of money expended in giving my son, John May, Jr., a profession as M. D." There was, further than this, no indication of an intention on the part of the father to charge these sums as advancements, or of the son to receive them as such. John May admits the amount expended as stated in the memorandum, but contends that money expended for the education of a child is no advancement. The intestate's estate was worth at his death twelve or fourteen thousand dollars, but was considerably encumbered with debts, and the money was advanced at different periods, through a course of three or four years, according to exigencies. These are the material facts of the case. What is an advancement, as was said in the case of Myers v. Myers, [2 McCord Eq. 214, 16 Am. Dec. 648,] will oftentimes depend on the circumstances of the case. In this case, the money advanced by the father was doubtless intended as an advancement and settlement in life. In a note to the case of Pusey v. Desbouvrie, 3 P. Williams, 307, it is said to have been determined that "small inconsiderable sums of money given by a father to his child, cannot be deemed an advancement or part thereof. Thus maintenance money, or an allowance made by a freeman

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to his *son at the university or in traveling, is not to be taken as any part of his advancement, this being only his education, and it would create change and uncertainty to inquire minutely into such particulars; so putting out a child as an apprentice is no part of his advancement, for it is only procuring the master to keep him for seven years, instead of the parent." But it is said that the father's buying an office for his son, though but at will, as a gentleman pensioner's place or a commission in the army, was decided by the Lords Commissioners Rollinson and Hutchins, to be advancements. Swinburne says that money expended by the father for the maintenance of the child, or given to bind him as an apprentice, or laid out in his education at school, at the university, or in his travels, are not considered

as advancements.¹ The true distinction I apprehend to be, whether the sums advanced were intended as advancements and settlement in life, and if so intended, they must be considered as advancements.—And in principle there can be no difference between giving money to procure the child a professional education, with a view to enable him to set up for himself, earn his livelihood and advance his fortunes, and giving money to set him up in trade, or to carry on a planter's interest, for the same purpose. And an eminent writer was of the opinion that a distinction must be made where a considerable sum of money is advanced by way of a premium for instruction, and not merely as a compensation for maintenance; and that in the former case the sum must be accounted for as advancements.² In the case of *Morris v. Burroughs*, 1 Atk. 402, Lord Hardwicke said, "I should think likewise if a father should give money to put a son out apprentice, or advance him by setting him up in trade, &c., that would have the same effect;" that is, that the sum so given should be considered as an advancement.—Suppose in this case, the intestate, John May, had coterminously with the advancement of this sum for the professional education of his son, John May, Jr., and with a view to his settlement in life, advanced a like sum to his other son in the purchase of a tract of land and settling him upon it with a view to his advancement in life; upon any principle of reason or equity, could a distinction be drawn between the cases, and the latter regarded as an advancement and the former not! In both cases he would be considered as intending a settlement and putting them forward in life. I have said that what must be considered an advancement must often depend upon the particular circumstances of the case.—Thus, if the father has given to all of his children the like expensive education, in which case the enquiry would have no material result, or if he was a man of great wealth, so that the sums expended would be inconsiderable in comparison with his estate and income, in these and similar cases I

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*apprehend the doctrine of advancement would not apply. But small sums, or large, if expressed or understood to be in the nature of advancements, must be brought in when the estate is distributed. I am of the opinion, therefore, that the money advanced by the intestate to his son, John May, for his professional education, is an advancement, being intended for his settlement in life. At the same time, I think that a just distinction can be drawn between money expended on his professional education, and on a mere academical course, such as is commonly afforded to children by persons

of the rank and condition in life of the father. It is ordered and decreed that so much money as was advanced by John May to his son, John May, Jr., for his professional education as a Physician, be considered as an advancement, and be brought into the account in the distribution of the estate. It is also ordered that it be referred to the Commissioner to inquire and report thereon, and that in his account of the advancement, he discriminate between the expenditures for professional education of John May, Jr., and such as were expended in giving him an education common to persons of his rank and condition.

Grounds of Appeal.

1st. Because the evidence was not sufficient to authorize the Chancellor to decide that John May intended the sum expended as an advancement.

2d. Because, under the circumstances in this case, it could and ought not to be so regarded.

3d. Because money expended for education, either "academical or professional," cannot be considered as an advancement.

Edwards & Williams, for the motion.

Carne, contra.

Curia, per JOHNSTON, Ch. The interest of the principal question involved in this appeal, is heightened by the consideration that it is, now, presented for the first time, for adjudication in this State.

It has been said, that the English statute of distributions was founded, in a good measure, upon the custom of London, the analogies of which have been freely and beneficially resorted to, as aids, in its construction.³ In the interpretation of our own statute of 1791,⁴ our Courts have hitherto derived much assistance from the adjudications upon the English statute, to which it bears a general analogy, though, occasionally, differing from it in phraseology, and in some of its substantial provisions. But, upon the point now submitted to us, though we may look, with advantage, to the English decisions and authorities, we are free, the matter being res integra, to follow such of them, only, as ap-

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pear most conformable to sound general principles, and to harmonize best with the terms of our own Act;—which, after all, is the true and only subject of construction.

The third section of this celebrated statute provides that "nothing herein contained shall be construed to give to any child * * * of the intestate, a share of his * * * estate, where such child * * * shall have been advanced by the intestate, in his lifetime, by portion or portions equal to the share which shall be allotted to the other children. But, in case any child, * * *

¹ Pt. 3, s. 18. See also *Bac. Ab. Tit. ex'rs. K.*

² 2 *Rop. Husb. and Wife*, 12.

³ *STROB. EQ.*—7

³ *Edwards v. Freeman*, 2 *Pr. Wms.* 449.

⁴ 5 *Stat.* 163.

who shall have been so advanced, shall not have received a portion equal to the share which shall be due to the other children, (the value of which portion being estimated at the death of the ancestor, but so that neither the improvement of the real estate, by such child, * * * nor the increase of the personal property, shall be taken into the computation;) then, so much of the estate of the intestate shall be distributed to such child * * * as shall make the estate of all the children to be equal."

The first impression produced by the terms which I have just recited, is, that the advancements contemplated by them, and required to be brought into hotch pot, must possess something of a tangible character,—or the qualities of property, to such an extent, at least, that their value may be measured by the common standards of value, applicable to the estate left by the intestate, and without resorting to speculation or conjecture. These advancements are spoken of as "portions," and as "real estate," and "personal property," susceptible of "improvement" and "increase," which physical additions, apart from the inhibitions of the statute, might have been "taken into the computation." 5

It will be found, I think, that any other construction would be unsafe, unreasonable, inconvenient, if not impracticable, and contrary to the current of decisions on the English Statutes and the custom of London.

It is a very current fallacy, hardly worth noticing,—that the statute of '91 was intended to effect what is no where avowed on its face, as coming within the design of its framers; to wit, that it was intended to equalize the distributees, by deducting, from the share of each child, the expenses to which his parent may have been put on his account. To say nothing of the endless investigations and intolerable litigation to which this must necessarily have led, nothing could be more repugnant to justice. Should the misfortunes of the sickly or feeble child be aggravated by reducing his portion below that of his more robust brother? or should the infant, incapacitated from contracting with any other person, be charged by its own father to the same extent as if it were able to contract, and as if the expenditures made for it were made upon the legal discretion of the child, and not of the parent? "If," as was said, with a somewhat

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different view, in *Wy*cherly v. Wycherly*, 2 Eden, 180, "I could charge my son with his schooling, his education at the University, and the expenses of travelling, &c. it would be to say the son might contract debts with his father, at a time when he could contract with no other person."

Whatever sums may be expended for a

child, must, if chargeable at all, be charged either as a debt or as an advancement. As a debt, they cannot be charged, unless the child was, at the time, capable of contracting. Nor can the expenditure, as an expenditure, rank as an advancement.

It is not the sum expended, but the thing which is bought with it,—the thing received by the child,—which constitutes the advancement; nor is the cost of the purchase the measure of the value of the thing advanced. The rule of the statute is that the advancement is to be estimated, not at what it cost, nor even at its value when given by the parent, but according to its value at the parent's death. No matter whether the negro which a father bestows on his son, cost him much or little; it is the value of such a negro at the father's death which is to be charged to the son. So here, if the education of young May, general or professional, is to be considered an advancement, its value is to be estimated by its intrinsic worth, and not by the money expended in procuring it. Such is the imperative direction of the statute; and I am at a loss for any rule by which a money valuation can be placed upon the mental proficiency resulting from education, whether of the one kind or the other.⁶

The utter absurdity of making the expenses of education the standard of the value of the education itself, may be easily demonstrated. Suppose the same sum expended upon two children of manifestly unequal capacity; will each of them have received an equal benefit? It is equally easy to shew the gross injustice of charging indiscriminately even a professional education as an advancement to the child upon whom it has been bestowed. Suppose a misjudging father, for the gratification of his pride, or from any other motive, compels his son to undergo the studies preparatory to a profession or an art, for which, upon attempting its duties, he proves utterly unfitted; shall he, in addition to the loss of his time, and the indescribable mortification arising from his position, be saddled with the expense of bringing him into it?

There can be no such principle as that the mental accomplishments with which a child is furnished for the duties of life are to be considered in the light of advancements. And there can be no distinction between a general or a professional education, in this respect. Whatever instruction, whether of the one kind or the other, is given, the object is equally to advance the child in life. And, indeed, when we consider the superiority of moral over merely intellectual train-

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ing, *as furniture for duties, and to a successful and happy and acceptable career in life, why shall not the one be regarded an estate as well as the other?—And then we shall have the task of instituting a compari-

⁵ *Vide* *McCaw v. Blewit*, 2 *McCord's Eq. Rep.* 91.

⁶ *McCaw v. Blewit*.

son in every case between the moral advantages afforded to the respective children, and of putting a money value upon them. Why should we adopt a principle leading to such consequences, and attended with such difficulties?

I have said that any construction which should include, within the definition of an advancement, things intangible, or not possessed of the qualities of property, or unsusceptible of valuation by ordinary standards,—would be not only unreasonable and inconvenient, but unsupported by the current of decisions upon analogous subjects.

This appears by the authorities quoted in the decree. With the exception of the dictum of Lord Hardwicke,⁷ referred to by the Chancellor, there is nothing to countenance such a construction. It is expressly said in the rule to *Pusey v. Desbouvrie*, 3 P. Wms. 317, which was a case upon the custom of London, "Maintenance money, or an allowance made by a freeman to his son at the university, or in traveling, &c. is not to be taken as any part of his advancement, this being only his education:—and it would create change and uncertainty to enquire minutely into such matters. So putting out a child apprentice, is no part of his advancement, for it is only procuring the master to keep him for seven years, instead of the parent. *Hender v. Rose*, at the Rolls, Trin. 1718." ⁸

In the same note it is said, "the father's buying an office for the son, though but at will, as a gentleman-pensioner's place, or a commission in the army,—these are advancements, pro tanto." *Norton v. Norton*, Mich. 1692, by Lords Commissioners Rollinson and Hutchins.

This comes up to my idea of an advancement. The office purchased is property, and having been bought may be sold again, and, therefore, has a marketable money value.

The same observation applies to the remark of Lord Henley in *Wycherly v. Wycherly*, that, "whenever a father purchases an office, or any thing else, for his son, it shall always be considered an advancement."

In *Edwards v. Freeman*, a contingent portion was secured by the father, by marriage articles, to the daughter; and it was held to be an advancement. This was property capable of valuation. But with regard to £80 maintenance money, the Lord Chancellor says, "this is not to be brought into hotch pot, no more than what is allowed or secured by the parent for the education of the child."

And so of all the cases and authorities, with the exception of the dictum already noticed.

There is another consideration. It is included in the very *idea of an advancement,

that it is the privilege of the child to stick to it, or bring it into hotch pot; of which doctrine Lord Chancellor King speaks in *Edwards v. Freeman*, 2 Murph. 133, cited arguendo in 2 McC. Eq. 100, where having held the portion of the daughter to be an advancement, he says, "it can be no injustice to the child, because it is left to the election of the child thus advanced, whether she will collate or not. If the child be contented with what she has received, she may keep it." This power of restitution clearly does not belong to an education. However the child may be dissatisfied with it or the value which may be set upon it in the distribution, he cannot restore it to the estate. It would seem to follow that it cannot be an advancement.

Upon the whole, I am satisfied that the professional education of John May, jr. should not have been charged against him in the distribution, any more than his general education.

It is not necessary to determine upon the sufficiency of evidence excepted to in one of the grounds of appeal. I think, however, that, according to *Sheppard v. Sheppard* and *Young v. Lorick*, the memorandum of the father was good evidence of the fact stated in it.⁹ But the fact stated was not sufficient to constitute an advancement. If it had been, according to the same cases, the estimate of the father would not have fixed the value of the advancement. That must be governed by the rule laid down in the statute. In a case where it might be doubtful whether the thing given was intended as an advancement, or not, as in *Murrell v. Murrell*, 2 Strob. Eq. 148, where the question was whether a tract of land was given to the son as an advancement from the father, or in compensation for his son's services, I think the father's declaration is good evidence as to the intention. But there is no necessity to give an opinion on this point here.¹⁰

⁹ See 1 Strob. Eq. 122, *Youngblood v. Norton*.

¹⁰ Note by JOHNSTON, Ch. It would seem that the declaration of an intestate may be evidence, as between, or against, distributees, who take as volunteers, under him; and that it should be allowed all the effect which, by the law of the case, it can be admitted to have. Such declaration was, according to the case of *Youngblood v. Norton*, incompetent to change the valuation of the advancement, though, perhaps, competent to prove the fact of advancement, if an advancement could be predicated of the transaction. By an order passed in *Youngblood v. Norton*, it was directed that stipulations or agreements between the distributee and the intestate, as to the value of the advancements, should be excluded. No such evidence having been afterwards offered, the correctness of this direction was not involved in the appeal in that case. If it had, it may be doubted whether it could have been sustained. Though the declaration of the father alone should have had no effect as to the value of the advancement, it might have been otherwise as to an agreement between the father and a distributee of full age, competent to contract. Lord Hardwicke said, in *Heron v. Heron*, 2 Atk. 160,

⁷ *Morris v. Burroughs*, [1 Atk. 402.]

⁸ *Toller's Law of Ex'rs*, book 3d, ch. 6.

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*It is ordered that the decree be modified, and that the expenses of the education of John May, jr. as well professional as general, be disallowed as an advancement.

DUNKIN and CALDWELL, CC., concurred.

DARGAN, Ch., absent at the hearing.

Decree modified.

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"the custom of *London has laid a restriction as to a freeman's personal estate, that the orphanage part shall go in equal shares, among the children; and he cannot deprive them of it. This has produced certain rules in this Court, which have long prevailed, to prevent any evasion of the custom by the father." But agreements for advancing the children, in marriage, or putting them out in the world, by way of trade, will be supported, as effectuating the intention of the custom.

3 Strob. Eq. 192

THOMAS NAPIER v. J. J. GIDIERE, Ex'r.

(Charleston. Jan., 1849.)

[*Deposits in Court* ⇨9.]

Parties who undertake to enforce securities taken by this Court, without having obtained its authority, must do so under the responsibility of shewing, whenever the matter is drawn in question here, that they have such a case as would have induced the Court to place the instrument under their control; and they must comply with whatever conditions the Court would have annexed to its order for the delivery or assignment of the securities to them.

[Ed. Note.—For other cases, see *Deposits in Court*, Cent. Dig. § 10; Dec. Dig. ⇨9.]

[*Deposits in Court* ⇨11.]

Where a single party is manifestly entitled to the exclusive benefit of a security in the hands of the Court, it may be ordered out to him, upon the terms before stated; but where several parties are interested, and the application is by one of them, it would seem to be the safer practice to direct the officer holding the security to bring suit, upon being indemnified as to costs and expenses; and to bring the proceeds of the suit into Court for its further order.

[Ed. Note.—For other cases, see *Deposits in Court*, Cent. Dig. § 12; Dec. Dig. ⇨11.]

[*Deposits in Court* ⇨9.]

Suits at law, upon securities taken by this Court, must be at the risk and charge of the party desiring to use them, and in exoneration of the Commissioner.

[Ed. Note.—For other cases, see *Deposits in Court*, Cent. Dig. § 10; Dec. Dig. ⇨9.]

[*Contempt* ⇨69.]

[Where an executor, who has been attached for refusing to pay over to the receiver the assets of his testator's estate, which were claimed by several creditors, gives bond for his discharge from custody, no creditor can bring suit upon such bond, except upon a showing sufficient to entitle him to an order of court directing such suit.]

[Ed. Note.—For other cases, see *Contempt*, Cent. Dig. § 244; Dec. Dig. ⇨69.]

This appeal was taken from two separate decisions—the first of which was made in 1844, and the second in 1846.

A brief statement of previous proceedings in the case, is necessary to a proper understanding of the points presented by the appeal.

The plaintiff, Napier, had obtained a judgment in the State of New York, against Descoudres, the testator of the defendant, Gidiere. Being dissatisfied with the management of the estate by Gidiere, as executor, which, in his opinion, tended to render his demand insecure, he filed this bill for a receiver, &c. Upon a motion made before Chancellor Dunkin for the appointment of a receiver, it appeared from the affidavit of Gidiere himself, that he had received assets, as executor, to the value of about \$12,000,

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out of which he *had, within the time prescribed for the ascertainment of debts, paid, on demands of less dignity than that of the plaintiff, about \$6,000, leaving in his hands for the payment of the plaintiff and other creditors, about \$6,000; which was not sufficient to satisfy them;—and that out of this balance, he claimed to retain about \$4,000, upon a demand which he set up on his own behalf. It further appeared that he had not made the returns required by law; and that he had threatened that the plaintiff should never realize one dollar on his judgment.

Under these circumstances, Chancellor Dunkin, in July, 1838, "ordered that the defendant, J. J. Gidiere, pay into the hands of the Commissioner of this Court, within ten days after notice of this order, the sum of \$6,233.14. That he also place in the hands of the said commissioner, the notes, books of account, and other evidences of debt, belonging to the estate of L. P. Descoudres, deceased. That the said commissioner, as receiver for the said estate, proceed to collect the outstanding debts, in the name of the said executor, who is hereby enjoined from collecting the same, or in any manner interfering with the said receiver in the execution of this order. The funds, when received, to await the further order of this Court."

Gidiere having failed to pay the money into Court, agreeably to this order, a rule for an attachment against him was made absolute in January, 1839, and an attachment issued accordingly, under which he was arrested.

Gidiere put in his answer, in which he alleged that Descoudres, his testator, left no individual estate, except a piano, some wearing apparel, a breast-pin and a watch—that the stock in trade, &c. of which he was in possession at the time of his death, belonged to a firm, of which he, Gidiere, had been a dormant partner since 1828, and of which he was, now, the surviving partner; and he

claimed the same in that character, for the purpose of settling the copartnership affairs.

This claim was brought to a hearing before Chancellor Dunkin, at June Sittings, 1839, who adjudged that the property in question belonged to Descoudres' individual estate, and directed that the orders previously made be carried into effect; and that the Commissioner take an account of the assets and liabilities of said Descoudres, and report thereon, preparatory to a final decree for marshalling and distributing the said assets.

From this decree Gidiere appealed.

Pending the appeal, a report was made, upon which it was ordered, at June Term, 1840, by Chancellor Johnson, "that so much of the report of the commissioner as fixes the amount of complainant's debt, be con-

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firmed; and that com*plainant be entitled to be paid the sum out of the assets of Descoudres, (ordered to be paid into court) in the due course of administration."

At the same time a petition filed by Gidiere was heard, in which he prayed that the attachment under which he was in custody might be suspended till the hearing of the appeal which he had taken. Upon this petition the same Chancellor "ordered, that the defendant, Gidiere, enter into bond to the Commissioner of this Court, with two good and sufficient sureties, in a penal sum equal to twice the amount ordered to be paid into Court by Chancellor Dunkin. The condition of said bond to be, that the said J. J. Gidiere will abide by and perform the decree heretofore made for the payment into court of the said sum of money, within ten days after the decree of the Appeal Court, in the matter decided by this Court, and by the decree of Chancellor Dunkin, or surrender himself a prisoner to the sheriff, under the attachment now in force against him. And on the Commissioner furnishing the sheriff with a certificate that he has given such bond, with two good and sufficient sureties, the sheriff is hereby authorized to discharge the body of the said Gidiere from custody under the attachment."

Gidiere accordingly entered into bond to Mr. Commissioner Gray, with Stephen Watson and Benjamin J. Howland sureties, in the penalty of \$13,000, conditioned as directed in the order of Chancellor Johnson; and was discharged from custody.

The appeal was heard, and decided against Gidiere, the 29th of May, 1843.

On the 9th of June, 1843, the following correspondence took place between the counsel of Gidiere and Napier.

"Dear Sir:—Mr. Gidiere wishes to pass a week in Aiken; but, as he is liable to be called on at any moment to surrender himself at Mr. Napier's suit, he requests that you would let him know when Mr. Napier

wishes him, and he will come by the next train.

Your obedient servant,

9th June, 1843.

J. L. Petigru."

"I can only say that, in the absence of Mr. Napier, I shall, myself, take no active steps, without intending thereby to, in any way, alter the relations of the parties.

Your obedient servant,

9th June, 1843.

Benj. F. Hunt."

On the 29th of the same month, Mr. Hunt gave notice to Messrs. Petigru & Lesesne, that he was instructed by Napier to proceed upon the bond.

On the 30th, Gidiere offered himself to the

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sheriff, but the *attachment was not to be found in his office, and he declined to take custody of him.

Suit was instituted at law, in the name of Mr. Gray, against Gidiere and his sureties. Whereupon, a petition was filed by Watson and Howland, the sureties, praying leave to surrender the principal; that the action at law be stayed, and that their bond be cancelled.

This petition, to which an answer was put in, came on to be heard at February Term, 1844, and which was heard; Gidiere was in court, and was tendered by the sureties.

The decree was made (which is one of the two decisions now appealed from.)

After stating the circumstances, the Chancellor (Johnston) said,

"It may be questioned whether the Master had any sufficient authority for assigning the bond to Napier for suit, without order; or, whether it may not be incumbent on the plaintiff at law to shew an authority for suing upon a bond taken by this Court, before he can sustain his suit on it. At all events, he who, without the authority of this Court, undertakes to enforce its obligations, must do so under the responsibility of shewing, when the matter is brought in question here, that he has such a case as would have induced the Court to place the obligation under his control.

"If Mr. Napier had applied for leave to sue the bond, after the letters of the 9th of June, 1843, and after the offer of the sureties to surrender their principal, I see no reason to doubt that his application would have been refused. For all substantial purposes, if the surrender had been accepted, the creditor would have been in possession of all the indemnities the Court intended for him, and in full time.

"That the attachment was not in the possession of the sheriff, may not have been the fault of Mr. Napier or his counsel. Was it the fault of Gidiere or his sureties? If it was the sheriff's fault, he is responsible to the party injured.

"I must direct the suit at law to be stayed until further order; and that the petitioners have leave to surrender their principal, (under an attachment to be substituted for the

original, if necessary :) and that, therefore, they have leave to apply for the cancellation of their bond—and it is so ordered.”

On the 3d of August, 1846, Napier moved, before Chancellor Dunkin, for an order on Mr. Commissioner Gray, to deliver the bond to him, which motion was refused by his Honor. This decision is the second of the two now appealed from.

The appeal is upon the grounds:

1. That the liabilities of the sureties were fixed by the order under which the bond was

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taken, and could not be *altered. The order was not complied with within ten days after the appeal decree, the bond was forfeited, and the rights of Napier vested.

2. Because every transaction after the defendant, Gidiere, was in custody, was without the consent of the plaintiff. There was no proof that the plaintiff withdrew the attachment; and its being out of the office at the tender of the body of Gidiere was immaterial, as that was not made till after the expiration of ten days from the appeal decree.

3. Because the decree on the petition did not preclude the plaintiff from further proceeding in this Court; and he was entitled to his motion for the delivery of the bond as his property.

The appeal was argued by Hunt, for the appellant, and Petigru, contra, January Term, 1848.

Re-argued by same counsel, January term, 1849.

[For subsequent opinion, see 7 Rich. Eq. 254.]

The following is the opinion of the Court of Appeals.

Curia, per JOHNSTON, Ch. We are satisfied with the position laid down in the decree of 1844—that parties who undertake to enforce securities taken by this Court, without having obtained its authority, must do so under the responsibility of shewing, whenever the matter is drawn in question here, that they have such a case as would have induced the Court to place the instrument under their control.

To this it must be added, that they must comply with whatever conditions the Court would have annexed to its order for the delivery or assignment of the securities to them; and it appears, upon principle, that suits at law, upon these obligations, must be at the risk and charge of the party desiring to use them, and in exoneration of the commissioner. See the practice in analogous cases, in the Ecclesiastical Courts, stated in the goods of Joseph Hall, 1 Haggard, 139,

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quoted in Villard v. Robert, 1 Strob. Eq. 407.

The bond in the case before us was taken by the Court, in the name of its commissioner. The interest of Mr. Napier in the instrument must depend upon his interest in the fund to which it relates.

That fund was ordered to be paid into Court, subject to its further order. All the unsatisfied creditors of Descoudres' estate were interested in it, and the decree of 1840, on which Napier relies, gave him no exclusive right, until, according to its terms, it should be ascertained, by further proceedings, that his debt was entitled to be paid out of it, “in a due course of administration.”

Where a single party is manifestly entitled to the exclusive benefit of a security in the hands of the Court, it may be ordered out to him, upon the terms before stated.

But where several parties are interested, and the application is by one of them, it

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would seem to be the safer practice to direct the officer, holding the security, to bring suit, upon being indemnified, as to costs and expenses—and to bring the proceeds of the suit into Court for its further order.

Such an order would have been granted on the application of Mr. Napier, if the Court had not entertained doubts, (which it now no longer entertains,) of the propriety of putting the bond in suit. And we suppose it will, under the circumstances, be a substantial compliance with the requisitions just stated, to direct that he be allowed to proceed, at his own costs and charges, with the suit already brought; the proceeds of the suit to be brought by him into this Court, subject to its order; and that the Commissioner attend with the bond, in order to sustain the suit. And it is so ordered.

In coming to this conclusion, we do not intend to express any opinion whether there is a breach of the condition of the bond or not. That is properly a question of law, and may be well decided on the trial in the law Court.

It may be admitted that there are cases in which this Court will not subject a party to the consequences of a technical breach, though one be committed. But we do not, in this case, see equity sufficient to induce us to put any restraint upon the legal effects of the bond, as against the parties to it.

It is ordered that the decrees appealed from be modified, according to the foregoing opinion and order.

CALDWELL and DARGAN, CC., concurred.

Decrees modified.

3 Strob. Eq. 197

G. V. ANCKER, Trustee, v. L. L. LEVY et al.
(Charleston. Jan., 1849.)

[*Husband and Wife* ⚭29.]

Where in contemplation and consideration of marriage, and with the view of making a settlement of her property to the sole and separate use of the intended wife, the parties about to contract the marriage, being each clear of debt, joined in a bond for a certain sum to one as trustee for the purpose, and secured the bond by a mortgage of the property, both of which were duly recorded—the Court held that the bond and mortgage were valid as a marriage settlement, and that the trustee (the marriage having been consummated and the husband become insolvent) was entitled to subject the property specifically described in the mortgage to the payment of the antenuptial bond.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 168; Dec. Dig. ⚭29.]

Opinion reserved until further inquiry into the facts of the case, as to whether the trustee was entitled to go further and subject other property not specifically included in the mortgage.

[*Bankruptcy* ⚭167.]

A husband having made a valid settlement of his wife's estate in trust for her separate maintenance, was allowed by the trustee the use of the funds of the estate, which, in copartnership with another, he employed in mercantile spec-

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*ulations—becoming otherwise largely indebted, he gave a bond to the trustee for the payment of the borrowed funds, confessed a judgment thereon, and, to secure the same debt, gave a mortgage of his share of the partnership assets (most of which were still unpaid for;) subsequently the copartners made a general assignment of their estate for the benefit of certain creditors &c., and soon after applied for the benefit of the United States bankrupt act of 1841.—The application of the husband was refused, on the ground that the bond and mortgage to the trustee, and also the assignment of the partnership estate, were fraudulent under the act and void. The trustee then filed a bill praying that the said bond, mortgage, &c., might be declared valid and subsisting liens &c.—The Court not only refused to sanction the attempt to subject the goods of the firm to the payment of the private debts of one of its members (more especially as the goods were unpaid for,) but held the securities and transfer of the property "utterly void" under the act of 1841 and the judicial proceedings under it.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 282; Dec. Dig. ⚭167.]

[*Equity* ⚭401.]

The extent of a party's claim under a deed is not a matter for inquiry by the master, but for the consideration of the Court on an inspection of the instrument, and the construction thereon to be given.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 869; Dec. Dig. ⚭401.]

[*Dismissal and Nonsuit* ⚭18.]

A codefendant may insist that he shall not be obliged to institute another suit for a matter that may then be adjudged between the defendants.

[Ed. Note.—Cited in *Adger & Co. v. Pringle*, 11 S. C. 547; *Latimer v. Sullivan*, 37 S. C. 121, 15 S. E. 798; *State v. Southern R. Co.*, 82 S. C. 15, 62 S. E. 1116.

For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 32; Dec. Dig. ⚭18.]

Before Caldwell, Ch., at Charleston, February, 1847.

Caldwell, Ch. The first question involved in this case is whether a marriage settlement made by Levin L. Levy, Abigail Sampson and Nathan A. Cohen, trustee, and the bond made by her and Levy to the trustee, on the 12th April, 1834, are void.

It appears from the evidence, that Levy, at his marriage with Mrs. Sampson, although worth but little, owed none of the debts now pressing for payment, and that she was also free from debt, and that she owned all the property specified in the settlement and schedule, and that her stock of goods was worth \$5,000. There was, therefore, no legal impediment, from the indebtedness of the parties, to their making such a contract. The marriage settlement, schedule, and bond, were regularly recorded within the time prescribed by law; and as there is no proof that the contract was entered into with fraudulent intentions, it is valid as to the property in the schedule that can be identified. But it has been insisted that the sum secured by these instruments (which will appear from the pleadings and exhibits) cannot be collected by the plaintiff (who has been instituted as trustee in the place of Nathan A. Cohen,) out of the property that has come into the possession of Levy, or of Levy & Ancker, as the original goods have long since been disposed of, and others substituted in their place; and that the covenant in the settlement cannot be enforced against Levy's interest in the property, in derogation of the rights of the New York creditors, who are entitled to a preference. These debts of Levy,

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*and of Levy & Ancker, have been contracted long since the execution and recording of these instruments, and the claims of the creditors must stand on a different footing than the want of notice. Although the terms of the settlement are different from the common form of such instruments, they are intelligible, and the only difficulty is in carrying them into effect. By the settlement, Levy and Mrs. Sampson agreed, among other things, with Cohen, the trustee, as follows:—

"Whereas, we, the said Abigail Sampson and L. L. Levy, are held and firmly bound unto Nathan A. Cohen, &c., by our bond bearing even date with these presents, in the sum of \$10,000—reference being thereunto had will more fully and at large appear. Now, know ye, that we, the said Abigail and Levin, for the better securing the payment of the said sum of \$10,000 unto the said Nathan A. Cohen, his heirs, executors, administrators and assigns, together with such interest as may grow due thereon, have bargained and sold, and by these presents do bargain and sell, and in plain and open market deliver, unto the said Nathan A. Cohen, all that house, on leased land, known as No. 205,

on East Bay street, together with the lease; also, the four negroes, Amy, Fanny, Betsey, and Adolphus, subject nevertheless, to the mortgage to secure a bond of \$3,000, payable to the said Nathan A. Cohen, in trust for Abigail Sampson, the daughter of the said Abigail; also all the stock in trade of the stores of the said Abigail Sampson, on East Bay street, Charleston, and in Columbia, in this State, together with all such other stock in trade, goods, wares and merchandize, of the said Abigail and Levin, as they may now possess, or may hereafter, from time to time, purchase and substitute therefor: to have and to hold the said house, slaves, stock in trade, goods, wares, merchandize, unto the said Nathan A. Cohen, his executors, administrators and assigns forever. Provided always, nevertheless, that if the said Abigail Sampson and Levin Levy, their heirs, executors, administrators and assigns, shall and do well and truly pay or cause to be paid unto the said Nathan A. Cohen, his certain attorney, executors, administrators or assigns, the said sum of \$10,000, according to the true intent and meaning of the said bond and of these presents, then this deed of bargain and sale, and every clause, article and thing therein contained, shall cease and determine, and be utterly void and of none effect, any thing herein contained to the contrary thereof, in any wise notwithstanding: and it is agreed between the parties to these presents, that until default shall happen in the payments of the said bond, the premises shall continue in the custody and possession of the said Abigail and Levin, and they shall be authorized, from time to time, to sell all or any part of the property included in this deed, and execute good and sufficient titles thereto, substituting always the proceeds

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*thereof, whether in money or goods, to the same uses, and subject to the same liabilities, as is herein declared of and concerning the land, house, lease, slaves, and stock in trade, wares, merchandize and goods, herein represented: And it is hereby declared by and between the said parties, and the said Abigail and Levin, their executors, administrators and assigns, do covenant, promise and agree, that if default shall happen to be made of or in payment of the said sum of \$10,000, as aforesaid, on demand being therefor, according to the true intent and meaning of these presents, then, and in such case it shall be lawful"—when a general power is given to the trustee to take possession of the property, or to sell it and return the surplus, after paying the \$10,000 to the parties, in the usual form of a mortgage. The settlement further states thus: "Whereas a marriage, by God's permission, is intended shortly to be had and solemnized between the said Levin L. Levy and Abigail Sampson, and whereas, it is agreed that the said bond and obligation, together with the

mortgage to secure the same, shall constitute a fund for the purposes of a suitable settlement for and on behalf of the said Abigail, for and in consideration of the marriage; and whereas, the intended marriage constitutes the consideration of the said bond or obligation and the mortgage to secure the same, it is hereby covenanted and agreed, that the said N. A. Cohen shall receive and hold the said bond and conveyance of the said house, land lease, negroes, stock in trade, goods, wares and merchandize, and he doth, for and in consideration of the intended marriage, covenant and agree to and with the said Abigail and Levin, to hold the said bond and conveyance by way of mortgage aforesaid in trust to and for the uses and purposes following, to wit: in trust to permit and suffer the said Abigail Sampson to have, use, and enjoy the sum of \$5,000, part and parcel of the said sum of \$10,000, also the said house and negroes, or their full value, part also of the said sum of \$10,000, during her natural life, free, cleared, discharged of and from all claim, right, intermeddling or demand of her said intended husband, in the same manner as if she was sole and unmarried, and not liable to his debts or contracts; and in case the said Abigail dies leaving any other child than she has at present, then in trust to divide the said sum of \$5,000, and the said house, lease, and negroes, or their value, equally, share and share alike, between all the children who shall be living at her death, the issue of any deceased child taking the parent's share; but in case she shall leave no child or children at her death, then, in trust, to apply the said sum of \$5,000, and the said house, lease and negroes, or their full value, to such uses and purposes as the said Abigail shall by any instrument in writing, in the nature of a last will and testament,

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duly appoint and declare; *which said will she is at liberty to make and execute, notwithstanding her coverture. And it is hereby further covenanted and agreed, by and between the said parties to these presents, that the rest, residue and remainder of the said sum of \$10,000, in the said bond mentioned, after fully securing and paying the said sum of \$5,000, and the house, lease and negroes, or their value in money, for the use of the said Abigail, as aforesaid, shall be held and paid by the said Nathan A. Cohen, for the sole use and behoof of the said Levin L. Levy, his heirs and assigns, forever," &c.

A marriage settlement may be made by giving a bond for a sum of money, as well as by conveying land and negroes, if the consideration and intention of the parties be expressed with sufficient certainty in the instrument, and it be recorded according to law. *Smith, executor, v. Patterson, administrator, Cheves' E. R. 29.* Here not only a bond was given for \$10,000, but another

cotemporaneous instrument (of which the above extracts are parts) was executed, by which property was pledged for its payment, binding Levy with a double cord, for the faithful performance of his covenants; and Abigail Sampson was also bound, both by the bond and the mortgage. This contract has every quality that can characterize a marriage settlement; it was made in contemplation and consideration of marriage; it secured the property of the intended wife, through a trustee, to the use of her and her issue; it exempted what was appropriated for her separate use, from the debts or contracts of her husband, and it bound him to raise the fund for that purpose; it restricted his marital rights, that would otherwise have attached on her property, and a trustee was appointed, who was a party to the contract. In addition to these circumstances, the contemplated marriage was consummated immediately after the execution of these instruments. This cannot be considered as a mere voluntary agreement, without consideration, but is the most important contract (except the marriage contract, of which it is a part) and founded on the most valuable as well as the best consideration known to the law. The terms of the Act of 1785¹ are certainly sufficiently comprehensive to include this agreement as a marriage settlement, as "any part of the estate, real or personal," of any person entering into such a contract, may be secured according to its provisions.

After the plaintiff had been substituted as trustee, in the place of Nathan A. Cohen, Levy, on the 10th of March, 1842, executed a bond in the penalty of \$15,528 to him, (in consideration of his liability under the instruments of the 12th of April, 1834.) and on the 1st of April, 1842, confessed a judgment on it, to Ancker, the trustee, for \$7,764, (the principal and interest of \$5,000, mentioned in the first bond,) which he promised to pay,

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with interest thereon, on or before *the 14th of April, 1843. Levy, cotemporaneously with this bond, made a mortgage (which has been recorded) to Ancker, of the slaves Titus, Sarah, Dean, and Charlotte, a house on leased land, situated in Market-street, also the stock of goods then on hand, at the store of Levy & Ancker, and such as might be, from time to time, purchased from them—the said goods being the proceeds of the stock originally mortgaged to secure the trust of the marriage settlement. The evidence shows the reason of this confession having been made: the trustee was advised to obtain it, to secure the trust estate, and it could not be considered as voluntary.—Levy did not seek (and was reluctant) to make it.

In inquiring into the fraud or fairness of such a transaction, it may, with propriety, be asked, why ought not Levy to have secur-

ed this amount to the trustee? His previous obligations, and his having had the use of the property for such a period, certainly constitute a sufficient consideration.² But a very ingenious objection is taken to this bond, that it was an extinguishment of the former bond, and in the nature of a second settlement, and, therefore, subject to all the rules and restrictions applicable to post nuptial settlements. But this objection cannot avail the creditors; the acceptance of an obligation of an inferior, or even of an equal degree, does not extinguish a prior obligation. So the taking of a new bond, it seems, is no extinguishment of a prior bond, and the obligee may proceed on either; and there is certainly no reasonable ground on which the trustee of a marriage settlement should be required to record his judgments and executions against debtors of the trust estate, in the Secretary's and Register's offices; he must be permitted to pursue his claims and recover his debts, as other creditors.³ There does not, therefore, appear to be anything, either irregular, improper, or fraudulent, in the proceeding of the trustee against Levy, and he appears to have done no more than prudence and justice dictated and his counsel advised, in securing the debt, by the confession of judgment and mortgage that Levy made to him. Levy's covenant in the settlement bound him to substitute whatever goods might be bought with the proceeds of the original stock, if there had been never so many changes by selling and purchasing, and his giving these securities was coming as near the performance of his contract as his circumstances, probably, permitted. Although it is a principle of law that one cannot grant or mortgage property of which he has neither the title or possession, yet he may grant personal property of which he is potentially, although not actually possessed.⁴ Thus he may grant all the wool that shall grow on his sheep that he owns at the time, but not the wool which may grow on sheep not his, but which he may afterwards buy. So a parson of a church

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may grant *his tithes, or a tenant his growing crop; and there seems to be no good reason why one may not mortgage his stock in trade, and grant the goods that are bought with the proceeds.—When the mortgagee gives the mortgagor the power to sell the stock of goods, and to purchase other goods and substitute them in the place of the former goods, here the mortgagor may be considered as the agent of the mortgagee, and the after acquired goods as potentially in the mortgagor's possession; but here it is

² Bailey v. Wright, 3 M'Cord, 484; 8 John. R. 54.

³ Cornell v. Lamb, 20 John. R. 407; Day v. Teal, 14 John. 404; Bank of Col. v. Patterson, 7 Cranch, 299, [3 L. Ed. 351;] 4 Har. & Mill. 482.

⁴ 2 Bacon, Hb. Grants, H. Hl. 132.

¹ 4 Stat. of S. C. 656.

not necessary to decide whether such a grant or mortgage would be good between creditors, but merely whether such a contract as was made between Levy and the trustee, was founded on a sufficient consideration, so as to make the confession of judgment valid.⁵ There is no evidence to raise even a slight presumption that the marriage settlement was fraudulent; nor is there any proof that Levy had made any payment to the trustee or provision to effectuate the objects of the settlement, although he had been deriving the benefit of it for so many years, and it may be inferred from all the circumstances that there was not only a valuable consideration for the settlement, but an adequate consideration received for the amount of the last bond and mortgage, and the confession. The plaintiff's claim is much stronger against these creditors in their present condition, than if they were second mortgagees. The creditors of Levy & Ancker are represented by the assignee in bankruptcy, and the result of all the ancient and modern cases is, that the assignee can only take such rights and interests as the bankrupt had or could claim and establish at the time of his bankruptcy, and, therefore, is affected with all the equities which would bind the bankrupt himself, if he were prosecuting those rights and interests.⁶

In England a post nuptial settlement will be good when expressed to be made in consideration of a portion to be agreed to be paid, provided the portion is afterwards actually paid; and it seems that a settlement after marriage will be valid, if made in consideration of a portion only vesting in security, if there be no fraud.⁷ Here the settlement was made before marriage. Levy was worth but little, and her friends might, with great propriety, have insisted that the whole of her estate should be secured to her sole and separate use, and the use of her issue; and surely the agreement that he should have possession of the property and derive a benefit from it, and the provision made for him after the \$5,000 and interest were secured to the wife and her issue, was a sufficient consideration for him to give the second bond and mortgage, which was only securing the first. In 1st Cooke's Bankrupt Law, 265, it is laid down "if a person give a bond for a sum of money, as a marriage

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portion, and the marriage takes effect, it

⁵ Cannon v. Johnston, Watson & Co. Jan. term, 1847, Charleston; Abbot v. Goodwin, 20 Maine, 208; Mitchell, assignee, v. Winslow et al. at Portland, Me. before Justice Story, C. Law Repr. 347.

⁶ Cooke on Bank. 265; Cooper H. 320; Owen, 239; C. Law Rep. 352.

⁷ Brown v. Jones, 1 Atk. 190; Prac. in Ch. 101; 2 Ves. Sr. 309; Colville v. Parker, Croke Jac. 158; Griffin v. Stanhope, II. 454; Atherly on M. S. 156.

is a good consideration for the bond, and the assignees cannot be relieved against it."⁸

As to the slaves that were purchased with the trust fund, (as Levy alleges in his answer,) there has been some difficulty in ascertaining the circumstances from the evidence; it appears that there was a sum of \$798 in cash, which Cohen, the former trustee, considered as trust property, and which he stopped from going into Levy's hands. The trustee kept it for a year, and paid interest on it, which made it nearly amount to the sum of \$870, which Smith testified was paid for Dean, Charlotte, Nanny, Tom, Footman and Handy, (about 16th February, 1841;) two slaves, Dean and Charlotte, are mentioned in the mortgage, but the witness' want of personal acquaintance with the slaves, except Footman, left the facts in some doubt. There, however, appears to be sufficient proof to render it probable that these slaves were purchased with the funds, and the subsequent dealings between Levy and the plaintiff would seem to be in confirmation of it; but if it be considered as only cumulative proof of the fairness of Levy's giving the second bond and mortgage, and confessing the judgment, it would go to strengthen the plaintiff's claim generally, and will be sufficient to bind the property, whether bought with the trust fund or not. The parties probably considered the first bond for the payment of the \$5,000 and interest, to the trustee, for the use of Abigail Sampson and her issue, as the extent of the provision by the settlement, and by their subsequent contracts they have conformed to this construction of it, although their construction may not be correct, and is, therefore, a subject proper for further enquiry. The trustees, Ancker and Levy, have been partners, and the very property that was mortgaged to secure the performance of the covenants of the latter, has been used by them, as partners, in trade; and anomalous as the proceedings of these persons have been, if they transpired in good faith, there is great difficulty in their creditors reaching the property in Levy's possession, until the claim of the trustee is satisfied; but if Levy has acted fraudulently, and the trustee has co-operated with him, and has mingled his own property with what was mortgaged to secure the provision for his cestui que trust and her issue, so that there are no means of identifying the re-purchased property with that originally held by him as trustee, and has thereby given a false credit to Levy, it may become an enquiry whether he has not waived or forfeited his rights to the property, and entitled the other creditors to the preference; but as these questions cannot be reached from the evidence heretofore offered, and must depend upon the circumstances connected with their

⁸ 2 Cowper's Reports, 742; Cooke on Bank. 242-3.

accounts and dealings, it is proper no decision should now be made upon them. It is

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very clear that property vested in one as trustee, does not devolve to his assignees upon his becoming a bankrupt, and the bankrupt, therefore, retains his character as trustee, until another be appointed, on application, in his place. The trust property may be followed in the hands of a bankrupt or insolvent trustee, if it be of a tangible nature, or capable of being identified, and it has been held to be immaterial that the trust property is blended with other property of the same nature belonging beneficially to the trustee.⁹ Also, when the trust estate or fund has been changed or converted into other property, it will be equally protected against the effects of bankruptcy; for the product or substitute of the original property must follow the nature of the thing from which it proceeded;¹⁰ but if the property possessed by the bankrupt, as trustee, has become so amalgamated with his general property that it can no longer be identified, the representative of the trust has, then, no other remedy but to come in as a general creditor, and prove for the amount of the loss.¹¹ There has been one remarkable case where the trust money had got into the general fund, it was held, under the peculiar circumstances of the case, that it had subsequently got out again.¹² Whether such a principle can be applied in this case, must depend upon the state of the accounts. Where the trust is constructive and there is only a doubtful equity, the legal property passes to the assignees; but, even then, the cestui que trusts may have the same relief in equity against the assignees as they would be entitled to against the bankrupt himself.¹³

As to the unsuccessful application of Levy for the benefit of the bankrupt act, his failure cannot affect the claim of the plaintiff. A judgment of that kind can only bind parties and privies. There are many acts which will deprive a debtor of the benefit of the bankrupt or insolvent laws; and yet the rights of such creditors as are not parties to the proceedings, will not be affected. The case of a trustee, or one acting in any other fiduciary capacity, does not come within the purview of the Act of 1841, as that class of debtors is expressly excepted. As far, therefore, as the plaintiff is concerned, his assignment cannot affect the rights of the cestui que trust; and if Levy, under the circumstances of his dealings with the property mortgaged to secure the performance

of his covenants in the settlement, be considered as coming within the exception of the Act, it may remove some of the difficulties that are connected with the case. It is, therefore, ordered and decreed that the bond and instrument executed by the parties on the 12th of April, 1834, constitute a valid marriage settlement—that the bond and mortgage given by L. L. Levy on the 10th of March, 1842, and the confession of judgment made by him to the plaintiff, on the 1st of April following, are also valid, and

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that the plaintiff is entitled to have his claim, as trustee, satisfied out of such of the property mortgaged as is of a tangible nature, and capable of being identified; and to have the same applied to his judgment and execution against L. L. Levy, in preference to the claims of the other creditors. It is ordered that it be referred to one of the Masters to ascertain whether the plaintiff's claim is to be restricted to the said sum of five thousand dollars and interest, or shall include the house and slaves, or their value, and report thereon; and that he do take the accounts connected with the business of the said L. L. Levy, from his intermarriage, both before and during his partnership with the plaintiff; and that the Master do ascertain and report what property L. L. Levy brought into the business—how the books were kept—what became of the property mortgaged, and the proceeds of it—what property or sums of money he received of the trustees, Cohen or Ancker—how he disposed of them—what investments he made—whether he acted as agent of either of them, or whether he assumed to act as a trustee in relation to the property mortgaged, or its proceeds—also, to ascertain and report the debts of the creditors represented by the different assignees—and any special matter. Parties to be allowed to apply for any special orders that may be necessary to carry out this decree.—The costs heretofore incurred in this case to be paid out of the property and funds in litigation.

The assignee in bankruptcy appealed, on the following grounds:

1st. That the bond and mortgage of 1834 are void as to creditors.

2d. That the bond of the 10th March, 1842, and the mortgage and judgment of 1st April, 1842, are void, as to creditors.

3d. That the proceeds of the property with which the firm of Levy & Ancker carried on business, ought first to be applied to the payment of the debts of that firm.

4th. That it was not proved that the slaves Dean, Charlotte, Nanny, Tom, Footman, and Hardy, were purchased with trust funds, and they, therefore, pass to the assignee in bankruptcy.

5th. That the assignment to B. F. Hunt, Esq. being in fraud of the bankrupt Act, and so decided by the Court of Bankruptcy, he

⁹ Hill on Trustees, 269; Lewin on Trusts, 254; Cooke on Bank, 128-9.

¹⁰ Pinket v. Wright, 2 Hare, 129.

¹¹ Taylor v. Plumer, 3 M. & S. 525; Scott v. Swan, Willis, 404.

¹² Ex parte Sayers, 5 Ves. 169.

¹³ Lewin on Trusts, 257.

ought to account to the assignee in bankruptcy.

Walker & King, for the motion.
———, contra.

Curia, per DUNKIN, Ch.—This Court concur with the Chancellor, that the instruments bearing date 12th April, 1834, are valid as a marriage settlement, and that the com-

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plainant is entitled to subject the property specifically described in the mortgage to the payment of the ante-nuptial bond, executed by the defendant, L. L. Levy. It is insisted, however, that the complainant is entitled to go further, and to subject other property, not specifically included in the mortgage, to the payment of the mortgage debt. On that point this Court desires to reserve the expression of any opinion, until a more full examination of the facts has been made under the inquiry directed by the Chancellor, in relation to what became of the mortgaged property and the proceeds of it, &c.

The circuit decree intimates an opinion that the original claim of the plaintiff was only for the sum of five thousand dollars and interest, and should not include, in addition thereto, the house and slaves, or their value; and the Chancellor rather infers that such was the understanding of the parties; but on this subject he concludes nothing, and directs an inquiry by the Master, whether the claim should or should not be so restricted. We are of opinion that this is matter not for inquiry by the Master, but for the consideration of the Court, on an inspection of the instruments and the construction thereon to be given.

The ante-nuptial bond has no penalty, but is in the nature of a single bill for the payment of ten thousand dollars.—The mortgage is to be void on the payment of the ten thousand dollars. "It is subsequently declared that Abigail Sampson is to have the sum of five thousand dollars, part and parcel of the said sum of ten thousand dollars, also the said house and negroes, or their full value, part also of the said sum of ten thousand dollars, during her natural life," with certain limitations set forth in the deed. It is finally provided that "the rest, residue and remainder of the said sum of ten thousand dollars, in the said bond mentioned, after fully securing and paying the said sum of five thousand dollars, and the house, lease and negroes, or their value in money, for the use of the said Abigail as aforesaid, shall be held and paid by the said Nathan A. Cohen, for the sole use and behoof of the said Levin L. Levy, his heirs and assigns."

Taking these papers together, the Court is unable to give them any other construction than that Levy was to pay five thousand dollars to the trustee for the sole and separate use of his intended wife, and was to be responsible for the house and negroes, or

their value, to be held also to her separate use, &c.

If the house and negroes were not forthcoming, he (L. L. Levy) was to account for their value. But if the value was less than five thousand dollars, so also would be the limit of his accountability, as the residue of the five thousand dollars was expressly reserved to himself absolutely.

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*The bond of the 10th March, 1842, is, substantially, an acknowledgment that the first part of the conditions of the mortgage had been complied with. The condition of the mortgage is specially recited, and the substitution of the plaintiff in the place of the original trustee, and then that "I, the said L. L. Levy, by the assent of the said trustee, did receive and employed the said sum of five thousand dollars so as above settled, &c. and am justly indebted to the said trustee in the full and just sum of five thousand dollars with interest from 12th April, 1834, being now seven thousand seven hundred and sixty-four dollars for cash, so as aforesaid borrowed from the said Nathan A. Cohen as trustee, prior to his resignation of his said trust, and since, of the said Gustavus V. Ancker," (the plaintiff,) and then provides for the payment of the aggregate sum of seven thousand seven hundred and sixty-four dollars with interest, on the 14th April, 1843. To refund the sum of five thousand dollars, thus borrowed from the trustee, the parties entered into this new arrangement of March, 1842, the effect of which will be hereafter considered. The only object of adverting to it at this time, is to show that by the acknowledgment of the parties, the five thousand dollars, part and parcel of the ten thousand dollars, had been received by the trustees, had been loaned to the defendant, Levy, and for the repayment of this the trustee had resorted to a new security. The bond and mortgage of April, 1834, though satisfied as to the five thousand dollars, part and parcel of the said sum of ten thousand dollars, were still, however, of force to secure to the uses of the settlement, "the house and negroes or their full value, part also of the said sum of ten thousand dollars." But, beyond that, we are of opinion that the complainant has now no claim under those instruments. How far he may be able to enforce that lien for this purpose, upon property not specifically described in the mortgage, under the special equities set forth in the bill, must depend, as before stated, upon such facts as the complainant may be able to establish, and which have not yet been satisfactorily developed to the Court.

The other question discussed and decided by the decree, relates to the bond of 10th March, 1842, and the confession of judgment thereon in April, 1842, and a mortgage to secure the same debt. In order to understand the points raised by the grounds of ap-

peal, it may be necessary to remark that, sometime in 1841, the complainant, G. V. Anker, and the defendant, L. L. Levy, entered into copartnership, under the firm of Levy & Anker. It is not stated at what time of the year the copartnership was formed, but that, between the months of September, 1841, and May, 1842, they purchased goods on credit in the city of New York, at various periods, and for various amounts, for which

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they gave their promissory notes, and that the notes had not run to maturity on the 1st March, 1842. The bond of that date, from Levy to Anker as trustee, under the settlement, is in the penal sum of fifteen thousand five hundred and twenty-eight dollars, and purports to be for the principal sum of five thousand dollars due on the bond of April, 1834, and the accruing interest. To secure this new bond of the 10th March, 1842, Levy mortgages not only the house on leased land, included in the original mortgage of 1834, but also certain slaves and "the stock of goods, then on hand, at the store of Levy and Anker." On the 7th of July, 1842, Levy and Anker made a general assignment of their estate to Benjamin F. Hunt, Esq. for the benefit of such of their creditors as should, within thirty days after notice thereof, execute to them a release and discharge of their respective claims, and, after payment of the same, the surplus, if any, for the benefit of their creditors generally. Wm. B. Smith was afterwards appointed agent for the creditors to act with the assignee. On the 10th Aug. 1842, L. L. Levy and G. V. Anker filed a petition in the United States Court for the benefit of the Bankrupt Act which had been passed 19th August, 1841. The application of Levy was resisted by the New York creditors, on the ground that the mortgage and confession of judgment, of March and April, 1842, to the trustee, Anker, and the assignment of 7th July, 1842, were fraudulent under the Act of Congress, which prohibits undue preferences to the creditors of the petitioner. The objection of the New York creditors was sustained by the decree of the district Judge, who refused the certificate, and, on an appeal by the petitioner to a jury, as authorized by the Act of Congress, the verdict of the jury was in conformity with the opinion which had been expressed by the Judge. The second section of the Act of Congress, to which these transactions were pronounced obnoxious, provides that "all payments, securities, conveyances or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, &c. shall be deemed utterly void, and a fraud upon this Act; and the assignee, under the bankruptcy, shall be entitled to claim, sue for, recover, and receive the same

as part of the assets of bankruptcy, and the person making such unlawful preferences and payments, shall receive no discharge under the provisions of this Act." The certificate of discharge was accordingly refused, and James M. Walker, Esq. one of the defendants, was appointed assignee in bankruptcy. This bill is preferred on the part of the complainant as trustee, and prays, among other things, that the bond and mortgage of 10th March, 1842,

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and the confession of judgment of 1st April, 1842, may be declared valid and subsisting liens, and that B. F. Hunt, Esq. and W. B. Smith may account for the proceeds of sales of the stock of Levy and Anker, and the debts collected, and that James M. Walker Esq. the assignee in bankruptcy, may be declared to have no interest, and be perpetually enjoined from prosecuting his pretended claim, &c. There can be no doubt of the general proposition, that copartnership assets must be first applied to the payment of the creditors of the copartnership. The attempt, therefore, to subject the goods in the store of Levy and Anker, more especially if those goods were yet unpaid for, to the payment of the private creditor of L. L. Levy, could receive no sanction in this Court. But we are further of opinion, that the Act of Congress, and the judicial proceedings under it, are conclusive upon the subject. The securities given to the trustee, (the complainant,) in March and April, 1842, and the assignment of 7th July, 1842, by which those creditors who released within thirty days were entitled to the assets, were manifestly violations of the Act of Congress, and have been so judicially declared. The consequences are, also, pronounced by the Act, and can neither be misinterpreted nor avoided. The securities and transfers of property are declared to be "utterly void," and that the assignee in bankruptcy shall be entitled to sue for and recover the same as part of the assets of the bankrupt.

It is true, as was insisted in the argument, the assignee in bankruptcy might be required to file a cross-bill before his codefendants should be required to account to him. But *cui bono*? The rule on this subject is stated by Chancellor Harper, delivering the judgment of the Court, in *Bank v. Rose*, 1 Rich. Eq. R. 294, "Wherever, in the progress of a cause, a defendant entitled himself to a decree, either against the complainant or against a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit, and making his proofs anew, such dismissal will not be permitted." And he cites the authority of Lord Eldon, in *Chanly v. Latouche*, 2 Sch. and Lef. 718, that a "co-defendant may insist that he shall not be obliged to institute another suit for a matter that may then be adjusted between the defendants."

It is ordered and decreed that the decree of

the Circuit Court be reformed according to the principles herein declared, that it be referred to one of the Masters to take an account of the amount due to the complainant as trustee, under the bond of the 12th April, 1834, according to the construction herein declared, and that the complainant be at liberty to show whether any of the property included in the mortgage of that date, has been disposed of by the mortgagor, and under what circumstances, and that the Master report any special matter in relation to the

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same. It is further ordered *and decreed that the assignee and agent, under the assignment of the 7th July, 1842, account before the Master for the assets transferred to them under that deed; any final order in relation to these matters, being reserved until the hearing of the Master's report thereon to the Circuit Court.

JOHNSTON, CALDWELL and DARGAN, CC., concurred.

Decree modified.

3 Strob. Eq. 211

AARON C. SMITH, Ex'tr v. O. B. HILLIARD et al.

(Charleston, Jan., 1849.)

[Wills ⇐603.]

Testator devised and bequeathed to his daughter "and the heirs of her body, if no children, to her entire disposal," certain real estate, &c.—held that the daughter took an estate in fee simple, subject to be cut down to a fee conditional in the event of her having children.

[Ed. Note.—Cited in *Garvin v. Ingram*, 10 Rich. Eq. 137.

For other cases, see Wills, Cent. Dig. § 1357; Dec. Dig. ⇐603.]

[Wills ⇐602, 603.]

Whenever there is a doubt as to the quantity of the estate devised, or whether it is vested, the rule is to presume that the testator intended to give an absolute rather than a qualified estate, and a vested rather than a contingent interest; and even where the words import a contingency, but do not create a condition precedent, they give a vested interest to the devisee, subject, however, to be divested if the contingency should not happen.

[Ed. Note.—Cited in *Rivers v. Fripp*, 4 Rich. Eq. 297; *Mobley v. Cummings*, 35 S. C. 125, 14 S. E. 721; *Walker v. Alverson*, 87 S. C. 58, 63, 68 S. E. 966, 30 L. R. A. (N. S.) 115.

For other cases, see Wills, Cent. Dig. § 1357; Dec. Dig. ⇐602, 603.]

[Wills ⇐602.]

There is no rule of law which prohibits a testator from devising different estates in the same lands to the same person on the happening of successive events—so a testator may devise a fee simple which shall be cut down to an estate for life or years on the happening of a prescribed event; and a fee conditional is as subject to such defeasance as a fee simple.

[Ed. Note.—Cited in *Mobley v. Cummings*, 35 S. C. 125, 14 S. E. 721.

For other cases, see Wills, Cent. Dig. §§ 1351-1359; Dec. Dig. ⇐602.]

[Wills ⇐457.]

When a testator uses technical terms throughout his will the Court will not undertake to substitute other words for them or to disregard their legal effect, or to adopt their popular instead of their legal meaning; but when from the whole, or a part of the will, it is apparent that the words were not used in a strictly technical sense which would be at war with the general objects and the express provision in another part, the intention must then be gathered from the whole will, without giving a preference to any particular part.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. ⇐457.]

[Wills ⇐470.]

Effect ought to be given, not only to every clause, but even to every word of a will, if it can be, so as to carry out the intention of the testator, and to do this the several sentences of the will on the same subject must be collated together.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 988; Dec. Dig. ⇐470.]

Before Dargan, Ch., at Charleston, June, 1848.

Circuit Decree.

Dargan, Ch. Edward Shrewsbury, being seized of the real estate mentioned in the pleadings, on or about the 18th February, 1793, executed his last will and testament. He shortly after died, leaving the said will unrevoked and in full force and effect. Isham Williams, who was the husband of the testator's daughter and devisee, Eliza Williams, was nominated as one of the execu-

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tors of the will, and took upon himself the burthen and execution thereof, having qualified in that character on 2nd March, 1793. Not long after the death of the testator, Isham Williams and Eliza his wife, by lease and release bearing date 27th and 28th Sept. 1793, reciting the title and seizen of Edward Shrewsbury and the making of his will on the 18th February of that year, and the devise of the wharf in question to his daughter Eliza Williams, and further that they, the said Isham and Eliza Williams, had been married many years and had no children, and that the said Eliza Williams, with the assent of her husband the said Isham Williams, being desirous to alien, convey and dispose entirely of all her right, title, and interest in the wharf mentioned, in consideration of £2,000, paid by Thomas Rivers, Jr., conveyed and released the premises to the said Thomas Rivers in fee simple. On the 3rd October of the same year, Eliza Williams regularly renounced her inheritance, which renunciation was duly certified and registered. By indentures of lease and release, dated 4th and 5th of the same month, after reciting the last mentioned indentures and renunciation, the said Thomas Rivers, in consideration of £2,000, reconveyed the premises to Isham Williams in fee; who thereupon, on the 6th of said month, by indenture of release, after reciting that it had been agreed by the said Isham and Eliza,

that the said premises should be afterwards conveyed to a mutual friend, to such uses and trusts as should be therein declared, the said Isham Williams conveyed the said premises in fee simple to Richard Furman, in trust, among other things, for the joint use of the said Isham and Eliza during their joint lives, and at the death of either, leaving no issue of the marriage then living, to the absolute use of the survivor, his or her heirs forever; on which last mentioned deed Rebecca Shrewsbury, on the 24th January, 1794, regularly and duly renounced her dower as the widow of the testator Edward Shrewsbury. Eliza Williams died on the 20th October, 1844, leaving no issue, and, as I apprehend the facts, without ever having had any issue; and leaving the said Isham Williams surviving her. On the day of August A. D. 1846, Isham Williams departed this life, leaving a will, which has been admitted to probate, bearing date the 4th November, 1845; in which inter alia he devises as follows "I order and direct my executors to sell my wharf lands in Charleston, and all my other real estate, at public or private sale, upon such terms of cash and credit as they may deem expedient," and appointed Aaron C. Smith and Robert Brodie the executors of his said will. Aaron C. Smith became the sole qualified executor of the will, and in pursuance of the directions thereof, after due notice by advertisement, the said Aaron C. Smith, on the 10th of November A. D. 1846, exposed at public auction

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the said wharf, *on certain terms and conditions. At this sale O. B. Hilliard, M. C. Mordecai, Thomas J. Ker, and Benjamin F. Smith, became the purchasers as tenants in common, at the price of \$18,500.00, and did, by themselves or their agent, sign a written memorandum of the contract of purchase. The said purchasers, immediately after the contract of sale, were let into the possession of the premises, and have been in the use and enjoyment or the receipt of the rents and profits thereof ever since; no abstract of title was exhibited to the purchasers before the sale, but after the sale, (it does not appear to me how long after,) an abstract of title was delivered to them or their attorney. But it seems that the purchasers, by an agreement to that effect, took possession, on the condition that such possession should be no waiver on their part of any defects or incumbrances that might exist in regard to the title.

It would be as well to remark in this connection, that R. C. Williams, the brother, and, as he represents himself, the sole heir at law of Isham Williams, (who is also a party in the pleadings) denies the validity of the will of the said Isham Williams, and therefore of the sale of Aaron C. Smith the executor. The said R. C. Williams claims the wharf for himself, alledging that the testator was not of sound and disposing mind at the time

of its execution; denying also that the will was executed in a manner, as to form, that would pass real estate. In reference to this claim, I will simply say here, that if in the course of this investigation it shall become necessary, an issue devisavit vel non will be ordered to try the validity of the said will.

The following persons, to wit, Edwd. C. Shrewsbury, John L. Shrewsbury, Anna H. Shrewsbury, John B. Adger and wife, Elizabeth K. formerly Elizabeth K. Shrewsbury, Dr. William Moultrie and Louisa his wife, formerly Louisa Shrewsbury, Mrs. Ann M. Brown, William Rogers, Thomas Williams and Mary his wife, formerly Mary Shrewsbury, and Stephen J. Shrewsbury, also set up a claim to the estate, as having reverted to them as the heirs at law of the testator Edwd. Shrewsbury, by virtue of the provisions of his will.

After the foregoing development of the facts of the case, and the state of the pleadings, I proceed to discuss in order the questions that are presented. And the first question necessary to be discussed and adjudged, is that of the reverter.

The clause in the will under which this question arises is as follows. "I give and bequeath unto my beloved daughter Eliza Williams, and the heirs of her body, if no children, to her entire disposal, one wharf with two stores thereon, one of brick and one of wood, likewise four carpenters, Peter, Luck, Adam, and Dublin, likewise one half moiety of a lot of land given me by Mrs.

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Johnson near the north gate of *Charleston, forever." The word "forever" seems rather out of place, and in the natural collocation of the members of the clause, should be transposed. The words "if no children to her entire disposal" are obviously an interpolation, occurring after a considerable erasure. No suspicion, however, exists as to authenticity of the interpolated words. The word "forever" should in reading the sentence be placed after the words "heirs of her body," making the sentence as follows: "unto my beloved daughter Eliza Williams and the heirs of her body forever." Or it should be placed after the interpolated words, making that part of the sentence read "If no children, to her entire disposal forever." I attach, however, very little importance to the transposition of this word, or its meaning, as its natural signification exists independently, in both branches of the sentence. In the first, words of procreation, which are sufficient to create an estate of inheritance, imply perpetuity. And the same implication arises in regard to the last, on the words "to her entire disposal." These words are also sufficient of themselves (considering them as creating a power and not an absolute estate) to authorize the alienation of the fee. The word "forever" (it seems to me) however transposed, gives no

additional strength, except that which may be derived from the tautology. I have made these remarks in reference to that portion of the argument which turned on this point.

I proceed to the great question involved in the case; what estate did the testator, by this clause, give to Eliza Williams in the wharf devised? I give and bequeath, (he says,) "unto my beloved daughter Eliza Williams and the heirs of her body," the wharf in question. Had he stopt there, there can be no legal proposition clearer, than that the words would have created a fee conditional in Eliza Williams, and she having died without heirs of the body, the reverter to the heirs of the testator would now take effect. Have the interpolated words modified the technical signification of the first member of the clause, in such a manner as to give her a greater or a less estate?

In the first place, do the subsequent words enlarge the estate given to Eliza Williams in the first part of the clause? As that is beyond all question a fee conditional, if it is at all enlarged it must be enlarged into a fee simple. There can be no doubt that if an estate is devised to one generally, with a general power of disposition or appointment, it will carry the entire fee. But if an estate is given to one for life with a general power of disposition at the death of the devisee, this does not create a fee simple. And it was so decided in the case of Pulliam v. Byrd, 2 Strob. Eq. 134, and I incline to the opinion, that the same rule of construction would prevail, where any particular estate is given to the devisee with a general power

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of disposition or alienation; as for example where the estate given is a fee conditional. The rationale of the construction would be the same. The defined extent of the estate given, in the first place, rebuts the presumption that makes what would be otherwise considered as a mere power, an enlargement of the estate. In Tomlinson v. Dighton, 1 P. Will. 149, 1 Salk. 239, per Parker, C. J., the distinction was based upon the particular limitation and description of the estate given. Where the estate given is express and certain, the power to alien, though general, is a distinct gift—and does not operate by way of enlargement of the estate. But the power must also, to have the effect assigned to it in the argument, be unlimited and unconditional. In Edward Shrewsbury's will the power of alienation is unlimited as to the manner of its execution, but was not to be exercised except upon the contingency of there being no children. It is therefore not unconditional, and the condition negatives all presumption that he designed Eliza Williams in the first place to take a fee simple. My opinion is that he did design her to take a fee simple, on a certain contingency. Whether such was his intention, and whether such intention (if it exists) can be carried into effect, I will hereafter con-

sider. But I am now engaged upon the question whether the express estate in fee conditional, has been enlarged into a fee simple, (as has been contended,) by the subsequent words. The implication, to control the technical meaning of words creating a previous express estate, must be a necessary implication. No such implication arises here; but on the contrary the implication is the other way, and is consistent with the intention of the testator, to create such an estate as the technical import of the words in the first part of the clause would imply.

Did the testator mean by the subsequent words to qualify the phrase to "Eliza Williams, and the heirs of her body," so as to give her a less estate than a fee conditional; the estate imported by those words?—If this construction could prevail it would be by making Eliza Williams the tenant of a mere life estate, and the heirs of her body purchasers.

If the subject matter of the controversy were personal property, and the words "and if there should be no children," could be made to mean children in the popular sense, living at the time of her death, it might, perhaps, on the authority of some of the adjudged cases, be held to restrict the interest of Eliza Williams to a life estate, and to have made her issue (if she had any,) take as purchasers, by way of contingent remainder. But both the postulata of such a construction are wanting, and therefore it cannot prevail. But what estate did the testator mean to give to Eliza Williams? We have seen that he in the first part of the clause gave her a fee conditional. Did he mean to qualify that estate by the interpolated words? And in the first place, what did he mean by the word "children" and the words "and if no children," &c. My

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opinion is that the word "children" is in that sentence nomen collectivum, and was used and is to be construed synonymously with the words "issue" or "heirs of the body." Such a construction would not be contradictory to the preceding clause, nor result in the abridgement of the estate given to his daughter, and the destruction of the estate in fee conditional previously created. To construe the word "children" in the popular sense, would be to make the testator mean that the devisee should have the power to alienate the property from her issue as well as his own, (for whom he had carefully provided by apt words,) provided there were no persons to answer the description of "children" in the ordinary sense of the word; to the exclusion in fact of grandchildren or remoter issue in the line of direct descent; such I think was not the testator's purpose, either in fact or according to those rules of interpretation by which his language is to be construed.

In Davis v. Stephens, 1 Doug. 321, there

was a devise of the fee simple to the testator's son William, and his child or children, forever, but if he died before 21 years of age, the testator gave the estate to his wife, forever. It was held that the word children meant heirs of the body, and that William took an estate tail. In *Wild's case*, 6 Co. 19, the word "children," when relating to persons unborn, was construed as synonymous with issue, and was held to create an estate tail. The rule stated in this case is, that where lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate tail.

The rule established in this case has been uniformly followed. Thus in *Seale v. Barber*, 2 Bos. & Pul., where the devise was to testator's son, and his children lawfully begotten, with power for him to settle the estate on any of them, and in default of such issue, then over to a daughter, it was held to create an estate tail. The word "son," has also been frequently construed a word of limitation: as where under a devise to one, and if he died not having a son, the word "son" was taken to be used as nomen collectivum, and the devise was held to be an estate tail. I will simply refer to the cases as collected in *Powell on Devises*, 565, and 2 *Jarman on Wills*, 307.

These are cases in which the words children and son, have been construed as words of limitation, and as creating a fee tail, where there were no preceding words, directly creating that estate. With how much more propriety may that construction be given to them when it is done for the purpose of preventing repugnancy to and a destruction of a fee conditional already created. The words of the will are not if there be "no children of Eliza Williams," but the phrase is "if no children, to her entire disposal." If no children of whom? It is uncertain. And if no children—at what time? It is equally uncertain. It is obviously no strained interpretation which would construe the word "children," as synonymous with

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*"issue." Whatever, then, may have been the further meaning of the testator, he intended to suffer the fee conditional which he had created, to remain intact, until it expired by its own natural efflux, the failure of heirs of the body. On the failure of that estate by its natural termination he intended to limit another estate, to vest in possession only at that time. Did he endeavour to effect this object by giving a direct estate to Eliza Williams in fee, after the termination of the fee conditional, or did he mean merely to give her a power of creating such an estate? I say nothing now of the validity of such estates or interests; for I am speaking more particularly as to what the testator meant, or desired to do.

My opinion is that he meant to give to

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Eliza Williams, after the termination of the fee conditional, a fee simple directly, without the intervention of a power.

The words "to her entire disposal forever," of themselves go very far towards implying an absolute estate.

If a testator uses words of technical nature only, then they must receive their technical construction. But we may look through the entire will for its true sense and meaning; and when we gather from the obvious import of the context, in what signification he uses certain words, we must give them the sense which the testator has adopted.

In looking through this will we find that the testator has uniformly used the words which have in this clause been construed in the argument as conferring a power, for the purpose of creating a fee. In the first place he says, "as to my real and personal estate I give and dispose thereof." He then gives a house and lot to his wife for life, and at her death to return to his "daughter Eliza Williams at her sole disposal forever." He likewise leaves certain negroes "to the sole disposal" of his wife. He next proceeds to say, "I likewise bequeath to my wife and to her sole disposal, one half moiety of a lot of land," &c. Now in all these instances of the use of this phrase, it is most manifest that they were used for the purpose of creating, and do actually create, a fee simple. And it is equally manifest, that the same phrase in the clause we are construing, was used by the testator with the same import. And although this establishes the meaning of the phrase "to her sole disposal," the structure and provisions of this whole clause are so entirely different from the preceding devises, where direct fees are at once created, that none will deny but that the testator here intended to create a different estate. Had he intended in the controverted clause to give her a fee simple directly, he would have employed the same language which he did in the preceding clauses, where he so effectually accomplished that purpose.

From the foregoing considerations my mind is irresistibly led to the conclusion that the testator created, and intended to

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*create, as to the wharf, a fee conditional in Eliza Williams, and that without intending to abridge or restrict that estate, he intended to limit upon it, at its natural efflux, an estate in fee to the said Eliza Williams. This limitation, as a matter of course, would be void; for it could not take effect either as a contingent remainder or executory devise. Upon the question whether a contingent remainder or executory devise can be limited upon a fee conditional, I have, in the case of *Buist and others v. Sommers and others*, heard by me at this term, expressed my opinion and given my reasons at large. I need not reiterate them upon this occasion,

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but refer to that case as affording the grounds upon which I hold that such interests cannot be supported.

In the event that such should be the opinion of the Court, it was contended that the doctrine of merger applied, and that Eliza Williams being the owner of an estate of inheritance and also being sole heir at law of Edward Shrewsbury, the interest that remained in him descended to her, and that there was a merger in her, therefore, by which she was seized of the entire fee.

The reversionary right of the donor dependant upon the natural termination of a fee conditional, is not an estate, but what is called a possibility of reverter. It is not devisable or assignable; nor descendable, even, in a proper sense, for it does not descend to or vest in the heirs of the donor intermediately living, before the termination of the precedent estate in fee conditional. But it falls upon and vests in those who can make themselves the heirs of the donor when the reverter takes place. The doctrine of merger does not apply. *Adams v. Chaplin*, [1 Hill Eq. 265.]

It was emphatically asked by one of the counsel in the argument, why might not the testator, by the same will in which he creates the fee conditional, dispose also of his possibility of reverter? This is precisely what this testator attempted to do, by giving to Eliza Williams a fee simple after the natural efflux of the precedent fee conditional to her. This was nothing more nor less than devising the possibility of reverter. The answer is obvious: by devising the possibility of reverter he would be limiting an estate after a fee conditional, by way either of contingent remainder or executory devise; which, as we have seen, the law will not permit.

What I have said and the conclusions I have drawn, would be sufficient to enable me to give my judgment, without alluding to another question that was much discussed on the trial. Though unnecessary, from the view which I have taken, I have no objection to express an opinion upon that question also. It was earnestly argued that the words "if no children, to her entire disposal" gave no estate, but was a mere power to alien in fee, upon conditions. And consider-

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ing it as *a power, it was contended on the one side that it was not duly executed; in which case the estate would revert to the same adverse claimants, the heirs of the testator; while on the other side it was contended that it was fully executed by the deed of lease and release to Tho. C. Rivers before mentioned. If the words in question convey a mere power, it is very clear that all acts done in pursuance of it, are developments of an efficacy or energy inherent in the will, and upon its authority must entirely rest for their validity. And another prin-

ciple is equally clear; that a testator cannot do, through the intervention of a power, and the agency of the person exercising it, that which he could not do by virtue of his own testatorial rights. If he cannot devise or alien his right or reverter dependant upon the termination of a fee conditional of his own creation, neither can he by his will clothe another with the power to do it. If, therefore, the testator gave to Eliza Williams a fee conditional, the reverter could not be affected by her deed.

But suppose that in conjunction with her estate in fee conditional (or whatever estate she took under the will,) she also had a power of alienating the fee simple. On this supposition I am of the opinion that the power was not executed in a formal and sufficient manner. The general rule certainly is, that if there be an interest and a power existing together in the same individual, and over the same subject matter, and a deed be executed or an act be done without special reference to the power, it will be applied to the interest, and not be construed an execution of the power. If there be a legal estate, on which the deed can operate, the power will be considered as not having been invoked. Indeed the rule was so far extended in *Shaw v. Cadogan*, cited in *Sug. on Pow.* 282, that in an elaborate discussion, it was held that a general disposition by will would not carry property over which the testator had only a power, unless it could be inferred that the testator did actually mean to execute the power. Where the will could not operate otherwise, it has been generally held to be an execution of the power; but where there is an estate or interest, on which the deed or will may take effect independently of the exercise of the power, it will not be considered an exercise of the power, unless it be referred to.

Now to make an application of the principle to this case. Eliza Williams had a fee conditional estate in the wharf; or at least some estate derived under the will. There is allusion made to the will, but it seems to be by way of reciting her title, rather than as being referred to for the derivation of a power. There is not the slightest allusion to the exercise of a power, but the implication is the other way; for the preamble recites that the said Eliza Williams is desirous to alien all her right, title and interest in the wharf

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mentioned, *a form of expression certainly not applicable to the exercise of a mere power, that gives no right, title or interest. And in the deed of trust which Isham Williams finally makes of the premises to Richard Furman, in pursuance of a post nuptial arrangement recited in the deed, there is still no mention of the exercise of any power derived under the will. The deed of Isham Williams and Eliza Williams to Thomas C. Rivers, is the joint deed of them both. If the supposed power was invoked in that

deed, the joinder of the husband was entirely unnecessary, as the execution of the power without his joining in the deed would have been equally efficacious.

If they had had issue, this deed would have barred the issue from taking *per formam doni*, and in fact would have carried the fee. Here, therefore, is enough for it to operate upon, without inferring that there was an intention to execute the supposed power. There is no sufficient evidence before me to show that the deed was informal merely; or that it did not actually embrace all the objects intended by the parties to it. Against the informal execution of powers, equity will relieve except as in favour of the husband. Where the power is informally executed by a femme covert in favour of the husband, equity will not interpose. If the rule admitted of being made to yield to circumstances, there are no special ones in this case favourable to the husband to induce the Court to reform the deed, as an informal execution of a power.

My opinion is, as before intimated, that Eliza Williams took a fee conditional under the will, not subject to any valid ulterior limitations, and that on her death without issue to take *per formam doni*, the estate reverted to the right heirs of the testator Edward Shrewsbury, who have now, as tenants in common, a right to the partition thereof.

It is ordered and decreed that the parties to this suit who are the purchasers of the said wharf from the executor of Isham Williams be discharged from the obligation of their contract for the same. It is further ordered and decreed that they, the said purchasers, do account to the parties to this suit who are the heirs at law of the testator Edward Shrewsbury, for the rents and profits from the time that they have been in possession of the said wharf under the said contract of purchase, and that it be referred to master Laurens to report upon the rents and profits.

It is also ordered and decreed that the parties to this suit, who are the heirs at law of the said testator, have leave to apply at the foot of this decree for a writ of partition, to divide the said wharf among them according to their respective rights, or for a sale thereof, for the purpose of effecting a partition.

It is also ordered that each party pay his or her own costs.

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*1 An appeal was taken from this decree, after the hearing of which the Court pronounced the following opinion:

Per CALDWELL, Ch. In deciding the question, what estate in the wharf did Eliza Williams take under the devise? the intention of the testator must be collected from

¹ The Reporter received neither the grounds of appeal, nor a copy of the will which was the subject of litigation in this case.

his whole will, and not from a particular part. When bequests and devises are made in technical terms, and the context of the will does not qualify their meaning, the legal effect of the expressions must control the construction, notwithstanding the testator may not have understood them.

Effect ought to be given, not only to every clause, but even to every word of a will, if it can be, so as to carry out the intention of the testator, and to do this, the several sentences of the will on the same subject, must be collated together.

In the first clause of the will, the testator, by using the words, "at her sole disposal forever," clearly indicates what meaning he attached to them, in the devise he made of the house in which he lived, and it cannot be doubted he wished his daughter to have the fee simple, after his wife had enjoyed her life estate in the premises; in the concluding sentence of this clause he uses the following words, "the negroes I leave to the sole disposal of my wife; and, likewise, I bequeath to my wife, and to her sole disposal, one-half moiety of a lot of land, given me by Mr. Johnson, near the North gate of Charleston;" then follows the devise and bequest to his daughter, which closes with these words, "likewise, one-half moiety of a lot of land, given me by Mr. Johnson, near the North gate of Charleston, forever." From these expressions, it is manifest the testator intended to give his wife and daughter each a moiety of this lot in fee simple; and he uses the same phraseology in the preceding part of the devise of the wharf to his daughter. It would seem to follow, that a similar construction ought to be given to it, especially as a common intention appears to have pervaded the whole clause. From the general tenor of the will, the testator evidently intended to dispose of his whole estate, and there is nothing, except the expression, "heirs of her body," that indicates that he entertained the remotest idea that any thing was reserved, or was to revert. These words, standing alone, create a fee conditional at common law, as the statute "*de donis*" is not of force in this State; and the question is, shall they be construed as controlling, not only the general intention apparent upon the face of the will, but the particular phrase that immediately succeeds them, "if no children, to her entire disposal?" The integrity

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*of every instrument ought to be preserved, unless its several parts are so inconsistent as to render a reconciliation impossible. The testator appears to have had two views in framing this clause—first, to give to his daughter a fee simple in the wharf, if she had no children, but if she had children, then to give it to her and the heirs of her body; the former, and more enlarged estate, must naturally and necessarily precede the latter, otherwise the less would control the greater

estate, and the fee conditional would exclude the devisee from the fee simple to which she was entitled in the event of her not having children. As the devisee had been married several years without having had a child, the testator may be supposed to have considered it improbable that she would ever have children, and, therefore, his first thought would be to provide for her if that event should not occur, by giving her the estate absolutely, but if she should have children, then the natural course of his affection and bounty would be, to provide for them. These appear to have been the two principal objects of his will.

The testator did not intend that the estate he devised to his daughter should revert for the want of persons to take per formam doni as he has anticipated and provided for that event, by directing that if there were no children, (a word which he probably used as synonymous with heirs of her body) she should have the entire disposal of the estate.

From his using these terms in such close conjunction, it may be fairly inferred that his intention was, first to give her an estate in fee simple in the wharf, defeasible upon the event of her having children, (heirs of her body) but as that was improbable, he could not have intended, if it never happened, that she should take a less estate, a fee conditional; had his intention been otherwise, he would never have superadded these important words, "if no children, to her entire disposal."

In popular parlance, the word heir is generally used for child, and the Court held, in *Moone and others v. Henderson and others*, 4 Des. E. R. 459, that where a testator devised "that if either of my aforesaid children should die without an heir, then his share shall go to the rest of my children"—that the word heir was synonymous with child, and the limitation over was not too remote. Where a testator uses technical terms throughout his will, the Court would not undertake to substitute other words for them, or to disregard their legal effect, or to adopt their popular instead of their legal meaning, but when, from the whole or a part of the will, it is apparent that the words were not used in a strict technical sense, which would be at war with his general objects and the express provisions in another part, we must

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then gather the intention from the whole will, without giving a preference to any particular part.

There is no rule of law that prohibits a testator from devising different estates in the same lands to the same person on the happening of successive events, such as an estate for years on the birth of the devisee's first child, for life on the birth of a second child, and of inheritance on the birth of a third child.² So a testator may devise a

fee simple which shall be cut down to an estate for life or years on the happening of a prescribed event; and a fee conditional is as subject to such defeasance as a fee simple. The birth of the children contemplated by the testator, must occur within the life of his daughter, and I think it plain, from the provisions of his will, that no other children but those of his daughter were contemplated. His object must have been, that the estate should vest in his daughter immediately on his death; she had then no children, and if the words "heirs of her body" had not been in the will, she would undoubtedly have taken at that time a fee simple, and can they qualify that estate which was devised upon an express contingency which has not happened? If any meaning can be attached to the words, "if no children, then at her entire disposal," they must signify that the testator either intended she should have a fee simple absolute if she had no children at his death, or that she should ultimately have such estate if she had no children during her lifetime; in either event her estate has turned out indefeasible. If the words "heirs of her body," were intended to create a fee conditional, then the inquiry is, what was the contingency upon which her estate in fee simple was to be cut down, and has it happened? If the event was her having children, as would seem to be inferable from the other expressions of the will, a fee conditional has never arisen, as the persons have never been born that were intended to be benefitted by that provision. To give a different construction, would reverse the natural order of events, and before we adopt such an inversion, we ask was there any reason in the testator's first giving his daughter a fee conditional, and then enabling her to enlarge it, (in the event of her having no children) by the execution of a power? Her condition at his death, and the improbability of her having children, repel such presumption; it is not probable that he intended to devise her a less estate, to be increased on an event that could not be ascertained with certainty, until the opportunity of enjoying its enlargement to a fee simple had passed. Whenever there is a doubt as to the quantity of the estate devised, or whether it is vested, the rule is, to presume that the testator intended to give an absolute rather than a qualified estate, and a vested rather than a contingent interest; and even

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where the words import a contingency, but do not create a condition precedent, they give a vested interest to the devisee, subject, however, to be divested if the contingency should not happen.³

The case of *Goodlittle v. Otway* has been relied on as bearing a resemblance to this

² *Fearne on Rem.* 1 *Jarman on Wills*, 734-5.

³ 6 Stat. of S. C. (1824) 237. *Fearne on Rem.* 242. *Smith on Exr. Ints.* 164.

case; there, a devise was made to one for life, and after her death, to her lawful issue, and if she should have no issue, to have power to dispose of it at her will and pleasure; as the contingency of issue never happened, it was held that she took a fee. It is difficult to find any case that is a parallel to the one under consideration, and its decision must, therefore, depend upon general principles applied to the construction of the will, much more than upon its analogy to adjudged cases. If the testator, by using the terms heirs of her body, intended she should only take a fee conditional, then he has defeated what appears to have been the main object of the devise, to give her a fee simple if she had no children; but if the latter and larger estate was vested in her, subject to the contingency of her having children, on which event the fee conditional could take effect, then the whole will is in harmony, and every part of it will take effect as the testator intended.⁴

⁴ Snow v. Poulden, 15 Cond. Ch. 187. Newman v. Newman, 16 Ib. 51. 2 Wilson Rep. 6 and 7.

As to the doctrine of powers, which has been involved in this discussion, we do not think it applicable to the case; neither do we think that the correctness of the previous decisions of our Courts on the subject of a fee conditional, has been drawn into controversy in determining this case.

It is, therefore, ordered and decreed, that the order and decree of the Circuit Chancellor directing a writ of partition to issue, be set aside; and it is adjudged and declared, that Isham Williams had a fee simple estate in the wharf described in the pleadings; and it is further ordered and decreed, that an issue be made up of *devisavit vel non*, as to the premises aforesaid, and sent to the court of law; in which issue his executors shall be the actors, and his heirs and next of kin shall be the defendants, and that the result of said issue be returned to this Court.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch. I dissent, and adhere to my Circuit decree, to which I refer for my unchanged opinions.

Decree reversed.

CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

COURT OF ERRORS OF SOUTH CAROLINA

DURING THE PERIOD COMPRISED IN THIS VOLUME.

3 Strob. Eq. *225

*JAMES McLEISH v. EDWARD C. BURCH
et al., Ex'rs.

[*Slaves* ⇨13.]

Testatrix bequeathed to her Executors "and the survivor of them, his Executors and Administrators," several slaves, with their future issue, "with this special charge, that no other service or wages shall be required of them, than may be sufficient to pay their taxes." She also bequeathed certain sums of money to be employed by her executors, for the education of the slaves. The court *held*, that both the slaves and the legacies bequeathed to them, were the absolute property of the executors, as legatees under the will, and that the charge as to the service to be rendered by the slaves, was mere advice, which depended for its observance upon the will of the donees, and not a trust which could be enforced in any court in favor of the slaves.

[Ed. Note.—Cited in *Skrine v. Walker*, 3 Rich. Eq. 263, 266, 267; *Broughton v. Telfer*, 3 Id. 438; *Heirs of David Morton v. Thompson*, 6 Rich. Eq. 375; *Ford v. Dangerfield*, 8 Rich. Eq. 108; *Blakely v. Tisdale*, 14 Rich. Eq. 94, 102.

For other cases, see *Slaves*, Cent. Dig. § 59; Dec. Dig. ⇨13.]

Before Caldwell, Ch., at Charleston, February, 1847.

The bill sets forth, that James McLeish is the assignee of Robert M. Rivers, the nephew and legatee of Ann McCants, a copy of whose will is filed with the bill, and marked exhibit A; that the said Robert M. Rivers is one of the legal distributees of the property of the said Ann McCants, undisposed of by the said will; that Edward C. Burch, Josiah Taylor, and Robert R. Taylor, were appointed executors of the said will, and that Edward C. Burch and Robert R. Taylor have alone acted as such executors; that the testatrix left several negroes undisposed of, which have since been sold by the acting executors, for sums and to persons unknown to the complainant; that there are certain

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clauses in the will of *Ann McCants, in evasion and violation of the Act of Assembly forbidding the emancipation of slaves; and that these clauses have been carried into effect by the acting executors. The bill prays that the said acting executors may full, true, and perfect answers make, to every tittle, matter, and thing charged in the bill, as ful-

ly as if particularly interrogated thereto; that such part or proportion of the property as may be undisposed of by the will, to which complainant may be entitled, in common with the other distributees, may be decreed to complainant, for the use of Robert M. Rivers; that all illegal clauses in said will be vacated; and that the court do order distribution of the property contained in such illegal clauses to the heirs at law; and for other and further relief, &c.

The following are the clauses of the will referred to in the complainant's bill.

Second clause. "To Edward Mallory Burch, son of Edward Christopher Burch, I devise my house and lot in Savage street, with the following reservations, that is to say:—reserving to Mrs. Burns, during her life, the occupation of the garret room she is now in; and also reserving the south-easternmost extremity or portion of the said lot, which said portion extends to the west, as far as the garden fence, and to the north, as far as a line drawn from the corner of the said garden fence, to the corner of the small building adjoining the stable, together with a right of way to the same through the yard—which said portion, with the said right of way, I do hereby devise to my executors hereinafter named, or such of them as shall qualify on this my will, the survivors or survivor of them. In trust, nevertheless, for the use, occupation and benefit of my servant Nancy, and her children, Louisa, Mary and Leah, it being her desire and intention to build a house on the same for herself and her children, which she has hereby permission to do."

Eighth clause. "To Louisa and Mary, children of my wench Nancy, one hundred dollars apiece, to be employed by my executors for their education. To Augustus, son of my wench Mary Horry, fifty dollars, to be applied in like manner."

Ninth clause. "To Edward C. Burch, I leave the piece of land on James Island, adjoining Mr. Matthews' tract, containing ten or eleven acres, lately occupied by my nephew, Robert Mallory Rivers, together with old Sary, her son Harry, and Miley, in trust to permit the said Robert M. Rivers to use

and enjoy the same during his life, and after his death, to and for the use, benefit and behoof of the children of the said Robert M. Rivers."

Eleventh clause. "To my friends and executors, Edward C. Burch, Josiah Taylor and Robert R. Taylor, and the survivor of them, his executors and administrators, I leave my

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*wench, Nancy, and her children, Louisa and Mary, and her future issue, by reason of her faithful services, and my wench, Mary Horry, a mulatto, and her child, Augustus, and any other children she may have, with this special charge, that no other service or wages shall be required of them than may be sufficient to pay their taxes."

Fifteenth clause. "Lastly, I nominate, constitute and appoint, Edward C. Burch, Josiah Taylor and Robert R. Taylor, executors of this my last will, who, after paying my just debts, and the two legacies last provided, are earnestly requested to fulfil the same in every other respect."

Codicil. "In the first place, I revoke and make null the devise of the south-eastern extremity of my lot in Savage street, to my executors, with the trust therein mentioned; and in lieu thereof, I give, devise and bequeath, to my said executors, another portion of my said lot, measuring in depth, from Savage street, twenty-five feet, and in width, thirty feet, and bounded on the West by Savage street, and on the South, by land of the estate of William Rivers."

"I give Nancy twenty dollars for a mourning suit. I also give my negro girl, Leah, to my executors, with the same trusts as specified concerning Nancy, her mother, and her sisters, Louisa and Mary. I also give to the said Leah, the sum of one hundred dollars, payable, as the legacies to her mother and sisters, by Edward C. Burch. I give Lucy, Dido, Anny and Mary Horry, five dollars each."

The answer denies all knowledge of the assignment of Robert M. Rivers to complainant, and prays that before any decree is made, there may be full and regular proof of such assignment. The defendants further answering, admit the death of Mrs. McCants; the execution of the will, and that the same was duly proved by these defendants, who, with Josiah Taylor, were appointed executors, and that these defendants have alone qualified, and have acted as executors: that testatrix, by said will, devised to the said Robert M. Rivers the sum of one hundred dollars, charged upon a tract of land on James Island, which was devised to the defendant, Edward C. Burch, and charges that the said sum has long since been paid to the said Robert M. Rivers.

The answer further admits the devise of a small piece or parcel of land on James Island, containing ten or eleven acres together with three slaves, old Sary, her son Harvey, and

Miley, to Edward C. Burch, "in trust, to permit the said Robert M. Rivers to use and enjoy the same during his life, and after his death, to and for the use, benefit, and behoof of the children of the said Robert M. Rivers." And the said Edward C. Burch saith, that although he believes the said piece or parcel of land has remained unoccupied since the death of testatrix, it has only been so because

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no means have *been found to make any profitable use of it, and the said Robert M. Rivers has had the full permission of the said Edward C. Burch, to use and enjoy the same; and that both Robert M. Rivers and Edward C. Burch have made frequent but fruitless efforts to rent the said land; that the old woman, Sary, is valueless, and a mere incumbrance, and has been kept by the said Edward C. Burch, at his own expense, and at the request of the said Robert M. Rivers, because she was an incumbrance, and no other place could be found for her; and that the slaves, Harvey and Miley, have been hired out by the said Edward C. Burch, and their wages punctually and regularly paid to the said Robert M. Rivers.

The defendants further answering say, that the devises and bequests aforesaid, comprise all the benefits given to the said Robert M. Rivers, by the will aforesaid, but admit that the testatrix left a small portion of her estate undisposed of by her will, and that the same is distributable among the statutory distributees, of whom the said Robert M. Rivers is one; and that the testatrix having left surviving her a sister of the half blood, and five nephews and nieces, children of four deceased brothers of the whole blood, the said Robert M. Rivers, who is the only child of one of the said deceased brothers is entitled to one-fifth part of said undisposed of or residuary estate, after payment, thereof, of debts, legacies not charged on specific funds, and the expenses of the administration. And these defendants say, that the said residuary estate consisted chiefly of five slaves, children of slaves specifically bequeathed, but who were born after the making of the will; and that by permission of the Ordinary, and with the consent of all the distributees aforesaid, the said slaves were sold by public auction, and the proceeds of sale received by the defendant, Edward C. Burch, who has managed all the pecuniary transactions and accounts of the estate of testatrix. And Edward C. Burch saith, that he has disposed of the said proceeds, and all other residuary estate of testatrix, in a due course of administration, in the payment of debts, legacies and expenses of the administration, except the sum of between three and four hundred dollars, which would have been distributed by this time but for this suit; and that he has regularly filed accounts of his transactions as executor, in the Ordinary's office, and is ready to produce the same.

And these defendants further answering say, that at the sale aforesaid, Maria, one of the five slaves aforesaid, being the child of Miley, one of the slaves bequeathed to the defendant, Edward C. Burch, in trust, for the said Robert M. Rivers for life, and after his death, for his children, was, by consent of said Robert M. Rivers, and the other distributees, bought in by this defendant, at the

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price of three hundred and fifty dollars, upon the same trusts, to wit:—for said Robert M. Rivers for life, and after his death for his children; and it was agreed by and among the said distributees, that the price of the said slave, Maria, should not be paid in money, either by the said Edward C. Burch, or the said Robert M. Rivers, and his children—but that the same should stand for, and be in discharge of, the said Robert M. Rivers' share of the undisposed residuary estate of the said testatrix. And these defendants say, that the said slave, Maria, is not only more than a full equivalent for his said share, but that the estate for his life in the said slave, is at least of equal value with any possible amount which he would have been likely to receive from the said residuary estate; and that the aforesaid arrangement was intended to be, and in fact is, to a considerable extent, a gift by the other distributees to the said Robert M. Rivers and his children; and they submit that the said Robert M. Rivers, and those who claim under him, are bound by his consent to the said arrangement, and that neither he nor the complainant have any right to invalidate the said contract. The defendant, Edward C. Burch, further answering saith, that after the sale aforesaid, he permitted the said Robert M. Rivers to have possession of the said slave, Maria, to wait upon him and his family, as a servant, and was subsequently astonished to learn, that the said Robert M. Rivers had made an attempt to dispose of the said slave, to the complainant, James McLeish, by an absolute sale; whereupon this defendant interfered, and recovered the possession of the slave Maria. And he respectfully submits, that after this, the Court will not compel him to surrender the possession of the said slave, or any other of the slaves bequeathed to this defendant, in trust for the said Robert M. Rivers for life as aforesaid, either to Robert M. Rivers or complainant; and, at all events, not without requiring the most ample security for the re-delivery of the said slaves, after the death of the said Robert M. Rivers, for the benefit of his children, who are entitled in remainder.

As to the allegation by complainant, that there are certain illegal clauses in the said will, these defendants further answering say, that they suppose that the said allegation refers to certain clauses in said will, by which the testatrix bequeathed a faithful old servant, Nancy, and her children, Louisa, Mary

and Leah, and another slave called Mary Horry, and her child, Augustus, to her executors, upon the charge that no other service or wages should be required of them, than would be sufficient to pay their taxes; and also directed, that the said slave should be suffered to reside on a part of a lot of land which testatrix devised to Edward Mallory Burch, the son of this defendant, Edward C. Burch, and that they should be permitted to erect a

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house on the said lot of land; and, finally, left to the said slaves certain small pecuniary legacies, charged upon a tract of land which was devised to this defendant, Edward C. Burch. And in reference to these provisions of the will, these defendants say, that so far as they relate to the woman, Mary Horry, and her son, Augustus, they have been rendered nugatory, by the testatrix having sold and disposed of the said slaves in her lifetime; as to the pecuniary legacies to the said slaves, that they have not been paid, with the exception of twenty dollars to Nancy, to purchase mourning; and that whether legal or illegal, neither the complainant nor Robert M. Rivers can have any interest in them, for, being charged upon a specific tract of land, if the legacies are void, the benefit enures to the devisee of that land; and with regard to the permission to reside on a part of a lot of land, and to erect a house thereon, that the house was erected by the testatrix in her lifetime, after making her will; and that although Nancy and her children have been permitted to reside in the said house since the death of the testatrix, in the same manner that they did before, yet these defendants are advised and submit, that this is a matter which concerns only the devisee of the land, and not the complainant or the said Robert M. Rivers. And as to the bequest of the said slaves to these defendants, with the charge not to exact of them other service or wages than are sufficient to defray their taxes—these defendants admit that they have accepted the said bequest, and that they have, so far, complied with the injunction of testatrix in relation to the said slaves; but they deny, that in doing so, they have done any thing illegal, or in any way violated or evaded the law against the emancipation of slaves. They have regularly paid the taxes of the said slaves, as slaves, and have, in every particular, exercised over them the supervision and control of owners; they have not turned the said slaves loose upon society—but continued to be responsible to the community as owners of the said slaves; and, unless there be some law with which these defendants are not acquainted, requiring owners of slaves to exact from their slaves the maximum of labor and services of which they are capable, there is no circumstance in the condition of the slaves aforesaid, which brings their case either within the letter of the law against

emancipation, or within the mischief which those laws were intended to suppress. The said slaves were treated in precisely the same manner by the testatrix during the latter years of her life; and hundreds of faithful old servants are so treated by their grateful masters. Nor can these defendants persuade themselves, that the laws of South Carolina, and the laws of humanity, are so opposed to each other, as that kindness to faithful servants, or even to their children, is stigmatized

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as illegal in this State. And *these defendants submit, that what a testator may lawfully do, he may lawfully enjoin to be done by his executors; and that if the testatrix was at liberty to treat her slaves with kindness in her lifetime, it was equally competent for her to require her executors to do the same after her death. But were it otherwise, these defendants submit, that the charge to the executors is not a trust technically, but a mere injunction, binding on them in conscience only, and not affecting the bequest of the property to them—and is, therefore, a matter with which neither the complainant nor the said Robert M. Rivers, have any concern, or any right, title or interest therein, which authorizes them to call these defendants into question in relation thereto.

Decree.

Caldwell, Ch. The defendants' exceptions to Master Laurens' report, present the questions arising in this case. The first exception is, "that the Master has erred in recommending that the defendant, Burch, be ordered to deliver the girl, Maria, to the complainant, as vendee of Robert M. Rivers; there not being a tittle of proof of any title in Robert M. Rivers, except of an estate for life, as set forth in the answer, which has been rejected by him; and if the estate for life is accepted, then security for the return of Maria, and her issue, on the death of Robert M. Rivers, should be given, before a delivery could be lawfully required. And if the life estate is not accepted, then, it is respectfully submitted, that Maria is still the property of the estate, and Robert M. Rivers or his vendee can only be entitled to his distributive portion, to wit—one-fifth of the residuary estate, including Maria." Ann McCants, by her will, inter alia, devised and bequeathed as follows:—"to Edward C. Burch, I leave the piece of land on James Island, adjoining Mr. Mathews' tract, containing ten or eleven acres, lately occupied by my nephew, Robert Mallory Rivers, together with old Sary, her son, Harvey, and Miley, in trust, to permit the said Robert M. Rivers to use and enjoy the same during his life, and after his death, to and for the use, benefit, and behoof of the children of the said Robert M. Rivers." The evidence, although not explicit, sufficiently establishes an agreement among the heirs of the testa-

trix, that Maria should be bought for the benefit of the children of Robert M. Rivers, and applied to the same uses as the land and slaves in this clause; and the testimony of Edward M. Burch, (in addition to the statement of the answer) proves, that when she was delivered to Robert M. Rivers, by one of the executors, he informed him of the terms, and that Hood was present, and near enough to hear the conversation. Such a gift can, no doubt, be created by parol, as well as by deed, either by way of trust, or as a direct gift, and as the terms are definitely

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established by *reference to this clause of the will, the agreement must be carried into effect. *Brummet v. Barber*, 2 Hill, 543; *Welch v. Kinard*, *Speer's Eq.* 256. The legal estate was in the executors, and, therefore, the delivery to Robert M. Rivers was a mere bailment; and his vendee can only claim his life estate in Maria, which is all the interest Rivers is entitled to, according to the agreement. There was a sufficient consideration between Robert M. Rivers and the executors, to sustain this contract. Before the sale, he was entitled to a distributive share in Maria, and a life estate in her would be a very fair equivalent in exchange for it. The circumstances and habits of Rivers rendered it prudent that the executors should not deliver her to him upon any other terms. This exception is, therefore, sustained.

The second exception involves the question of the value of Maria's hire, with which the defendant, Burch, should be charged. If it could be ascertained what she would have brought at a public hiring, that would be a fair estimate of her value; but as that only occurred one year, we must rely upon the opinions of the witnesses, as to what she was worth. Mr. Whitter estimated her value, in 1843, at \$10; in 1844, at \$15; and in 1845, when she was hired out, she brought \$36, deducting her clothing, \$7 or \$8; and in 1846, she brought \$25. This witness, who appeared intelligent, and experienced on the subject of hiring negroes, stated that the best hand on James Island would only bring \$50 per annum, and the master would have to find the clothes; a woman would bring but \$40, and he has known such negroes as Maria, hired for food and clothes. Servants in the city will bring more. From this evidence, and the testimony of E. M. Burch, who appeared to think that for the greater part of the time she was only worth her victuals and clothes, I think the estimate of the hire at \$72 per annum too high, and that the defendant should only be charged with the amount specified in Mr. Whitter's testimony.

The third exception must conform to, and follow, the result of the first exception.

As the case will have to go back to the Master for a modification of his report, he can take evidence on the subjects of the fourth and fifth exceptions. The two items

amounting to \$13.57, although allowed by the Ordinary, may not have been particularly noticed, and may have been passed by him inadvertently; his decision is not conclusive upon the Master; but when there has been a long interval of time from the return, and the amounts are under 40 shillings, the presumption is, that the accounts are correct. It does not appear that the executor has been guilty of any default, or has done more than a prudent man would have done, under the circumstances, to save the property; and

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there is no good *reason why he ought not to be allowed his counsel fee, although not out of the estate generally, but out of the legacies of those whose interests he has represented and defended. These matters are referred to the Master for further report.

The sixth exception is, that the Master has also erred, in deciding that certain provisions made in the will of the testatrix, for the benefit of some of her slaves, are illegal; and that the benefit of these provisions sinks into the residue, and are to be distributed as in case of intestacy; whereas, it is submitted, that these provisions of the will are not illegal; and that if they were, they would not enure to the benefit of the statutory distributees of the testatrix. The clauses of the will to which this exception refers, are as follows:—"to my friends and executors, Edward C. Burch, Josiah Taylor, and Robert R. Taylor, and the survivor of them, his executors and administrators, I leave my wench, Nancy, and her children, Louisa and Mary, and her future issue, by reason of her faithful services; and my wench, Mary Horry, a mulatto, and her child, Augustus, and any other children she may have, with this special charge, that no other service or wages shall be required of them than may be sufficient to pay their taxes. I also give my negro girl, Leah, to my executors, with the same trusts as specified concerning Nancy, her mother, and her sisters, Louisa and Mary. I also give to the said Leah, the sum of one hundred dollars, payable as the legacies to her mother and sisters, by Edward C. Burch."

The 3d section of the Act of 1841 provides, "that any bequest, gift or conveyance, of any slave or slaves, accompanied with a trust or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void and of no effect; and every donee or trustee holding under such bequest, gift or conveyance, shall be liable to deliver up such slave, or held to account for the value, for the benefit of the distributees or next of kin of the person making such bequest, gift or conveyance." If the testatrix had died since the passage of the Act of 1841,¹ there could be no doubt that the clauses of the will relating to these slaves would be void and of no effect, and the question is, does her dying before 1841

change the conclusion? The testatrix, by these bequests, evidently intended that the negroes therein mentioned should be held in nominal servitude only, as "no other service or wages shall be required of them, than may be sufficient to pay their taxes." It is equally clear, that the bequest is a trust; the first clause uses the phraseology, "with this special charge;" and the second clause is, "I also give my negro girl, Leah, to my executors, with the same trusts as are speci-

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fied concerning Nancy," &c. The bequests of legacies of one hundred dollars to them, in addition to these expressions, leaves no doubt of testatrix intending that it should be a trust in the executors, without any profit to them, and solely for the benefit of the slaves.

The third section of the Act of 1841 is not framed with a prospective view, like the preceding section, but the words are comprehensive enough to embrace the past as well as the future; but the rules of construction are repugnant to retrospective operations of a law. "Retrospective laws," says Justice Story, "are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation, nor with the fundamental principles of the social compact."² *Calder v. Bull*, 3 Dall. 387, [1 L. Ed. 648;] *Brown v. Penobscot Bank*, 8 Mass. 445; *Call v. Hagar*, *Id.* 423. The Act cannot be considered as an ex post facto law, unless the bequest be considered as a contract. *Fletcher v. Peck*, 6 Cranch, 138, [3 L. Ed. 162.] An ex post facto law is, strictly speaking, only applicable to criminal cases, and is, either when an innocent act is converted into a crime, or the punishment of a crime increased, or different, or less evidence required to convict after the act was committed. *Society v. Wheeler*, 2 Gall. C. C. R. 138 [Fed. Cas. No. 13,156.] This clause of the constitution does not extend to civil rights or remedies. Would giving this section a retrospective operation impair the obligation of a contract, or divest the executors of their rights? If the State passed an Act to annul conveyances between persons, and declare the grantors should be invested with their former estates, it would be a violation of the constitution, as palpably as if the State should undertake to release the payment of a bond or promissory note.

The contracts of which the constitution speaks, are such as respect property, or some object of value, and confer rights which may be asserted in a Court of Justice. It is, however, not necessary that a beneficial interest should accrue to the obligee, to bring his rights within the protection of the constitution.³

A grant to a private trustee, for the benefit of a particular cestui que trust, is not less

¹ 11 Stat. at Large, 155.

² 3 Story, 266.

³ 2 Story, 259.

a contract, than if the trustee should take for his own benefit. No right to the slaves, which vested in the executors at the death of the testatrix, can be divested by the Act, although the executor's trust, to be performed, may be annulled; and if the executors have, by the terms of the bequest, become the absolute owners of the slaves, they would be exonerated from its obligation. The trust was, perhaps, originally lawful, although it appears to militate against the spirit of our laws, relating to the emancipation of slaves; and it is very doubtful whether they could have been compelled, even before the Act, to execute the trusts. It is clear the negroes could not have applied to the Court for that

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purpose; and, perhaps, no one but the trustee would have had a right of application for their benefit. The slaves were chattels, and, under the law, could acquire no right to enforce the trust against the executors. In *Bynum v. Bostick*, 4 Dess. E. R. 266, a bequest to a trustee, with directions to liberate, was held an attempt to evade the law, and void. A legacy to a slave is void, and falls into the residuum.

The peculiar phraseology of these clauses in the will, clearly indicate that the testatrix intended a trust. Whenever the expressions manifest an intention that the donee is not to have the beneficial enjoyment of it, they will bind the conscience of the trustee, and will, in Equity, effectually exclude his claim to any beneficial interest. *King v. Denison*, 1 V. & B. 273. Nor is it necessary that the donee should be expressly directed to hold the property to certain "uses," or "as trustee," or "interest." Any words that show clearly the intention of the parties to create a trust, will have the same effect. If a trust is imposed, the trustee cannot take beneficially, although the trust may be too indefinite for execution. *Gibbs v. Rumsey*, 2 V. & B. 296.

"When a gift is conclusively and absolutely impressed upon the character of a trust, the trustee will not, in any event, be entitled to the beneficial enjoyment, although the particular object of the donor's bounty becomes unable to take it.

"Wherever," says Lord Eldon, "there is a plain declaration, that a person, to whom property is given, is to take it in trust, then, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party will be a trustee, if not for those who were to take by the instrument, then for those who take under the disposition of the law."

Before the Act of 1841, the trust might have been carried out by the executors, if they saw fit; but since then, it cannot be executed or enforced without violating the law; the slaves having been bequeathed to them, in the character of executors, and not as individuals, and the object of the bequest

being, not for their personal benefit, but exclusively for the protection and benefit of the slaves, the executors are holding the slaves on an illegal trust, which is null and void. *Gordon v. Blackman*, 1 Rich. E. R. 61. If the Act of 1841 had not been passed, what would have become of the issue of these slaves, for the privileges to them are not extended to their issue? Would they not have been property of the testatrix, undisposed of by the will, and liable to distribution as other intestate property? The effect of the Act is only to abolish the privileges conferred upon the slaves by the will, and to render the execution of the trust unlawful; and the executors must, therefore, be considered as holding the slaves, and their issue, for the distributees and next of kin of the testatrix.

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*This exception is, therefore, overruled.

It is ordered and decreed, that the report be re-committed to the Master, and that he do modify the same, agreeably to these principles.

From this decree the defendants appealed, and moved that the same be reversed or modified, for the reasons following:

1. That so much of the decree is erroneous as declares, that the bequests of certain slaves to the defendants are rendered illegal and void, by reason of certain benefits directed by the will of the testatrix to be allowed to the said slaves, and that certain small pecuniary gifts to the said slaves, are also illegal and void, and, therefore, that the defendants must be considered as holding the slaves and their issue, for the distributees and next of kin of the testatrix, and, as it would seem, are not justifiable in delivering to the said slaves the pecuniary gifts directed by the will; whereas, it is respectfully submitted:—1. That the pecuniary gifts to the said slaves, and other provisions directed for their comfort, violate no law whatever, not even the Act of 1841, but are as consistent with the laws of South Carolina, as they are with the dictates of humanity. 2. That the directions contained in the will, relative to the time and services of the said slaves, are conditions of the bequest to the defendants, and not trusts; and, being conditions subsequent, do not invalidate the gift. 3. That, even if these directions be regarded as trusts, they were not illegal at the death of the testatrix, and cannot be rendered so by the subsequent enactment of the Act of 1841.

2. That the only relief prayed by complainant's bill, to which he has shewn, by evidence that he has any title, was the delivery of the slave, Maria, or, at the most, an account for Robert M. Rivers' share of that part of the estate of the testatrix, for which Maria was assigned to him for life; and as the contract, by which Maria was substituted for Robert M. Rivers' said interest in the estate, has been recognized and

established by the decree, and the decree has likewise declared that the complainant is not entitled to a delivery of Maria, his bill ought to have been dismissed with costs.

3. That the complainant has shewn no right to litigate the legality of the provisions made for the benefit of the slaves, referred to in the first ground of appeal, nor the validity of the bequest of the said slaves to the defendants; and there is, therefore, no ground for any decree in relation to them.

4. That the decree is, in other respects, against Equity and good conscience.

Bailey & Brewster, for the motion.

Wilson & Phillips, contra.

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*The Chancellors being divided in opinion on the question made by the first ground of appeal, sent the case up to the Court of Errors for its adjudication—and, after hearing argument, that Court decreed as follows:

Curia, per CALDWELL, Ch.—Mrs. Ann McCants made her will on the 17th of March, 1837, and a codicil thereto on the 25th of December following, and died in the year 1839; by the former, she devised and bequeathed, among other things, as follows: “To Edward Mallory Burch, son of Edward Christopher Burch, I devise my house and lot in Savage-street, with the following reservation, that is to say:—reserving to Mrs. Burns, during her life, the occupation of the garret room she is now in; and also reserving the southeasternmost extremity or portion of the said lot, which said portion extends to the west, as far as the garden fence, and to the north, as far as a line drawn from the corner of the said garden fence, to the corner of the small building adjoining the stable, together with a right of way to the same through the garden—which said portion, with the said right of way, I do hereby devise unto my executors hereinafter named, or such of them as shall qualify on this my will, the survivors or survivor of them, in trust, nevertheless, for the use, occupation and benefit of my servant, Nancy, and her children, Louisa, Mary and Leah, it being her desire and intention to build a house on the same, for herself and her children, which she has hereby permission to do.

“To my friends and executors, Edward C. Burch, Josiah Taylor and Robert R. Taylor, and the survivor of them, his executors and administrators, I leave my wench, Nancy, and her children, Louisa and Mary, and her future issue, by reason of her faithful services, and my wench Mary, a mulatto, and her child Augustus, and any other children she may have, with this special charge, that no other service or wages shall be required of them than may be sufficient to pay their taxes.

“To Edward C. Burch, I give my land on James Island, adjoining Mr. Gerardeau’s

and New Town Cut, containing about one hundred and forty acres, subject to the payment, within one year after my death, of the following legacies, making in all seventeen hundred dollars.” The testatrix then proceeds to bequeath various pecuniary legacies, and among them, “to Louisa and Mary, children of my wench Nancy, one hundred dollars a piece, to be employed by my executors for their education.”

By her codicil she devised and bequeathed, among other things, as follows:

“In the first place, I revoke and make null the devise of the southeastern extremity of

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my lot in Savage-street to my *executors, with the trusts therein mentioned, and in lieu thereof, I give, devise and bequeath to my said executors another portion of my said lot, measuring in depth from Savage-street, twenty-five feet, and in width thirty feet, bounded on the west by Savage-street, and on the south by lands of the estate of William Rivers. I give Nancy twenty dollars for a mourning suit.”

“I also give my negro girl Leah to my executors, with the same trusts as specified concerning Nancy, her mother, and her sisters Louisa and Mary. I also give to the said Leah the sum of one hundred dollars, payable (as the legacies to her mother and sisters) by Edward C. Burch.”

The matters of account were referred to one of the Masters, and on the coming in of his report, the defendants filed various exceptions thereto, but only one question, arising out of the sixth exception, has been submitted to the Court of Errors; that exception was, “that he erred in deciding that certain provisions made in the will of the testatrix, for the benefit of some of her slaves, are illegal, and that the benefit of these provisions sinks into the residuum, and are to be distributed as in case of intestacy: whereas it is submitted that the provisions of the will are not illegal, or if they were they would not enure to the benefit of the statutory distributees of the testatrix.” This exception was overruled by the Chancellor who heard the cause on the circuit, and the defendants on the appeal insist “that so much of the decree is erroneous as declares that the bequests of certain slaves to the defendants, are rendered illegal and void by reason of certain benefits directed by the will of the testatrix to be allowed to the said slaves, and that certain small pecuniary gifts to the said slaves, are also illegal and void, and therefore that the defendants must be considered as holding the slaves and their issue for the distributees and next of kin of the testatrix, and, as it would seem, are not justifiable in delivering to the said slaves the pecuniary gifts directed by the will: whereas it is respectfully submitted, 1. That the pecuniary gifts to the said slaves, and other provisions directed for their comfort, violate no law whatever,

not even the Act of 1841, but are as consistent with the laws of South Carolina as they are with the dictates of humanity. 2. That the directions contained in the will, relative to the time and services of the said slaves, are conditions of the bequest to the defendants, and not trusts, and being conditions subsequent do not invalidate the gift. 3. That even if these directions be regarded as trusts, they were not illegal at the death of the testatrix, and cannot be rendered so by the subsequent enactment of the Act of 1841."

Before the Act of 1800,⁴ an owner had a right in South Carolina, to emancipate his

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slave in any way he might see fit, without restriction. That Act prescribed a mode, and provided in case any slave was set free, otherwise than according to it, "it shall and may be lawful for any person whosoever, to seize and convert to his or her own use, and to keep as his or her property, the said slave so illegally emancipated or set free."

The Act of 1820 created an additional restriction upon emancipation, by enacting "that no slave shall hereafter be emancipated, but by Act of the Legislature." These were the only laws limiting the powers of the owners of slaves as to emancipation, when the testatrix made her will and died. Since then, in 1841, an important change has been made by an Act which, among other things, provides that "any bequest, gift or conveyance of any slave or slaves, accompanied with a trust or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void and of no effect; and every donee or trustee, holding under such bequest, gift or conveyance, shall be liable to deliver up such slave or slaves, or held to account for the value, for the benefit of the distributees or next of kin of the person making such bequest, gift or conveyance."

The first enquiry is, was the bequest of Mrs. McCants, of the slaves in controversy, to the executors, lawful in 1839? And secondly, what interest or estate did they take? These questions naturally precede those that may arise under the doctrine of trusts, which has been discussed in the circuit decree.

At the time testatrix made her will, there was no law that restricted the owner of a slave from bequeathing, giving or conveying a slave, with a trust or confidence, either secret or expressed, that such slave should be held in nominal servitude only: if it had been otherwise, why pass this clause of the Act of 1841? Nor can it be said that it was declaratory of what the law was before that time, as neither principle or case can be adduced to establish such a proposition. The object of the Act was to suppress and prevent a great and growing evil, which had counteracted, to a considerable extent, the

effects intended to be produced by the Acts of 1800 and 1820.

But these Acts were not framed to cover the case of one person transmitting to another the title of a slave with a trust of nominal servitude; for although the slave might be as free from service as his master, yet he was, nevertheless, a slave and subject to all the disabilities and servitude of his condition—he was liable for his master's debts—subject to sale, passed as chattels in case of intestacy, and might be bequeathed to another owner. Such a trust could not be enforced in any Court, in favor of a slave, and depended for its execution upon the mere will of the donee. In the case of

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*Cline v. Caldwell, 1 Hill Rep. 423, the Court held that the deed of a slave, absolute on its face, but with a secret trust, to let the negro go at large as a freeman, or with a view to future emancipation, was no violation of the Act of 1820, and was obligatory between the parties; until emancipation takes place the right of property remains in the grantee. There the conveyance was made by the owner of the slave John, to the plaintiff, who was a free negro, the wife of John, and her rights were protected. But if the owner, without a formal act of emancipation, permits his slave to go at large, and to exercise the rights and enjoy all the privileges of a free person of color, the slave would become liable to be seized under the Act of 1800, and the owner could not maintain trover for him without previously seizing him under the Act. Nor is a slave liable to capture, unless the owner parts with the possession, and permits him to go at large and act for himself.⁵

In the case of Frazier v. Frazier's executors, 2 Hill Eq. Rep. 314, which was decided in 1835, the Court laid down the principle that the owner of slaves may, by his last will, direct his executors to dispose of them in any way he could; and as he could, in his lifetime, have removed his slaves to another State, and there have emancipated them, he might, by will, direct his executors to do so; and they were accordingly ordered to remove and emancipate them.

The second enquiry is, what estate did the executors take in the slaves under the will?

From the terms of the bequest, it appears the whole estate that the testatrix had in the slaves, was left to and vested in the executors, who are entitled to their absolute ownership.

If the slaves had not been given to the executors without limitation or reservation, and the title had been left where the law vests it independently of the bequest, then the sole right of the executors would have arisen from their representative character, which would clothe them with nothing but a trust; but here they are vested with the

⁴ 7 Stat. of S. C. 442, 443.

⁵ Linam v. Johnson, 2 Bail. R. 137. Lenoir v. Sylvester, 1 Bail. R. 632.

legal estate *ex vi termini*, as legatees, and the alleged trusts merely amount to advice, which they may or may not follow as they see fit. If the testatrix had not bequeathed the slaves to any one, but required her executors to perform the trusts, by paying them their legacies, and permitting them to live free of service or wages, except what might be sufficient to pay their taxes, it would have constituted a very different case from the present, where she has transmitted the whole legal and equitable estate to the executors as legatees. The executors took possession of the slaves, and became their owners to all intents and purposes before the Act of 1841, disincumbered of the supposed trusts, which clearly fell within that class of duties that are denominated by writers on ethics, imperfect obligations, such as cannot be en-

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forced either in *law* or equity: neither the slaves or any one for them could set up their claims under the will, and whatever legacies or benefits were bequeathed to them, either belong to or can be controlled by their masters, and as far as the slaves are concerned, have no more weight than if such provisions had never been made in the will.

As soon as the executors took possession of the property of the testatrix, paid her debts and assented to the legacies, all the valid subsisting trusts, connected with these slaves and the bequests left to them, were executed and terminated, and there was nothing upon which the doctrine of indefinite and void trusts, when no personal benefit is bestowed upon the executor, can operate so as to create a resulting trust in favor of the next of kin. We are not disposed to controvert the views of the circuit decree on this subject, but we think they are inapplicable to this case. The title, both legal and equitable, in the slaves, having vested in the executors and legatees, before the passage of the Act of 1841, there was no such trust in existence as it contemplated, upon which it could attach. The civil law made a material distinction between natural and arbitrary laws: "the former being taught by nature and reason, have of themselves justice and authority, which oblige the people to obey them," but the latter are "as facts naturally unknown to man, and which are not binding until they are promulgated; from whence it follows that natural laws regulate both the time to come and the time past, but arbitrary laws have their effect only for the time to come, and it is to give them this effect that they are put down in writing—that they are promulgated, and that they are recorded, to the end that nobody may pretend ignorance of them."⁶

"As new laws regulate what is to come, so they may, as occasion requires, change the consequences that the former laws would

have had; but this is always without prejudice to the rights that any persons had already acquired."⁷ A learned writer, Dr. Taylor, commenting upon the principle, "*leges et constitutiones futuris certum est dare formam negoties, non ad facta praeferita revocari*," says, "the operation of law is naturally forward. Law is a direction of manners, prescribing what is to be avoided; but they are things in futuro only that can possibly come under that description, i. e. that can be avoided or not; for as no previous instituted law of man can prejudice or invalidate any future constitution, so no future constitution can operate to the prejudice of any past action. It is an equal absurdity, that law in the one case should valere ad ventura, or in the other ad praeferita."

Speaking of the changes of law, he adds, "the law giver cannot alter his mind to another man's disadvantage, or amend a law, which to another has created a right; and

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even *this* restriction wants to be restrained itself, for as to that man, he is bound; as to others, not. The whole of this is best seen by instance; as it is a matter of indifference whether the State permits a man to dispose of his effects by will, or directs them in the channel of nature to the heir at law, I can suppose one of the directions altered on a sudden, and wills, for instance, to be declared of no force hereafter: here many things will meet my reader's observation, which I have been discoursing upon above. 1. As either way of succession *vel ex testamento, vel ab intestato*, is indifferent, the law may direct either course indifferently, and change its mind uncontrollably.

"2. Those who were in possession of property before, under the operation of a will, were in possession of a right which no power can defeat by the alteration of judgment.

"3. For if an alteration of judgment, in the Legislature, can defeat a right created before then, a law can *valere in praeteritum*, which we have seen to be absurd."⁸

When the testatrix made her will and died, it was not unlawful for a master to hold his slave in nominal servitude, or to give or bequeath him to be held in that way; but even then the execution of such a trust could not be enforced against the donee or legatee, the property became his absolutely, and it depended entirely upon his discretion whether he permitted the slave to enjoy the benefit of the provision or not, and neither he or any other person on his part could enforce it.

If all her interest and estate in the slaves, and the bequests to them, passed to her executors, the only question that can arise is, was there, notwithstanding this, such a valid and subsisting trust at the passage of the Act of 1841, upon which it could operate?

⁶ 1 Domat. 45, sec. 1, advice concerning the use of rules.

⁷ 1 Domat. 5, sec. 15.

⁸ Taylor's Civil Law, 168.

If the character of the alleged trust was merely advisory, and could not have been enforced before the Act, it would seem to have no existence either in law or equity, and being a nullity was, therefore, not the subject of legislation. It cannot be controverted that the owner has a right to hold as loose a rein over his slave as he pleases, so that he does not part with his possession, and permit him to go at large as and to exercise the privileges of a freeman, and thereby to become delinquent and liable to be captured under the law. There is no limitation over after the estate bequeathed to the executors, and there is no ulterior reservation expressed or implied; the legacy is not left upon condition, nor is it liable to forfeiture, but its terms are amply sufficient to convey all the estate the testatrix had in the slaves. Her object seems to have been to invest her executors with all her rights in relation to the slaves, and to induce them to pursue the same course that she, if living, would probably have adopted for the government, protec-

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tion, *and principally for the comfort of the slaves, and the executors have not forfeited their rights as absolute owners, from their faithfully fulfilling the wishes of the testatrix, neither would they have done so if they had subjected them to the severest servitude, and appropriated the legacies left them to their own use; their course has depended upon their will and pleasure, and not upon any obligation arising out of the will that can be enforced either in law or equity. This view enables us to steer clear of the question as to the validity of retrospective laws.⁹

As early as the time of Bracton, the maxim *nova constitutio futuris formam imponere debet et non praeteritis*, (which was borrowed from the civil law,) was incorporated into the common law, and seems to have received the united sanction of every elementary writer, down to the time of our own commentator, Chancellor Kent, who says, "the very essence of a new law is a rule for future cases."¹⁰

Some of our sister States have, by their constitutions, specially provided against the passage of such laws, and the general tenor of our institutions is to restrict the law making power to the future. A strict construction of the powers of the different departments of government, and of the laws that are adopted, and an inviolable regard for vested rights, are among the strongest securities that can protect property and perpetuate our institutions.

The retroactive effect of an Act upon the past, would involve the exercise of not only legislative but judicial power; for instance, a new character would be given to such a be-

quest, by declaring it illegal, and then another rule applied, making the property distributable.

But we are not left to feel our way through abstractions to the correct conclusions on this subject; from the current of our own cases, we can derive probably the most satisfactory arguments, and the most weighty authority.

This case is clearly distinguishable from *Lenoir v. Sylvester*, for there the executors might lawfully have carried out the testator's intention in emancipating the slaves before the Act of 1820; but as they had failed to do so, and that had intervened and prevented them from accomplishing it afterwards, the estate of remainder, after the interest of the tenant for life had been exhausted, became intestate property and enured to the benefit of his next of kin.

So in the case of *Gordon v. Blackman*, the bequest was not as in this case to the executors, but that the slaves should be hired out by the executors until a sufficient sum should be raised from their hire to pay testator's debts; that they should, then, apply to the Legislature to procure the emancipation of the slaves, and if they should fail to procure such Act then to carry them to the

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nearest non-slaveholding State *or to Liberia. Before a sufficient amount had been realized from the hire of the slaves, to pay testator's debts, the act of 1841¹¹ was passed which intercepted the execution of that part of the will that directed the slaves to be carried to the nearest non-slaveholding State or to Liberia, and rendered it unlawful, and it was held that a trust resulted for the testator's next of kin: this case was decided in strict analogy to the preceding. But if the testators had, in both these cases, bequeathed the slaves to their executors absolutely, these trusts would have been null and void.

In *Rhame v. Ferguson et al.*, *Rice's Law Reports*, 196, the testator bequeathed slaves to his executor, and his executors and assigns forever, in trust, to permit them to apply and appropriate their time and labor to their own proper use, &c. and gave the residue of his estate, both real and personal, to his executor, upon the trust that the slaves and their issue should be permitted to use and enjoy the same forever; and it was held that the effect of the will was to vest the legal title in testator's estate in his executor, who had the right to take possession of the property and use it for the purpose of paying the debts of the estate, and then to do with it as he pleased.

Carmille v. Administrator of Carmille et al., [2 *McMul.* 454,] is almost a perfect parallel to this case; the only difference is, there the conveyance was by deed, here it is by will; there the donor had parted with do-

⁹ Lit. 4th, p. 228.

¹⁰ Kent's Com.

¹¹ 11 Stat. of S. Carolina, 154.

minion over the property, and put it beyond his reach, and whatever estate he had had was transmitted to his donees, against whom his legal representatives could have no redress. The slaves were conveyed to Pringle and Chartrand upon the trust that they would suffer them to receive what they might obtain for their labor "after paying the trustees the sum of one dollar per annum and no more." Here the terms of the will convey an absolute estate to the executors, and their title would probably have never been questioned if the Act of 1841 had not been adopted, and as that can have no effect upon such a bequest, the case must be decided independently of its provisions. In Carmille's case the second deed conveyed to the trustees two slaves for the use of other slaves previously conveyed to them, and the Court held that as the trustees had the possession they had the right to say it was a naked conveyance to them, and that the trust was mere matter of advice and recommendation, which they may or may not regard. The same principles would seem to prevail when the gift had been made by will; for its construction must depend upon the existing laws, and it is always supposed to have been made in reference to them, unless there be some palpable repugnancy. When an ulterior interest was reserved or limited over, and an absolute bequest was made of slaves before the Act of 1841, no such inoperative trusts in favor of them can enure to the next of kin.¹²

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*It is, therefore, ordered and decreed that the circuit decree be reversed on this point, and that the slaves and the legacies bequeathed to them, be the absolute property of the executors, to whom they belong under the will of the testatrix.

RICHARDSON, O'NEALL, EVANS, and FROST, JJ., and DUNKIN, Ch., concurred.

WITHERS, J., holding Court in Charleston.

DARGAN, Ch., and WARDLAW, J., dissented.

Decree reversed.

The point submitted having been decided by the Court of Errors, and the case sent down to the Court of Appeals, that Court decreed as follows:

Per CALDWELL, Ch.—The Court of Errors having determined the question submitted to it, and having reversed the circuit decree upon that point, and the other grounds of appeal having been heard by this Court, it is ordered and decreed that the circuit decree be affirmed in all other respects, and the appeal dismissed.

The whole Court concurred.

3 Strob. Eq. 245

JOHN A. ROSS et al. v. BANK OF THE STATE OF S. CAROLINA.

[*Banks and Banking* ⚡179.]

Mortgages taken by the Bank of the State of South Carolina, for any other indebtedness than that contracted under the loan office department, are not mortgages which, under its charter, "shall be considered as being recorded from the date thereof," but they are mortgages taken under the incidental and implied powers of a banking corporation. The Bank of the State stands on the same footing with such mortgages, and is bound to the same diligence.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 671; Dec. Dig. ⚡179.]

Before Dunkin, Ch., at Kershaw, June, 1848.

Dunkin, Ch.—On the 18th of April, 1837, J. W. Cantey executed to the complainants a mortgage of certain real estate in Camden, to secure them for a loan of their two notes of the same date, for six thousand dollars in the aggregate, to be discounted in the Branch of the Bank of the State of South Carolina at Camden, and the proceeds to be passed to the credit of J. W. Cantey. This mortgage was duly recorded in the office of the Registrar of Mesne Conveyances for Kershaw district, on the 23d of May, 1837. The same premises had been mortgaged to the defendants (the parent Bank in Charleston) by J. W. Cantey, on the 26th day of July, 1836. The deed was in the usual form taken by the bank, reciting a loan of thirty thousand dol-

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lars (30,000) secured by bond, payable in four equal annual instalments, with interest payable annually. This mortgage was not recorded in the Registrar's office for Kershaw, till the 1st of March, 1841.

In February, 1842, the bank was about to sell the premises under their mortgage, when the complainants interfered, and an agreement was made that the sale should proceed, and that the question should be made as to the appropriation of the funds. This bill was thereon filed, in which the complainants, among other things, alleged that they had "no notice or the slightest suspicion" of the existence of the mortgage to the defendants, until it was placed on record in March, 1841. The defendants, in their answer, contended that, under the provisions of their charter, it was not necessary to record this mortgage. They also suggested that the complainants had actual notice of the mortgage to the defendants, which notice they hoped to establish by proof.

When the cause was originally heard on the circuit, the only question argued was in relation to the form of the instrument executed to the defendants; which the Chancellor deemed sufficient. One of the grounds of appeal was, that the mortgage was not taken for a loan of money under the special clause of the bank charter, and consequently was not entitled to the peculiar privileges

¹² *Finley v. Hunter*, 2 Strob. E. R. 218.

therein provided. The Chancellor, (Johnston,) who originally heard the cause, was of opinion at the hearing of the appeal, that this question should be investigated, and the case was remanded, with the concurrence of the Court, for the purpose of inquiry upon this subject, as well as in relation to the question of actual notice to the complainants, and any other grounds of defence.

The Bank of the State was established in 1812. ¹ The preamble declares that it was expedient "to establish a bank on the funds of the State, for the purpose of discounting paper and making loans for longer periods than has heretofore been customary, and on security different from what has hitherto been required." To accomplish these objects, the Act, after providing a capital for the bank, vests in the institution all the ordinary powers of such corporations, such as the right of receiving moneys on deposit, discounting bills of exchange, and notes with two good names thereon, or secured by a pledge of stock; and also enables the bank to take and hold real and personal estate. A special provision is then made authorizing loans of a particular character, and to be secured in a different manner. These loans were to be "apportioned among the election districts, throughout the State, in proportion to their representation in the Legislature." They were "loans in the nature of discount on real or personal property, secured by mortgage and power of attorney to confess judgment on default of payment." The Act

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declared that the sums so loaned must never exceed one-third part of the real unincumbered value of the property so mortgaged, and furthermore, that no individual should be permitted to borrow on his own account, a greater sum than two thousand dollars. The loans were to be called in by annual instalments of one-tenth each year. The fifth clause provided that the mortgage thus taken, "should be considered as being recorded from the date thereof, and should have priority of any mortgage of the same property not previously recorded in the proper office."

In order to insure the utmost caution in making loans of even this limited amount, on such security and on this extended credit, it is specially provided that the value of the property shall be ascertained by assessors, and that the President and Directors "shall be answerable to the State in an action at law or a suit in equity, wherein the damages incurred by taking insufficient security, shall be assessed by the jury or by the decree of the Court, unless the Judges of law or equity, as the case may be, shall be of opinion and certify that every necessary precaution was used, and no manner of neglect on the part of the President and Directors." Other special provisions are made to regulate what

has, not inappropriately, been termed the loan office department of the institution, a department avowedly established for the purpose of accommodating the citizens generally with loans to a moderate amount, on a long credit, and secured by property of three times the amount in value. The principal inquiry is, whether the transaction with General Canteley was a loan made under this special provision of the bank charter, or whether it was an ordinary arrangement used by all banking institutions, for the purpose of securing a large pre-existing debt, in which operation the Bank of the State has no peculiar privileges, but must exercise the ordinary diligence for the security and protection of its rights, which is required of every other corporation, and of every individual in the community.

On the face of the transaction there is much to create a doubt whether this was such a loan as is authorized by this special provision of the charter, and to secure which loans the mortgages executed to the bank are placed on a footing so favorable to the bank, and so perilous to others who may have had dealings with the debtor of the bank. This was a loan to one individual of \$30,000, secured by property of not that apparent value, and on a credit of four years. It had no feature of a discount made on property under the loan office department of the bank, and thence the inquiry directed by the Court of Appeals. It was not, nor is it now, intended to be inferred that a departure from these provisions or regulations would, in any man-

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ner, invalidate the security *taken. This is not the subject of inquiry. But whether this was, in fact, an original loan intended by the parties to be made under the special provisions of the charter, and entitled to the special protection therein given, or merely an arrangement by which the bank obtained more ample security for a large existing debt, and the debtor obtained an additional advance in consideration of the new security.

It is hardly necessary to premise that a debt due at either of the branches, is an indebtedness to the principal institution. The branches are merely agencies. The directors are appointed by and are under the control of the board in Charleston, which, by the express terms of the charter, "allots to the branches such portion of the active capital of the bank as may to them seem advantageous."

Chief Justice Marshall says, in *United States v. Fisher*, 3 Cranch, 358, [2 L. Ed. 304.] that "where great inconvenience will result from a particular construction of a statute, that construction is to be avoided; unless the meaning of the Legislature be plain." And again, "that consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted: where rights are infringed—where the general system of the laws is de-

¹ 8 Stat. p. 24.

parted from, the legislative intention must be expressed with irresistible clearness to induce a Court of Justice to suppose a design to effect such objects."

When it is remembered that the provision in regard to the loan office department, applies to mortgages of personal as well as real estate, and that by subsequent amendments to the charter of 1812, the same power of making such loans is extended to the several branches, the consequences of a loose construction of this provision cannot be disregarded. When no man can safely purchase a negro in Pendleton, or take a mortgage of a tract of land in Newberry, until he has first searched, not only the ordinary offices of record, but has also searched the offices of the parent bank in Charleston, and of the several branches in Columbia, Camden, &c. for incumbrances upon the property, the Court would very reluctantly give such construction to the statute as would extend the secret lien to any other than the cases specially provided.

At the hearing, the defendants proposed to show notice to the complainants of their mortgage, but the evidence entirely failed, and this was not again urged. Mr. Salmond, the President of the Branch Bank at Camden, was then examined for the defendants, and his testimony accompanies this decree. He said, among other things, that at the same time that the bank took from J. W. Cantey the mortgage of the real estate, they took a mortgage of seventy-two negroes.—This latter was recorded in Charleston, 10th August, 1839. The real estate had been sold for \$5,400, and the negroes for about \$25,000.

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*C. M. Furman, the cashier of the parent bank in Charleston, was examined by commission. It seems that he was absent from Charleston during a part of the summer of 1836, and that he has no recollection of the negotiation with General Cantey, but that he finds on the minutes of the Board, 12th September, 1836, the following entry: "Gen. Cantey's proposition for a loan of thirty thousand dollars, agreed to." The money was placed to his credit, and appropriated in a manner hereafter to be noticed. This is very unsatisfactory. The proposition of General Cantey, thus agreed to by the Board, is precisely the subject of inquiry; doubtless it was in writing, was entered on the previous minutes, or the original is in possession of the bank. If the proposition was for an original loan of money under the special provisions of the charter, which has been recited, much other evidence would appear. Any person applying for a loan under these provisions, must produce a just and true account of "the property proposed to be mortgaged, which said property shall be valued on oath by Commissioners appointed by the Board for that purpose," and who receive a compensation for their services. The applicant must

also submit his titles to the lands intended to be mortgaged to the inspection of the said Board of Directors, "before the obtaining of such loan." It has been before stated that the President and Directors were liable in an action at law or in equity, for making a loan under this special provision without taking sufficient security, unless the Judge certifies that there was no manner of neglect, &c.

If the loan to Gen. Cantey was made under the special provisions of the charter, it was no ordinary transaction, and involved no ordinary responsibility. The President and Directors would have omitted no precaution to preserve the testimony of their justification, and that if the loan was large, it did not, in the language of the Act, exceed one-third part of the real unincumbered value of the security taken. The absence of any such testimony induces an impression that the proposition of Gen. Cantey was not addressed to the loan office department of the institution.

The subsequent testimony of Mr. Furman confirms the inference that this was not a loan made by the bank under this special provision of the charter, but that it was, on the contrary, an arrangement made to secure a large pre-existing debt of Gen. Cantey to that institution. He says that at the time of the loan to Gen. C. in September, 1836, he owed the bank in Columbia a debt of ten thousand dollars, which had been contracted in February, 1836, and that he was, at the same time, (September, 1836,) indebted to the Camden Branch, on sundry notes, to the amount of five thousand and seventy dollars. Mr. Furman further says that General Cantey drew a check in his favor, individually,

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for the \$30,*000, that he had remitted him a draft on the Camden Branch for \$16,000, and on the Columbia Branch for \$14,000. That General Cantey may have paid "his indebtedness above mentioned, out of that loan so made to him, and probably did so." He repeats afterwards that out of the \$30,000, Gen. Cantey "may have taken up his indebtedness at the branches, and he presumes he did." It is true he adds that so far as he is informed, "it does not appear that this was a condition annexed to the loan." This may very well have happened. In reply to the third interrogatory in chief, he says he was "absent during part of the summer of 1836;" he has no recollection of the negotiation of the loan to General Cantey, and he furnishes no evidence whatever of the proposition of Gen. Cantey, which the Board agreed to on the 12th September, 1836. The evidence of Mr. Furman even leaves it uncertain whether the indebtedness at the Branches was actually paid out of the loan. But any doubt on either point is removed by the consideration that Mr. Furman was a witness introduced by the defendants, and it was perfectly in their power to have shown by other evidence what was the character of the negotiation with

General Cantey, and what were the conditions, if any, of the loan in September, 1836. It was not less in their power to have shown, if such was the fact, that the indebtedness at the Columbia and Camden Branches was not paid out of this loan to General Cantey. The proposition of General Cantey was agreed to on the 12th of September, but the money was not advanced to him, says Mr. Furman, until the 28th of October, and the debt to the Columbia Branch of \$10,000, was certainly paid off on the 1st November.

All the circumstances lead to the conclusion, that this was not a transaction under the special provision of the charter, authorizing a loan not exceeding two thousand dollars to any individual on mortgage of property of at least three times the value of the amount loaned; but that it was not an uncommon, but very judicious arrangement of the bank to secure a large debt of more than fifteen thousand dollars, ten thousand dollars of which had been contracted at Columbia in February previous, and five thousand and seventy dollars of which was due on "sundry notes" in the Branch at Camden. The event proved the wisdom of the arrangement, and that the security was ample; not indeed under the loan office provision, but to secure the sum of thirty thousand dollars. The only neglect was the omission to record the mortgage of real estate until 1st March, 1841, and the mortgage of negroes till August 10th, 1839. They may have recorded both so soon as they apprehended any difficulty or danger of the debt, and in case of the negroes the delay wrought no injury. But in the mean time their debtor had executed an-

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other mortgage of the real estate, to indemnify a bona fide surety; which mortgage was promptly recorded in the proper office, and to which the general law of the land accords a preference over all prior unrecorded mortgages. The Court is of opinion that the mortgage to the bank falls within the latter category, and must be postponed to the lien of the complainants. It is ordered and decreed that from the proceeds of the sale of the real estate, the balance due on the notes of complainants be first paid, and that they be refunded any sums which they may have hitherto paid to the bank on account of said notes, with interest thereon; and that the surplus, if any, be appropriated towards the payment of the balance due on the debt of J. W. Cantey to the defendants.

The defendants moved the Court of Appeals to reverse the decree, on the following grounds:

1. Because the mortgage executed by J. W. Cantey to defendants, was taken by them in pursuance of the charter of the bank, and as such is entitled to be considered as recorded from its date, without actual registration, by virtue of the fifth clause of the charter.

2. Because the conditions upon which the

directors of the bank were authorized to loan money on bond and mortgage, are instructions to them from the owners of the bank, upon the violation of which no third person can predicate a right. Such instructions are immaterial to third persons.

3. Because all mortgages taken by the bank are recorded from their date, by virtue of the 5th section of the charter.

4. Because the sum of money mentioned in the bond and mortgage, was actually paid to J. W. Cantey, and agreed to be so paid without any condition annexed, other than the repayment of the same.

5. Because the mortgage was executed to defendants for money loaned and advanced at the time of its execution, and upon no other consideration.

J. M. DeSaussure, defendants' solicitor.
J. Gregg, contra.

Ordered up to the Court of Errors, for the adjudication of the question made by the 3d ground of appeal.

Curia, per DUNKIN, Ch. The testimony seems to the Court to establish very satisfactorily that the loan to Genl. Cantey, in October, 1836, was not an original transaction, but that it was also to secure payment of an existing indebtedness to the institution, amounting to more than fifteen thousand dollars. In the argument here it was not questioned that this indebtedness was satisfied or extinguished from the proceeds of the loan made in October, 1836. Yielding this conclusion the appeal rests on the 3d ground, to wit, that "all mortgages taken by the Bank are recorded from their date, by virtue of the 5th section of the charter."

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*On this point it is proposed to add very little to the observations made in the decree. Having power, under the other sections of the charter, to discount notes and bills of exchange and to transact other banking business, and also to take and hold real and personal estate, it would seem difficult to deny the power to this institution, which is exercised by all other banks, of taking a mortgage or assignment of property, real or personal, to secure an existing or contemplated indebtedness. But, although this power would seem to result from other powers expressly granted, as well as from the 16th clause of the 1st section authorizing the President and Directors generally to do and execute all such acts as it may appertain to them to do, subject to the rules, &c., prescribed in the Act, yet no power is expressly vested in the bank to take a mortgage, except in those sections which establish and regulate the loan office department. Mortgages taken by the bank for any other indebtedness than that contracted under the loan office department are not mortgages taken "for loans of money under this Act." (expressions which clearly point to some

foregoing and express authority to take a mortgage) but they are mortgages taken under the incidental and implied powers of a banking corporation. The Bank of the State stands on the same footing with such mortgagees, and are bound to the same diligence. It may be added that, throughout the Act, the term 'loan' is used in contradistinction to 'discounting paper,' and is uniformly applied to the special accommodations to be made to the citizens to a limited amount, on a single name, but on collateral security to three times the amount loaned, and the mortgage expressly authorized to be taken is always to secure the loans thus authorized to be made.

There is no doubt of the power of the Legislature. They may give a priority to public securities, as in the case of the paper medium loan office; or they may prefer debts due to the public, as in the administration of the assets of a deceased person. In the same manner it would be competent for that body, however invidious the enactment, to give a preference to all mortgages taken by the Bank of the State, and, indeed, to all debts, of whatever kind, contracted with that institution. They might place all notes discounted at the Bank of the State on the same footing with debts due to the public in the administration of assets. But such preference should be clearly given, and would not, and ought not to, be left to doubtful interpretation, or inference. It is believed that no such priority has ever been claimed by the Bank, as representing the State; certainly none such has ever been recognized by any judicial tribunal. But, if the Bank be nothing else than the Treasury of the State, a note discounted at that institution is a debt due to the public, and the inference would be too palpable to be evaded, that the bills of the Bank are emitted in violation of the con-

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stitution of the United States. The appellants have not, however, assumed this position. They rely on the specific preference accorded by the charter of incorporation. In the judgment of the Court this does not extend to the mortgage described in the pleadings, and the appeal is therefore dismissed.

JOHNSTON, CALDWELL, and DARGAN, CC., and O'NEALL, EVANS, WARDLAW, and FROST, JJ., concurred.

RICHARDSON, J., dissenting.—It will be conceded, as unquestionable, that the President and Directors of the Bank of the State of South Carolina are officers of the State under the constitution.

This was settled in 1813, both by the House of Representatives and Senate; who, at that time, excluded four of the then Directors from their Legislative seats, because they had become Directors of this State bank.

They were held to be what is called in the

constitution, Commissioners of the Treasury, or Treasurers of the State. That is, they held an office of trust, and were excluded, by the 1st Art. 21st sec. of the constitution of South Carolina. This decision of the two houses has never been controverted. No Director has ever held a seat in the Legislature.

It follows, irresistibly, that the Act to establish the Bank is to be understood and expounded, precisely, as if the Act of incorporation had constituted the two State Treasurers and Comptroller, the President and Directors of the Bank. The President and Directors are, therefore, truly and identically, the constitutional Treasurers of the State.

It also follows, with the same force, that all the money, in any way discounted, loaned, or disposed of, by the corporation, is of the State's money; and the debts due therefor, are to the State; and of course, all mortgages or other security to assure payment is given to the State. Any other disposition, or confiding of the Treasury of the State, but to such officers, would be evidently, unconstitutional. It is on this account that so much vigilance, and even personal responsibility, are required of the Directors, in lending money.

The State having resolved to make a corporate body its Treasurers, felt the necessity of great vigilance in controlling them. Experience had taught, and does teach all nations, that, at least, the riches of the State have wings; and its money apt to fly away. Hence, it is historically true, that nations, very generally, require a preference in payment, of debts due to the State, over other creditors of equal grade.

For instance, our own Act giving preference in cases of mortgages for all loans to the former Commissioners of the loan office, the administrators Act, and the Acts of Congress, '97 and '98, giving the like preference to the United States.

All prudent nations require the preference. —Because, men, the most astute in guarding their own domestic exchequer, are liberal and charitable in diffusing the public money.

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*If the Act of 1812 had, in express terms, given all its powers to the State Treasurers and Comptroller, and they were the lenders of the State's money, I do not question that the Act would be felt to be a necessary and great remedial law, to prevent the evil, and common inconvenience, just pointed out—which are found in the aptness, by which the public money is dispersed; and the necessity of guarding against so common a danger.

In such a case the arguments ab-inconvenienti would have been felt, in all the force attached to them, in the construction of doubtful Acts, by all common law writers; and the counter argument of the increased inconvenience to second mortgagees, in their being obliged to inquire at the Bank offices,

if the property offered had been already mortgaged, would have been considered too trifling to prevail against such a necessary guard of the public interest.

Public convenience and State necessity, in so important a matter, would have outweighed such minor objections.

In a word, then, if the Treasurers of the State had been the lenders of the public money, the arguments from inconvenience, as well as those from the spirit, end, and object, of the Act, would have been seen, as upholding the letter of the Act; and thereby, rendering the literal construction as unanswerable, as it is plain and unqualified, in its own language.

But what is the fact?—The President and Directors are the very constitutional Treasurers of the State. They constitute the financial department of the government, with all the official privileges of that department, to constitute, in the language of the constitution, "offices of trust"—I would say of high trust, and great moral and political power. They are Treasurers, with the power of lending the public money to whomsoever they deem fit.

I have sometimes heard this speculation on the character of the Bank:—That as the State cannot issue "bills of credit," the bills of this Bank must be issued by a corporate body, for the State. This speculation assumes two palpable absurdities. 1. That the State has power to do, indirectly, what it cannot do, directly; i. e.—issue bills of credit by its Bank corporation—but this is too absurd for argument. 2. It assumes that bank bills are identical with "bills of credit." But bank bills are no more than promissory notes, and may not be taken as money. Whereas bills of credit must be taken in payment, as and for gold and silver coin. Like the old continental bills—such is the bill of credit, and what the Federal constitution prohibits every State from doing.

But every State can do, in this respect, what may be done by any individual citizen—issue its own notes for what they may be worth in the market, to buyers and borrowers who confide in such paper. This is the

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whole meaning of bank bills. No one is obliged to take them in payment, like lawful coin, or "bills of credit."

We have only, then, in conclusion, to turn to the express enactment under a distinct section of this Act, to learn its literal meaning. But before citing this section, suffer me to remark, that the Bank Act of 1812 is extremely well drawn; each section constitutes a distinct head, or subject. For instance—the first section establishes the Bank, and contains 17 clauses, marked by figures relating to that head. The second section goes to a different head, to wit, how to ascertain the value of property mortgaged. The third section requires the inspection of the

title of the borrower. And the fourth section gives the form of the mortgage.

Now it is evident to my understanding, that if the fifth section had been intended to refer only to such particular mortgages, it would have constituted a clause merely of this fourth section; or at least, have expressly referred to such particularly described mortgages. But instead of this, the fifth section is disjoined from all that go before it; and is in the following terms.

"V. And be it further enacted by the authority aforesaid, That all mortgages taken for loans of money under this Act, shall be considered as being recorded from the date thereof, and shall have priority of any mortgages of the same property not previously recorded in the proper offices."

How can we construe this section to be a mere clause; and to relate only to those particular mortgages? Can words be plainer, or more comprehensive? "All mortgages for loans of money under this Act." That is to say, for the public money lent in virtue of this Act. There is no expletive or relative, referring to any particular mortgages, whatever. Not a syllable referring to any antecedent. On the contrary, the most general terms are used, as if expressly to carry out the State policy, necessity, and convenience of a preference, as indispensable to the safety of the public Treasury.

Can we go by such terms of a plain general enactment, and confine this preference to the loan office exclusively? This would be doing violence to the letter of the Act.

As to the spirit and general intentment of the Act—I would observe, that the many guards cautiously set forth in the Act—the revolution made in the financial system—all the public money and stock, past, present, and to come, and the extraordinary powers concentrated in these commissioners of the Treasury—all indicate the same guarded legislative aim, to defend the public exchequer, and give the State a preference, wherever its mortgage is first, although unrecorded. As to the intrinsic argument, the evidentiary;—the whole natural and rational right is in favor of the State; she being the elder mortgagee.

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*The complainants urge against such right, this technical rule of law;—that their mortgage being first recorded, outweighs the right of the State to its natural priority;—but the State rejoins, that the registry Acts do not apply to her mortgages; both by the express general provision of the Act of 1812, and the common public policy.

Which of these ought to prevail, under such an enactment?—is the question.

Its letter and terms admit of no dispute; and according to my understanding, the auxiliary arguments forcibly concur in the same construction. And I will add, that I know of no precedent to justify the Court in disre-

garding so plain and positive an enactment of the legislature.

I do not know, nor would I enquire, how much the State may lose by the present decision; which seems to my understanding, to pay too little regard to the letter of the Act, as well as to mistake its wise policy and object. And if the Act be so construed, some remedial and explanatory Act ought to be immediately passed, under the rational policy of a State preference in all such cases.

Nor can I conceive it necessary to rely upon any common construction of the Act; though I apprehend the practice to be in favor of the Bank.

Lastly, there may have been abuses, as some suppose, in using the powers of this great State corporation. If so, abuses ought to be corrected. But we are to do no injury to the public estate; which consists in the money placed in such bank hands; and this estate is to be guarded now, as originally intended, as if the State, itself, acted at every step. It is not whether the Bank shall be constituted; but how this established institution shall be conducted for the best interest of the State, is now the question.

Assuredly, at least, we are not to curtail its legal advantages. But on the contrary to cherish it, by doing the best we can, according to the character of such settled estate. However great the public disappointment, in its practical character, revenue, or policy. How is this to be done?

I answer. By returning—not precipitately—to the principle of the constitution; i. e., at a fixed period; and thereafter, let the former Treasurers or Directors pass receipts, every four years, with a new set of incoming Directors; which is what the constitution absolutely requires. This was clearly the intention of the Act of 1812, as proved by the early expulsion of Directors from legislative seats.

It is a fact, that the Comptroller was held to be reeligible without limitation. But, at last, it was seen he was a Commissioner of the Treasury; and accordingly, he was then restricted to the constitutional four years. In like manner, though late—let it be with the Bank Directors.

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*Such a return to the constitution will carry, not only increased safety to the State's Treasury; but give satisfaction, in place of public discontent with the Bank; and go far to cure the suspicion of favoritism, now so abounding in the general apprehension.

There is no safety for the discretionary disbursement of the public money, but in the actual counting and passing receipts, at regular periods, by new and incoming officers. In this consists the practical wisdom of the constitution, in regard to treasurers, sheriffs, &c.; and this principle is not to be changed, or eluded, by the invention of Bank

corporations taking charge of the public Treasury.

But we have to return to the true principle, with due regard to old errors, as we did, not only in the Comptroller's office, but in the late Court of Errors. The conservation of the constitution must be. But it is in the just, true and considerate spirit of such conservatism, to modify and restrain prevailing errors, so as finally to accomplish that end and object, without opposing with precipitation, inveterate popular misapprehension; and the constitution then becomes clearer and stronger from past errors.

Returning after this digression, to the proper construction of the Act. My argument is, that from the title of the Act; i. e.—“To establish a Bank on behalf of and for the benefit of the State.”—From its preamble—from its absorbing capital of money, stocks, and State revenues. Its various powers of lending money. The pledge of the faith of the State. Its power to own real and personal estate, and to sell the same. Its penalties on Directors, individually, for lending out money on illegal interest. And to borrow money on the credit of the State. From such provisions of this well considered Act, I can draw but one conclusion of its spirit, public character, and general intentment. Under such considerations and arguments,—to use technical terms—drawn *ex rei termini*, *ab inconvenienti*, *et ex visceribus actis*, I am opinion that the motion should be granted, and the State have its preference, in this case, by reason of its first mortgage, unregistered, against the younger mortgage, though registered first.

1. Because the Act so makes the law, without the least qualification in its terms.
2. Because public necessity urges it.
3. Because prudence and good policy require such preference.
4. Because it is the accustomed law of governments to guard its Treasury by such preference.

All which arguments render the present literal enactment, a wholesome, necessary, and satisfactory law, for the State of South Carolina.

WITHERS, J., absent holding Court in Charleston.

3 Stro. Eq. *258

*JOHN WILSON et al. v. JOHN BAILER et al.

[*Husband and Wife* ⚭117.]

The following words used in a bequest to a married woman, “by her to be freely enjoyed to every intent and purpose, as her own in every respect,” held not to create a separate estate.

[Ed. Note.—Cited in *Trustees v. Bryson*, 34 S. C. 413, 13 S. E. 619.

For other cases, see *Husband and Wife*, Cent. Dig. § 419; Dec. Dig. ⚭117.]

[*Husband and Wife* ⇐119.]

The absolute terms in which the property is given to the wife, or the amplitude of her enjoyment, have never been deemed sufficient to create a separate interest in derogation of the common law right of the husband.

[Ed. Note.—Cited in *Foster v. Kerr*, 4 Rich. Eq. 391; *Martin v. Bell*, 9 Rich. Eq. 43, 70 Am. Dec. 200; *Wade v. Fisher*, 9 Rich. Eq. 363; *Bouknight v. Epting*, 11 S. C. 76; *Howard v. Henderson*, 18 S. C. 191.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 424-429, 447; Dec. Dig. ⇐119.]

[*Husband and Wife* ⇐119.]

[Cited in *Charles v. Caleb Coker & Bro.*, 2 S. C. 133, to the point that where the trust instrument declares the receipt of the wife a sufficient discharge the estate is separate.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 424-429, 447; Dec. Dig. ⇐119.]

Before Dumkin, Ch., 1848.

This was a bill filed by the children of Catharine Bailer, and claimed that, under the will of Isabella Curtis, the said Catharine Bailer took a sole and separate estate in certain negroes, &c.

John Bailer, Sr. the husband of Catharine Bailer, who was one of the defendants, contended that Catharine Bailer did not take a sole and separate estate, but that his marital rights attached to the property, and further plead the Statute of Limitations.

John Bailer, Jr. son of John Bailer, Sr. was also a defendant, but he denied that he had any of the negroes, and the bill was dismissed as to him.

The defendant, John Bailer, Sr. also referred in his answer to a clause in the will of Thomas Curtis, the husband of Isabella Curtis.

Circuit Decree.

Dumkin, Ch. The bill alleges that Catharine Bailer died some seven years ago, entitled to certain negroes, now in the possession of John Bailer, and to certain other negroes, now in the possession of John Bailer, Jr. The last denies that he has any negroes which were ever in the possession of Catharine Bailer, deceased; and as there was no evidence on the subject, the bill, as to him, must be dismissed.

But whether Catharine Bailer had or had not a separate estate, under the will of Isabella Curtis, it is quite clear that, in this form, the bill cannot be maintained. If the marital rights attached, the negroes were the absolute property of the husband, John Bailer, the elder; but if the estate was to her sole and separate use, no one but the legal representative of Catharine Bailer is entitled, and such legal representative is no party to these proceedings. It would be in the discretion of the Court to retain the bill and give leave to the complainants to amend, by making the administrator of Catharine Bailer a party; or perhaps the defendant might be held responsible, under the 31st

section of the Act of 1789. But, in this latter view, the defendant is protected by the Statute of Limitations. Even according to

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the statement of the bill, *the right accrued "between five and seven years prior to 30th October, 1845," when the bill was filed. The complainant, Solomon Jones, suggests no disability or exemption; John Wilson, though out of the State, was barred in four years. The right of Sabra Jones, whatever it might be, vested in the husband, John W. Williams, on the marriage, who might have instituted the suit in his own name, and can insist on no protection or exemption from the operation of the Statute, in consequence of the minority of his wife.¹

It is ordered and decreed that the bill be dismissed.

The complainants appealed, on the grounds—

1. Because the rights and claims of the complainants (fully and clearly established) were not barred by the Statute of Limitations, which cannot avail the defendant, John Bailer, Sr. the surviving husband of Catharine Bailer, whose separate estate, under the will of Isabella Curtis, was distributable among her said husband and the complainants, as codistributees.

2. Because, upon the case as made by the bill, answer and proof, the decree should have been for the complainants.

And also, because leave should have been granted to amend the bill, so as to make the legal representative of Catharine Bailer a party to the proceedings.

Hutson & Bellinger, for the motion.

Glover, contra.

The Court of Appeals decreed as follows.

Per JOHNSTON, Ch. If the will of Mrs. Curtis created a separate estate in Mrs. Bailer, according to the doctrines of this Court, then we are satisfied that the Statute of Limitations is no bar in the case. The husband would be construed a trustee for the wife, and upon her death, her equitable interests would devolve on her personal representative for distribution. It appears, however, that there was no personal representative to make the claim, and according to the cases of *Kennedy v. Edwards*, and *Geiger v. Brown*, [4 McCord, 418,] the Statute would not obtain currency until one was appointed.

If, therefore, this Court was satisfied that a separate estate was created in Mrs. Bailer, it would retain the case and permit the plaintiffs to cause administration to be granted on her estate, and to amend their bill by making the Administrator a party, upon payment of costs.

But, upon the question whether the words

¹ See *Adm'r. Forbes v. Foot*, 2 McC. 331, [13 Am. Dec. 732.]

of the will conferred a separate estate, this Court is equally divided. It is, therefore, ordered that that question be remitted to the Court of Errors, on the ground of an equal division of this Court upon it.

The whole court concurred.

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*Extract from the will of Isabella Curtis—Probate 14th July, 1807:

"I give and bequeath to Catharine Bailer, daughter of Thomas Curtis, all my negroes and property which I am possessed of, or may have, by her to be freely enjoyed to every intent and purpose, as her own in every respect."

Extract of the will of Thomas Curtis, dated in 1794:

"I give and bequeath to Isabella Curtis, my wife, whom I likewise constitute, make and ordain the sole executrix of this my last will and testament, all my negroes and property which I am possessed of or may have, by her to be freely enjoyed to every intent and purpose, as her own in every respect whatsoever, during her lifetime, and at her decease to have the full disposal of it as she shall think proper, to the heirs of my body, and in no otherwise whatsoever, otherwise this will to be void and of no effect."

Question remitted to the Court of Errors.

☞ "Whether, by the words of the will of Isabella Curtis, a separate estate was created in Catharine Bailer?"

The following is the opinion of that Court.

Curia, per DUNKIN, Ch. In approaching the decision of the question submitted to the Court of Errors, it is well to bear in mind what has been often said by English Judges, and as often repeated by our own, viz:—that a separate interest in a married woman, is in derogation of the husband's common law right—that it is the creature of the Court of Chancery—and that, unless the intention to exclude the husband is clearly expressed, or arises by necessary implication, the marital right is maintained. In this, all the authorities concur. In one of our own cases it is thus stated. "By the common law, the personal estate of the wife, reduced to possession, becomes the absolute estate of the husband." "To create a sole and separate estate in the wife, free from the control of the husband, requires that there should be a clear and distinct expression of the intention of the grantor to create such an estate, such a departure from the rule. Equivocal expressions are not sufficient." And again—"The expression of such intent should be plain, explicit and unequivocal; else there will be a continual conflict, from the desire to raise up implications of an intention to give a sole and separate estate to the wife, from slight expressions, leading to unceasing litigation." Hence the absolute terms in which the property is given to the wife, or the amplitude of her enjoyment, have never been deemed sufficient to create a separate in-

terest, in derogation of the common law right. The implication is, however, necessary when the estate is declared to be for the

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sole and separate use of the *wife, although the words, 'independently of her husband'—or 'without the control of her husband,' are not superadded. So, if the wife is authorized to give a receipt, or to do any other act which, as a feme covert, she would not ordinarily do. Here is a necessary implication that her separate existence was recognized, and that, in this matter, she was to act and be treated as a feme sole. But, beyond this, it is vain to attempt to reconcile the conflicting decisions. It is necessary to analyze the language in every case, in order to ascertain whether it was intended to exclude the marital right. In the will before us, the terms "to be freely enjoyed to every intent and purpose," may very well indicate no more than the amplitude of the estate, and words of a similar character occur, not unfrequently, without any more definite purpose. The other terms used, "as her own in every respect," have been repeatedly the subject of judicial consideration. The cases are collected by Mr. Justice Story, § 1382-3, and the conclusion at which he arrives is that, although the words "for her own use and at her own disposal," create a separate estate, as in the case of *Pritchard v. Ames*, 11 Cond. Eng. C. C. 127, where the decision of the Court is rested on the latter words as giving a *jus disponendi* which does not otherwise belong to a feme covert—yet, says he, "on the other hand, a gift or bequest to a married woman 'for her own use and benefit,' or 'to be paid into her proper hands, for her own proper use and benefit,' have been held not to amount to a sufficient expression of an intention to exclude the marital rights of the husband, for although the money is to be paid into her own hands, or to her own use, yet there is nothing in that inconsistent with its being subject to his marital rights." Section 1383. In a note he remarks, that this is the doctrine expressly maintained in the authorities, and that, although there are antecedent dicta or opinions the other way, they seem to have proceeded on a misapprehension of the case of *Johnes v. Lockhart*, which has now been correctly reported in Mr. Belt's note to 3 Bro. Ch. R. 383. The case of *Graham v. Graham*, 3 Hill R. 145, goes farther in sustaining the marital rights than is, perhaps, warranted by any previous decision. The gift was to Rebecca Cooper, the wife of George Cooper, "to her, and at her disposal at her death." After a full examination, the Court say, "we are, therefore, of opinion that the provisions of the will in question, do not create a sole and separate estate in Mrs. Cooper, (afterwards Mrs. Graham) disposable by her, whilst a married woman, in derogation of the marital rights." It has been sometimes said, that some of the concurring Judges may have thought the words suf-

ficient to create a separate estate during the existing coverture with Cooper, but that it did not extend to the second marriage. No such distinction is intimated in the decision;

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and it may be added that, so far as able argument and high authority may amount to a final adjudication, it is now settled that a gift to the sole and separate use of a woman, married or unmarried, is good against an after taken husband. But in the case before us, there are no such words as in *Graham v. Graham*—no words vesting in the married woman an express right of disposition; and we are of opinion, upon authority, that the marital right attached—and such is the response of the Court of Errors to the question submitted.²

But this cause was heard in the Court of Chancery. The will of Thomas Curtis, from which the title of the testatrix, Isabella Curtis, was derived, constituted part of the pleadings in the cause, according to the proper construction of which will, the defendant also insisted on his right, independent of the bequest from Isabella Curtis. Thomas Curtis, in 1794, bequeaths to his widow his property, "by her to be freely enjoyed to every intent and purpose, as her own in every respect whatsoever, during her life," &c. It can hardly be contended that this exhibits an unequivocal intention to exclude the marital right of any future husband his widow might take, or that he contemplated such an event; or that it is any thing more than rather a tautologous expression of the amplitude of the gift. For many purposes a person is presumed to have knowledge of the instrument through which he derives title. But the identity of the language adopted by Mrs. Curtis in her own will, with that which her husband had used in the gift to herself, would not only add a strong presumption that she was, at least, familiar with the instrument, but goes very far to shew that the language was used not with reference to the marital rights, or with any purpose of excluding them, but because this form of donation had received the sanction and authority of her own honored husband.

RICHARDSON, O'NEALL, EVANS, WARDLAW, and FROST, JJ., and DARGAN, Ch., concurred.

WITHERS, J. Holding Court in Charleston.

The Court of Appeals in Equity then made the following order:

Per JOHNSTON, Ch. The Court of Errors having responded to the question submitted by this Court, that the marital right of John

Bailer attached on the property bequeathed by Isabella Curtis; it is ordered and decreed that the appeal be dismissed.

Appeal dismissed.

3 Strob. Eq. *263

*WILLIAM B. JOHNSTON, Survivor, v. THE SOUTHWESTERN RAILROAD BANK.

[*Banks and Banking* ⚡211; *Courts* ⚡95.]

The complainant, to whom its bills were delivered by the Ocmulgee Bank, as collateral security for advancements made or to be made, but who agreed that they should not be put in circulation, was *held* not to be a bill holder so as to charge the persons and property of the stockholders, under the ninth section of their charter, over and above the amount of stock paid in.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 791; Dec. Dig. ⚡211; *Courts*, Cent. Dig. § 323; Dec. Dig. ⚡95.]

[*Banks and Banking* ⚡211.]

Although the Ocmulgee Bank was required by its charter to have twenty-five per cent. of its capital stock paid in before it should proceed to banking, the noncompliance with the charter in that particular does not constitute a valid defence either for the corporation, or for its stockholders, when sued on its bills.

[Ed. Note.—Cited in *Bird & Co. v. Calvert*, 22 S. C. 297.

For other cases, see *Banks and Banking*, Cent. Dig. § 791; Dec. Dig. ⚡211.]

[*Banks and Banking* ⚡80.]

The transfer and delivery of assets made to the defendants by the Ocmulgee Bank, to secure a pre-existing debt, was set aside as fraudulent, but it was adjudged not to be a forfeiture of their debt. They are only deprived of the benefit of any security which they acquired by the transfer.

[Ed. Note.—Cited in *Pettus v. Smith*, 4 Rich. Eq. 205; *Arnold v. House*, 12 S. C. 608.

For other cases, see *Banks and Banking*, Cent. Dig. §§ 184-196; Dec. Dig. ⚡80.]

[*Courts* ⚡95.]

All other countries are bound to follow the construction of a statute which has been adopted by the Judiciary of the country in which it was enacted.

[Ed. Note.—Cited in *Brown v. Peebles*, 10 Rich. Eq. 482.

For other cases, see *Statutes*, Cent. Dig. § 256; *Courts*, Dec. Dig. ⚡95.]

[*Banks and Banking* ⚡112.]

A party is bound civiliter by the fraud of his agent: he will not be permitted to retain advantages gained through that fraud; nor can he resist the unraveling of transactions brought about by his misconduct.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 271; Dec. Dig. ⚡112.]

[*Principal and Agent* ⚡131.]

Although a principal is not answerable criminaliter for the conduct of his agent he is responsible civiliter for all acts done by him in the course of his employment.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 458-464; Dec. Dig. ⚡131.]

[*Principal and Agent* ⚡99.]

Where the end to be effected, only is pointed out, while the means are left to the agent's discretion, the principal is bound, not only as to the end, but the means also; and all third persons dealing with the agent have a right to

² See *Tullett v. Armstrong*, 4 Mylne & Craig, 377, and *Nowland v. Painter*, Id. 408—and the note to § 1384. ² *Story's Eq. Juris.*

insist upon the responsibility of the principal to this extent.

[Ed. Note.—Cited in *J. C. Stevenson Co. v. Bethea*, 79 S. C. 492, 61 S. E. 99.]

For other cases, see *Principal and Agent*, Cent. Dig. §§ 254-261; Dec. Dig. § 99.]

When, and when not, necessary to file a creditor's bill.—In what cases a plaintiff may sue alone, and when it is necessary to join other parties. Points of pleading discussed by Johnston, Ch.

[Ed. Note.—Cited in *Terry v. Calnan*, 4 S. C. 514; *Warren v. Raymond*, 17 S. C. 204; *M. Ferst's Sons & Co. v. Powers*, 64 S. C. 224, 41 S. E. 974.]

Before Johnston, Ch., at Charleston, February and March, 1848.

The following Circuit Decree contains a full statement of all the pleadings and evidence necessary to an understanding of the points adjudicated in this case.

Johnston, Ch. The bill is filed by William B. Johnston, a citizen of Georgia, against the South Western Rail Road Bank of this State, and against the Ocmulgee Bank, and Robert Collins, both of Georgia; and the pleadings and evidence in the cause relate to certain dealings between the parties, respecting the Ocmulgee Bank.

This Ocmulgee Bank, situated in the town of Macon, was incorporated by an Act of the Georgia Legislature, approved the 30th of December, 1836;¹ and its charter contains, among others, the following provisions, which were much commented on at the hearing.

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*Sec. 1. The capital stock to be \$500,000; divided into 5,000 shares of \$100 each.

Sec. 2. After prescribing the times, places, &c., of taking subscriptions for stock, directed that the subscriptions should be "payable in gold or silver coin, or in current bills," of specified Banks, in the following manner:—5 per cent. at the time of subscription; 25 per cent. at such times as the commissioners should designate; and the remaining 70 per cent. at such times and in such sums as the Directors (when elected) should appoint. When the first two payments of 5 and 25 (amounting to 30) per cent. were paid in to the commissioners, the stockholders were to be convened and proceed to the election of seven Directors;² which Directors, when chosen, were to receive from the commissioners the 30 per cent. paid in by the stockholders, and "forthwith commence the operation of said Bank in the city of Macon."³ But by sec. 11 "nothing should be so construed as to authorize the Directors to proceed to banking, until 25 per cent. of the capital stock is paid in, in specie."⁴

¹ Prince's Digest, 118.

² The first set of Directors to serve until the first Monday of November, succeeding their election, and succeeding elections to take place annually thereafter.

³ Prince's Digest, 118. See also sec. 5, Rule 1. Prince, 120.

⁴ Prince, 123.

Sec. 5. Rule 9.—"The bills obligatory and of credit, notes and other contracts, whatever, on behalf of said corporation, shall be binding and obligatory on said company; Provided, the same be signed by the President and countersigned or attested by the Cashier of said corporation," but not otherwise, "except only checks on any other Bank in the United States, shall be binding, if signed by the Cashier only."⁵

Sec. 5. Rule 13. No loan or credit to be made on pledges of stocks of the Bank, but "should any of the corporators be indebted by note, draft, bills of exchange, or other obligation, which shall be past due, under protest, or in suit, then and in that case, it shall be lawful for the Board of Directors, for the time being, to declare the stock or shares, belonging to such persons, forfeited to the Bank, to the amount he or she or they may be so indebted to the said corporation, as above."

Sec. 7. "The said corporation shall not, at any time, suspend or refuse payment, in gold or silver, of any of its notes, bills or obligations; and if the said corporation shall, at any time, refuse or neglect to pay, on demand, any note, bill or obligation, issued by the corporation, according to the contract, promise or understanding therein expressed, the charter hereby granted shall be forfeited." Provided, however, that the Bank might redeem its bills, when demanded by any other Bank, with the bills of the demandant, instead of specie.⁶

Sec. 9. (The most important.) "The persons and property of the stockholders, for the time being, of said Bank, shall be pledged and bound, over and above the amount of

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said *stock paid in, in proportion to the amount of the shares that each individual, copartnership, corporation, or body politic may hold in said Bank, for the ultimate redemption of the bills or notes issued by or from said Bank, in the same manner as in common commercial cases, or cases of debt."⁷

Sec. 10. Limits the charter to the expiration of the year 1856.⁸

At the time of the incorporation of this Bank, there were, and still remain, of force, two statutes of the State of Georgia, which were frequently referred to at the hearing.⁹

The first of them was approved the 24th of December, 1832; by which the President and Directors of every Bank in the State were required to make semi-annual returns to the Governor, upon the oath of the President and Cashier, on the first Monday in April and October, of the names of the stockholders, with the amount of stock owned by each, and

⁵ Prince, 122.

⁶ Prince, 123.

⁷ Prince, 123.

⁸ Prince, 123.

⁹ Prince, 49.

the amount of money actually paid in upon their shares; and in their return, to set forth "a minute statement of the standing and management of each incorporated Bank," and their branches, "showing particularly the amount of bills (held by them) on other Banks of Georgia; the amount of gold, silver and bullion in their vaults; the amount of debts due them at the north or elsewhere, which may be denominated specie funds; the amount of active or running paper; the amount in suit; and clearly stating what amount of all the debts due the Bank is considered good; what bad, and lost to the Bank; the amount of issues by each Bank; the amount of bills in circulation, and the amount of bills of said Bank in circulation under the amount" [head or account] "of deposit; and the highest amount due and owing by each Bank."

The other was an Act, approved the 23d of December, 1833: the 40th section of which declares that "all conveyances, assignments, transfers of stock, effects, or other contracts made by any Bank, in contemplation of insolvency, or after insolvency, except for the benefit of all the creditors and stockholders of said Bank, shall, unless made to an innocent purchaser for a valuable consideration, and without knowledge or notice of the condition of said Bank, be fraudulent and void. And the President, Directors and other officers of said Bank, or any of them, making, or consenting to the making of such conveyance, assignment, transfer, or contract, whether the same be made to an innocent purchaser, or any other, shall, severally, be guilty of a misdemeanor, and on indictment and conviction thereof, shall be punished by imprisonment and labor in the penitentiary for any time, not less than four years, nor longer than ten years." ¹⁰

The full amount of stock having been sub-

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scribed, the Ocmulgee Bank was organized and proceeded to business in 1837.

On the 25th of February, 1839, an Indenture,¹¹ purporting to be an indenture tripar-

tite between Henry G. Lamar, in his own right, and as executor of B. B. Lamar, as trustee for Victoria Lamar, and attorney for Mrs. G. Lamar, Geo. Jewitt, Charles Collins, E. Sinclair, Wm. B. Johnston, (the plaintiff,) David Flanders, and John D. Winne, stockholders in said Ocmulgee Bank, of the first part: James Hamilton, for himself, and as agent for Robert Collins, (a defendant;) A. Blanding, Alex. Black, C. Edmondston, I. E. Holmes, C. A. Magwood, William Patton, James Legare, L. Trapman, William Gregg, J. C. Kerr, and M. C. Mordecai, stockholders in the South Western Rail Road Bank, of the

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second part: and *James Hamilton, agent

the third part—Witnesseth, That whereas said party of the first part, having purchased and transferred to the said party of the second part, one thousand shares of the stock of the said Ocmulgee Bank of the State of Georgia, including shares now held by the said Robert Collins; and also having purchased and transferred to the South Western Rail Road Bank aforesaid, two thousand five hundred shares of said stock, on each of which shares the sum of forty dollars has been paid. Now, therefore, it is by this Indenture, stipulated and agreed between the aforesaid parties of the first, second and third parts as follows:—

1st. That the parties of the first part will retain among themselves one thousand shares of the stock of the said Ocmulgee Bank, and do, at the execution hereof, hold and retain the said one thousand shares aforesaid.

2d. The aforesaid party of the second part shall hold among themselves, not less than one thousand shares of said stock; and the party of the third part, the South Western Rail Road Bank, shall hold two thousand five hundred shares of the stock of the said Ocmulgee Bank; and that persons, not parties to this Indenture, shall not hold in all more than five hundred shares: And the party of the first part, hereby agree and bind themselves, severally, to the party of the third part, to give, at all times, their proxies in the said Ocmulgee Bank, to the President of the South Western Rail Road Bank, or such person as he or the Board of Directors of the last mentioned Bank may appoint.

3d. And the party of the first part does hereby agree, and it is hereby stipulated by them severally, to and with the aforesaid party of the third part, not to sell or transfer the shares of the aforesaid stock, which they may severally and respectively hold, to any person but a party to this contract, or to such other person as the Board of Directors of the South Western Rail Road Bank shall approve. But in case an offer to sell shall be made, and within sixty days therefrom, no person approved by said Bank shall offer to purchase at the par value of the said stock, and such advance thereon as shall be equal to the proportion of the clear nett profits, which the shares offered shall be entitled to, then and in that event, the holders thereof shall be at liberty to sell to any other person. And it is in like manner hereby stipulated and agreed, that the aforesaid party

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of the second *part, shall not sell the shares held by them to any other person than the South Western Rail Road Bank, a Director thereof, or such stockholders as shall be approved by the said Direction of said South Western Rail Road Bank.

4th. That if the South Western Rail Road Bank shall desire to sell its stock, or any part thereof, it shall offer the same to the parties of the first part, and if within sixty days after

¹⁰ Prince, 633.

¹¹Exhibit A.

Georgia, Bibb County.

This Indenture, made and entered into this twenty-fifth day of February, in the year of our Lord eighteen hundred and thirty-nine, between Henry G. Lamar, in his own right, as executor of the last will and testament of B. B. Lamar; as trustee for Miss Victoria Lamar, and as attorney for Mrs. G. Lamar, George Jewitt, Charles Collins, E. Sinclair, William B. Johnston, David Flanders, and John D. Winne, stockholders in the Ocmulgee Bank, of the State of Georgia, at Macon, of the first part:—James Hamilton for himself, and as agent for Robert Collins, A. Blanding, Alexander Black, C. Edmondston, I. E. Holmes, C. A. Magwood, William Patton, James Legare, L. Trapman, William Gregg, J. C. Kerr, M. C. Mordecai, stockholders in the South Western Rail Road Bank, of the second part:—And James Hamilton, agent for the said South Western Rail Road Bank, of

for the South Western Rail Road Bank, (a defendant,) of the third part: was executed by the parties aforesaid, (except that instead of John D. Winne, Mortin N. Burch appears to have sealed the same.)

This indenture, after reciting that the parties of the first part had purchased and transferred to the parties of the second part, one thousand shares, stock of the Ocmulgee bank, (inclusive of shares previously held by Robert Collins,) and had also "purchased and transferred to the South Western Rail Road Bank aforesaid," (the third party,) "two thousand five hundred shares of said stock, on each of which shares, the sum of forty dollars has been paid," covenants as follows:

1. That the parties of the first part have and will retain, among them, one thousand shares in the Ocmulgee Bank.

2. That the parties of the second part will hold, among them, not less than one thousand shares.

3. That the third party will hold two thousand five hundred shares.

4. That no person, not parties to the indenture, shall hold exceeding five hundred shares.

notice thereof to them, or such of them as reside in Macon, they or some of them shall not take said stock at its par value, and an advance thereon equal to the clear nett profits thereon, as aforesaid, then, and in that event, the said South Western Rail Road Bank may sell the same to any other person: Provided, that the party of the third part may, at any time, sell so many of their shares to individuals in their confidence, as may enable them to give as many votes as the votes which may be given by persons not parties to this contract: Provided also, that such sale shall not extend beyond five hundred shares.

5th. And the party of the second part, hereby agree and bind themselves, severally, to the party of the third part, to give at all times their proxies, in the said Ocmulgee Bank, to the President of the South Western Rail Road Bank, or such person as he or the Board of Direction of the last mentioned Bank may appoint.

6th. In consideration of all which stipulations, the party hereto of the first part, and Robert Collins, one of the parties of the second part, hereby guarantee the goodness of all the debts that may, in any manner, be owing to the said Ocmulgee Bank, at the execution hereof.

In testimony whereof, the parties hereto have set their hands and seals.

Geo. Jewitt,	[L. S.]
Henry G. Lamar,	[L. S.]
W. B. Johnston,	[L. S.]
Charles Collins,	[L. S.]
David Flanders,	[L. S.]
E. Sinclair,	[L. S.]
Mortin N. Burch,	[L. S.]
J. Hamilton, for himself,	[L. S.]
and trustee Oswechee Co.	
J. Hamilton, as agent for	[L. S.]
R. Collins and others.	
J. Hamilton, as agent of	[L. S.]
the So. W. R. R. Bank.	

Test,

H. S. Jewitt,
Edward R. Pease,

L. J. Moses, witness to the signature of
Mortin N. Burch.

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*5. That parties of the first and second part, always to give their proxies to the President of the South Western Rail Road Bank, or to such person as he or the Directors of his bank may appoint.

6. The parties of the second part not to sell their shares to any other than the South Western Rail Road Bank, a director thereof, or such stockholders as shall be approved by its Board of Directors.

7. The parties of the first part to be restricted, as to alienation of their shares, in the same way, except under particular circumstances, not material in this case.

8. The third party, (the South Western Rail Road Bank,) not to sell its shares without a previous offer of them to the first party, except that for the purpose of enabling the said South Western Rail Road Bank to give as many votes as could be given by strangers to the indenture, it might sell a number of its shares, not exceeding five hundred, to "individuals in its confidence."

9. Lastly, the parties of the first part, and Robert Collins, one of the parties of the second part, guaranteed the goodness of all debts then owing to the Ocmulgee Bank.

The bill has been ordered pro confesso against the Ocmulgee Bank. Answers have been put in by the South Western Rail Road Bank and Robert Collins.

The bill states (what is very evident from the foregoing indenture,) that the object of the South Western Rail Road Bank, in becoming a stockholder in the Ocmulgee Bank, was to obtain entire control of the latter, and to use it in its own business operations; and it further states that at the final stoppage of the latter, the South Western Rail Road Bank held two thousand seven hundred and fifty shares of its stock.

That in the month of July, 1841, (the said South Western Rail Road Bank then owning the said two thousand seven hundred and fifty shares,) the Ocmulgee Bank applied to the firm of William B. Johnston & Co. of whom the plaintiff is the surviving partner, to advance cash funds to it, from time to time, to enable it to continue its operations; and to secure such advances, offered to place in the hands of said firm, its bills, which it represented to be (in virtue of its charter) undoubted security. That, accordingly, the said firm advanced said bank various sums, amounting in July, 1841, to \$87,308; and the said bank issued to the said firm, as collateral security for the same, \$50,000 of its bills.

That the said bank desiring to continue a credit with the said firm of William B. Johnston & Co. agreed that the said bills should continue in the hands of the firm, to cover the said advances, and any other sums which might become or remain due, throughout their mutual dealings; and that, accordingly, the said firm continued their dealings

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with said *bank, and made other advances, until, on the 7th of September, 1842, by an adjustment between them, the indebtedness of the bank was duly recognized by its Board of Directors, at the sum of \$96,951.05.

That the said William B. Johnston & Co. continued to hold the notes of said bank, issued to them as aforesaid, and the bank's indebtedness to them remained undischarged until the final stoppage and failure of the bank, which took place the 25th of November, 1842; at which time the said bank owed the said firm of William B. Johnston & Co. \$52,210.80, together with interest, and the said firm held bills of the bank, issued to them as aforesaid, amounting to the sum of \$49,165; which are now in the hands of the plaintiff, and upon which he claims as bill holder.

That the President, Directors and officers of the South Western Rail Road Bank, were well aware of the condition and business of the Ocmulgee Bank; and well advised of its embarrassments, which induced it to ask the said advances; and that on the 18th of January, 1842, Mr. James Rose, President of the South Western Rail Road Bank, attended a meeting of the Directors of the Ocmulgee Bank, in Macon, and was then notified of the indebtedness of the latter bank to William B. Johnston & Co. and also that the said firm held \$50,000 of the bills of said bank, as security for the said advances.

The bill charges that Mr. Rose, then and there made himself fully acquainted with the affairs of the Ocmulgee Bank, and knew the liabilities of the South Western Rail Road Bank, as stockholder, to the plaintiff's firm; and communicated this information to the Board of Directors of the South Western Rail Road Bank; whereupon that bank concerted a scheme to rid itself of its liability by transferring its stock to other persons.

That by the amount of their stock, they were enabled to control the action of the Ocmulgee Bank; and with a view to defeat the rights of the plaintiff, they selected, as their means, the 5th section, rule 7th, of the charter; thus converting a statutory provision, which was intended as a protection and security to the Ocmulgee Bank, into an engine for defeating the very purposes designed by the charter.

"Your orator believes," (says the bill.) "and so charges, that the said South Western Rail Road Bank, knowing that Dr. Robert Collins was a large debtor to the Ocmulgee Bank, by some arrangement between them, the nature whereof your orator is not precisely acquainted with, proposed that the said Robert Collins should become the purchaser of the stock held by the said South Western Rail Road Bank, or a portion thereof, at a nominal and inadequate price; and that the inducement held out to the said

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Robert was, that the Ocmulgee Bank would, under the provisions of their charter last mentioned, declare so much of the said stock forfeited, as, at par, would be equal in amount to the debt due by the said Robert Collins, and thereby extinguish, at the same time, the liability of the South Western Rail Road Bank as stockholder, and the indebtedness of the said Robert Collins."

The bill, then, states that the Directors of the Ocmulgee Bank having received some intimation of the plan in agitation, did, on the 14th of May, 1842, adopt the following resolution:

"Whereas the South Western Rail Road Bank has transferred, or made an agreement to transfer, the entire amount of stock held by it, as well as the debts due from the Ocmulgee Bank of the State of Georgia, to said South Western Rail Road Bank, in a way and to an extent not contemplated by this Board, and which would diminish the security of the bill holders and others, to whom this bank is indebted. Be it, therefore,

Resolved. That we refuse to grant any order, whereby the officers of this institution, or either of them, shall declare as forfeited, any part of the stock which may be transferred to Robert Collins, by which his debts might be extinguished."

The bill proceeds to charge that the said South Western Rail Road Bank, still persisting in their purpose of avoiding their liability, either by securing a more pliant Board of Directors, or by other means, on the 16th of May, 1842, transferred one thousand of their shares in the Ocmulgee Bank to D. F. Fleming, one of the directors of their own bank, nominally and without any consideration paid, and in the beginning of November following, when the term of the acting directors of the Ocmulgee Bank was about to expire, sent him as their agent to Macon, to carry out their schemes.

That at this time, the plaintiff, William B. Johnston, was the acting cashier of the Ocmulgee Bank, and being called on by the said Fleming, in relation to its affairs, a full exposition thereof was made to him; and he and the plaintiff consumed nearly a day in examining into its affairs, with the most unreserved confidence: and the plaintiff distinctly avers that Fleming, then and there, told him that the South Western Rail Road Bank owned the greater part of the stock of the Ocmulgee Bank, and, as stockholders, were bound to pay the debt due to the said William B. Johnston & Co. That an estimate was then made of the assets and debts of said bank, and the plaintiff parted with Fleming, under the belief that he was satisfied, and that the South Western Rail Road Bank was about to place funds in the Ocmulgee Bank to enable it to proceed with its business. That the next day, the election

of directors took place; when the plaintiff, to his great surprise, found that he had re-

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ceived a vote only *proportioned to the proxies which he himself held; and that the whole Board of Directors had been elected exactly according to the dictation of Fleming. And that upon inquiry, the plaintiff discovered that the said Fleming, acting as agent of the South Western Rail Road Bank, had proposed to some of the old directors that if they would put in such a direction as he would select, the South Western Rail Road Bank would place funds in the Ocmulgee Bank, and enable it successfully to carry on its business, and that he had agreed with others of the old directors, and with the President, that the stock held by them should be taken at par, or set down to extinguish their debts to the Ocmulgee Bank. That by these various means, he secured a majority of the directors, and himself voted in their favor the one thousand seven hundred and fifty shares still standing in the name of the South Western Rail Road Bank. And in order to qualify some of these newly elected directors, he transferred to them a portion of the one thousand shares which the South Western Rail Road Bank had transferred to him. These preparations having been made, and the plaintiff as cashier, having, upon being required to do so, summoned the new directors, and having upon further requirement, resigned his office of cashier, the Board of Directors proceeded to elect, as cashier, William C. Breese, one of the Officers of the South Western Rail Road Bank, at Charleston, and the South Western Rail Road Bank became the surety to the official bond of said Breese.

That the South Western Rail Road Bank, having thus secured the entire control of the Ocmulgee Bank, proceeded to consummate their scheme to relieve themselves of their stock; and on the 22d of November, 1842, sent to Macon, as agent, another of its directors, who transferred to Dr. Robert Collins, one thousand seven hundred and fifty stock shares in the Ocmulgee Bank; and that on the same day, the Ocmulgee Bank was debited with about \$30,000 of the bonds of the Central Rail Road and Banking Company, which were passed to the credit of the South Western Rail Road Bank, which had, some how or other, been paid in by the said Collins, in purchase of the said stock thus transferred to him, whereupon Collins's obligations to the Ocmulgee Bank were surrendered to him, and his shares in the bank cancelled to a large amount; thus, at the same time, giving up the assets of the bank to a great amount, and relieving the stock from liability to the creditors of the bank. The bill charges that this whole transaction was a fraud upon the provisions of the Ocmulgee Bank charter, and more especially upon the said William B. Johnston & Co. then holding

the bills of the said bank; and that the said transfers of stock were intended by the

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South Western Rail Road Bank, *to defeat the rights of said firm, and were, therefore, fraudulent and void; and in proof that the whole arose from a scheme, unfounded upon due consideration, it is alleged that at the date of the transfer to Collins, the South Western Rail Road Bank had already, in addition to the one thousand shares transferred to Fleming, as aforesaid, transferred to him three hundred other shares, and to Breese two hundred shares; making in all, one thousand five hundred shares, and thereby incapacitated itself to transfer one thousand seven hundred and fifty shares to Collins; and that in order to make good the transfer to Collins, Fleming and Breese were under the necessity of re-transferring some of the stock which had been transferred to them.

The bill further alleges, that while this fraudulent scheme was in the course of execution, the South Western Rail Road Bank held out, through Fleming and others, promises that it would furnish ample means to sustain the Ocmulgee Bank, in paying its debts and carrying on its business; by which, and by the before mentioned contrivances, it induced the directors of the Ocmulgee Bank to place the management of that bank under its control and direction; and that, accordingly, the said South Western Rail Road Bank advanced to the Ocmulgee Bank the sum of \$5,000; and under pretext of securing that sum and the Central Rail Road bonds paid in by Collins, as aforesaid, the said South Western Rail Road Bank, on the 23d November, 1842, induced the Board of Directors of the Ocmulgee Bank to select the best assets of the latter bank, to the amount of \$137,764, and transfer the same to the South Western Rail Road Bank, and the said assets were so transferred and delivered, at Macon, to the agent of the South Western Rail Road Bank, and have been received, and as the plaintiff believes, collected by the South Western Rail Road Bank, and applied to its own use; which transfer was not completed until the 25th of November, 1842, on which very day the Ocmulgee Bank stopped payment and closed its doors, and has proved utterly insolvent. And the bill, averring that this transfer of assets by the Ocmulgee Bank, was not intended for the benefit of all its creditors and stockholders, but for the exclusive benefit of the South Western Rail Road Bank, who knew their insolvent condition, charges that it was fraudulent and void, under the Act of 1833, before stated; and that the latter bank is bound to account to the plaintiff, as creditor, for the assets so received by it.

Finally, the bill states that since the failure of the said Ocmulgee Bank, in November, 1842, its President and Directors have

resigned their offices to the stockholders, and there is now no acting President or Director, who can be served with process.

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*The bill prays a discovery of the stock held from time to time by the South Western Rail Road Bank in the Ocmulgee Bank, and when, to whom, and under what particular agreement it was, at any time, transferred, and particularly in relation to the stock transferred to Collins, and the arrangement for forfeiting the same. Whether Fleming was agent for the South Western Rail Road Bank; the circumstances attending the transaction; the particulars as to the transfer and assignment of the Ocmulgee Bank's assets, with a schedule of the assets assigned; what amount of the said assets have been received—what disposition has been made thereof, and where they are now.

That the said transfer and assignment of assets may be declared null and void; and the South Western Rail Road Bank decreed to account for said assets to the creditors of the Ocmulgee Bank. That an account be taken of the assets of the latter bank, and the plaintiff's claim established against the same; also, that an account be taken of the bills of said bank, and those in plaintiff's possession declared a charge upon the stockholders agreeably to the charter, and the South Western Rail Road Bank decreed to pay in proportion to their stock in the Ocmulgee Bank,—and for general relief.

Although the bill has been taken pro confesso, against the Ocmulgee Bank, I cannot consider that corporation a party to this suit, because the bill itself states that there are no officers of the institution in existence, upon whom process can be served, or who can appear and answer for it, nor does the bill affect to make its stockholders parties.

The answer of the South Western Rail Road Bank admits the incorporation of the Ocmulgee Bank, and that the subscribers to its stock were organized by electing a President and Directors, who assumed to act as a corporation. That subsequently, these respondents were induced by specious representations made to them by the plaintiff and others, of the condition of the Ocmulgee Bank, to enter into the agreement of the 25th of February, 1839, (before stated:) in which the plaintiff expressly stipulated that the shares thereby transferred to the South Western Rail Road Bank had been paid up, to the extent of forty dollars per share; in pursuance of which agreement, two thousand five hundred shares in the Ocmulgee Bank were transferred to said South Western Rail Road Bank, for which it paid to the plaintiff and his companions the sum of \$100,000, being \$40 per share—and afterwards 250 shares more were transferred to this defendant, for which it paid the plaintiff and those contracting with him ten thousand dollars;

these last mentioned 250 shares having been, in the first instance, transferred, nominally, to certain directors of the South Western Rail Road Bank, and by them to the corpora-

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tion, and paid for by *the latter to the plaintiff and his associates. That when this defendant contracted for the purchase of this stock, it supposed it had received correct information of the state of the Ocmulgee Bank, and the plaintiff then asserted, as he does in the bill, that the provisions of the charter had been faithfully complied with, and more particularly the clause making it an indispensable condition that 25 per cent. of the stock should be paid in specie before the corporation should proceed to banking. But in these particulars, these defendants were deceived, and are informed, and hope to prove, that the Ocmulgee Bank was a mere bubble, and its shares a mere deception upon the public.

That the plaintiff, William B. Johnston, was one of her original subscribers, and upon organization of the bank, became a leading and influential director, and though these defendants are informed that the 5 per cent. per share, required by the charter, to be paid by subscribers at the time of their subscription, was in some way made up; yet the subscribers entered into a scheme to evade the condition imposed by the charter, that 25 per cent. of the stock be furnished in specie, and did, in fact, take measures to dispense with the payment of the stock in any funds whatever. That the second instalment (of twenty five dollars per share) was called for in April, 1837, and the charter required that instalment to be paid in specie; to evade which requisition, the subscribers combined with the Macon branch of the Bank of the State of Georgia, and with the Macon branch of the Central Rail Road and Banking Company of Georgia, to obtain large discounts, and to receive as the proceeds thereof, certificates of specie deposits; which certificates were exhibited as evidence of specie paid in to the capital of the Ocmulgee Bank, to wit: \$76,000 in the certificates of the Central Rail Road and Banking Company, and \$49,000 in the certificates of the Bank of the State of Georgia. That, thereupon, the subscribers elected a Board of Directors, and chose their officers. That the plaintiff, Johnston, was one of the directors so chosen, and cognizant of the whole scheme of evasion; and the Board of Directors, in pursuance of the agreement under which the specie certificates had been obtained, returned them to the banks from which they came, and received in exchange the notes of their subscribers, which were immediately re-discounted—and the company did, in fact, commence business without any specie whatever, and no funds, except about the sum of \$19,277.80, in notes of other banking companies of the State of Georgia.

That the whole of this scheme and combi-

nation was studiously concealed from the South Western Rail Road Bank, who were the dupes of plausible representations of the plaintiff and his associates, and who, in ig-

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norance of the true *state of the Ocmulgee Bank, were drawn in to pay the large sum of \$110,000 to the plaintiff and his associates, without any valuable consideration; and having got the shares aforesaid, they admit that they continued to hold them, because, in fact, it was impossible to dispose of them.

These defendants say that they are strangers to the circumstances under which the plaintiff advanced to the Ocmulgee Bank, the large sums of money for which he claims payment; and they deny the right of the Directors of said Bank to bind these defendants to pay to one of their associates a further contribution under pretence of a deposit of bank bills, and insist that the liability of these defendants, as stockholders, can only inure to the benefit of bona fide holders of bills of the Bank, taken in the way of business. That the plaintiff, so far from having any just claim on these defendants, is justly responsible to them for the fraud and imposition practised upon them in the sale and transfer of a fictitious stock, under the pretence of shares in a capital actually paid in.

That in addition to the large sums obtained from the South Western Rail Road Bank, by this pretended sale and transfer, the plaintiff and his associates levied a further sum of \$82,500, by pretending to call in another instalment of 30 per cent., when in fact the Ocmulgee Bank was in arrears to the South Western Rail Road Bank upwards of \$100,000, on account of bills accepted and paid for the said Ocmulgee Bank, and which they failed to provide for; and, also, on account of collections made by the Ocmulgee Bank for the South Western Rail Road Bank; and the call for an additional instalment served as a pretext to charge against the South Western Rail Road Bank the pretended amount of such instalment on the shares.¹²

These defendants charge that the plaintiff was a Director of the Ocmulgee Bank from April, 1837, till the — Nov., 1842, and was intimately acquainted with the operations of that Bank, while the defendants were, on the contrary, strangers to them, and were purposely kept in the dark as to the transactions, which they had the greatest interest in knowing.

That Mr. Rose did visit the Ocmulgee Bank in the beginning of 1842; but it was impossible for him, without more information

than the Directors chose to impart, to form any estimate of its real condition; and, so far is it from being true, that the President and Directors of the South Western Rail Road Bank were correctly advised of its condition and business, that, in a statement

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of the condition of that Bank on *the 30th of October, 1841, sworn to by the President and Cashier, and transmitted to the Governor of Georgia, and a copy of which was sent to the South Western Rail Road Bank, the whole amount of notes of the Ocmulgee Bank then issued was represented to be \$10,000; and in a statement of its condition on the (blank) day of April, 1842, also furnished to the South Western Rail Road Bank, the issue of notes at that time was stated at the sum of (blank). And in the report of its condition, made under oath to the Governor on the (blank) day of October, 1842, the issue of notes was stated at the sum of (blank.) And they further say, that at the time of making each of the said statements, the plaintiff, William B. Johnston, was a Director of the Ocmulgee Bank, and at the date of the last mentioned statement, not only Director but Cashier.

These defendants deny, "that upon being informed of the alleged indebtedness of the Ocmulgee Bank to the complainant, and the liability of the stockholders to him, on account of his holding the notes of the Ocmulgee Bank, the South Western Rail Road Bank formed a design to rid themselves of their liability, by passing away their stock to others;" on the contrary, the South Western Rail Road Bank had determined, long before the time when the advances of the complainant to the Ocmulgee Bank are alleged to have been made, to dispose of their stock in that Bank. That at a meeting of the stockholders of the South Western Rail Road Bank, in November, 1839, being the first meeting which took place after the said stock was purchased, and nearly two years before the advances of the plaintiff to the Ocmulgee Bank are alleged to have been made, a resolution was adopted, instructing the President and Directors of the South Western Rail Road Bank to dispose of said stock as soon as practicable; in pursuance of which instructions, the said President and directors endeavored to dispose of said stock, and offered it to the parties of the first part, named in the articles of agreement before mentioned, and in conformity to said articles; which offer they declined; whereby the South Western Rail Road Bank were set at liberty to sell the stock to any other person.

That afterwards, about the 8th of November, 1841, Mr. Henry G. Lamar, then President of the Ocmulgee Bank, made an offer on behalf of that Bank, to purchase the stock at the nominal price of 80 per cent. of the amount paid in on the same, to be

¹² Does this statement mean that the instalment of \$82,500, was actually paid in? or only that it was set off against the \$100,000, due by the Ocmulgee Bank to this stockholder? thus leaving a balance (at that time) due on that debt, of \$17,500?

paid by transfer of debts to that amount due to the Ocmulgee Bank, to be selected from a schedule; whereof \$130,000 were debts for which Robert Collins was liable, either as principal or surety, and which he had declared he would not pay, and the residue consisted of debts of other persons, of whose ability to pay these defendants had

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no *knowledge, but supposed they were no better than the debts of the said Robert Collins; and the offer was, therefore, declined.

That, about this time, the said Collins proposed to treat for the purchase of the said stock, and a negotiation was opened with him, which resulted, about the 16th of February, 1842, in an agreement that the South Western Rail Road Bank should transfer to him 1750 of their shares in the Ocmulgee Bank for \$61,250 of bonds of the Georgia Central Rail Road and Banking Company,—\$30,000 of said bonds to be delivered immediately, and the residue by instalments of \$5,000, at intervals of ninety days—and it was understood that the shares so to be transferred to said Robert Collins, were to be taken and forfeited by the Ocmulgee Bank in payment of debts of the said Collins to said Bank, to the amount of \$122,000, to be selected by Mr. Lamar, President of the Bank, from among all the liabilities of Collins to the Bank. These defendants believe that Collins had, before entering into this agreement, ascertained that the President and Directors of the Ocmulgee Bank would consent to forfeit said stock for his indebtedness as aforesaid; and that in truth, the said President and Directors did, at that time, assent to the forfeiture; and their subsequent dissent, expressed in their resolution of the 14th of May, 1842, set forth in the bill, was induced by circumstances which arose afterwards, and remain to be stated.

These defendants deny that the arrangement for forfeiting the stock, sold by them to Collins, for his indebtedness to the Ocmulgee Bank, was contrived, suggested, or proposed by them.

They state that Mr. Henry G. Lamar, not as President of the Ocmulgee Bank, but in his individual character, was authorized to receive from Collins, for them, the Central Rail Road and Banking Company's bonds, which Collins was to give for their stock; but, during Mr. Lamar's absence from Macon, Collins delivered 30,000 of these bonds, in part execution of his contract, to J. A. White, the Cashier of the Ocmulgee Bank; which the Directors of that Bank took possession of, and appropriated to their own purposes. That afterwards, about the 12th of April, 1842, D. F. Fleming, then a Director of the South Western Rail Road Bank, was appointed agent of that Bank, to proceed to Macon, for the purpose of disposing

of the remaining one thousand shares, still held by them in the Ocmulgee Bank; and also to obtain a settlement of a debt of the Ocmulgee Bank, and debts of Collins to the South Western Rail Road Bank—and for the more convenient execution of the business thus entrusted to him, the said one thousand shares, and the debts of the Ocmulgee Bank and of Collins to the South West-

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ern Rail Road Bank, *were transferred to said Fleming, who accordingly went to Macon, and on the 1st of May, 1842, made a contract with Collins for the sale of said stock and debts to him, (Collins,) which contract was reduced to writing, and signed by Collins and Fleming, and a copy of it marked B., is exhibited with this answer.

The agreement of the 1st of May, 1842, thus exhibited, after reciting that Fleming had become the owner of one thousand shares in the Ocmulgee Bank; of a debt of \$50,394.26, (principal and interest,) due by the said Bank to the South Western Rail Road Bank; and a debt of \$42,297.31, due to the same by Collins, and Collins & Cleaveland; and had, that day, sold the one thousand shares of stock to Collins, and taken therefor Collins' note of that date, and due at one day, for the sum of \$35,000; and that he had also sold him the debt on the Ocmulgee Bank, for which and for Collins, and Collins and Cleaveland's debt, Collins had delivered to Fleming, at par, Georgia 6 per cent. bonds to the amount of \$10,000; and also his (Collins') notes of that date, (set forth in a schedule marked A.) for the payment (in instalments, beginning the 13th of October, 1842, and ending 13th of January, 1844,) of \$70,345.78—it was then covenanted that Fleming should retain possession of the evidence of the debt on the Ocmulgee Bank, and the evidences of the debt of Collins, and Collins & Cleaveland, (set forth in a schedule marked B.) and of 220 shares in the Central Rail Road and Banking Company, previously delivered to him as collateral security for Collins, and Collins & Cleaveland's said debt; and of the note of 35,000 dollars, that day executed by Collins, as aforesaid—that Collins should pay respectively, at maturity, his notes, (amounting to \$70,345.78) set forth in schedule A,—in Georgia 6 per cent. bonds, at par value; and should he fail to pay any one of said notes within fifteen days after its maturity, all his rights under the agreement should become forfeited, and in that event, Fleming should retain, as his own property, the \$10,000 advanced to him as aforesaid, the said \$35,000 note given by Collins, and whatever amount of the debt of the Ocmulgee Bank and of the debt of Collins, and Collins & Cleaveland, might remain due at the time of such failure; and should also retain, as collateral security, for the last mentioned debt, the 220 shares of the Central Rail Road and

Banking Company. It being expressly understood, that upon failure to pay any one of the notes in schedule A., as aforesaid, the contract should be held to be fully executed, so far as at that time it had been fulfilled, as to both parties—but void, so far as it remained unfulfilled; and so far as unfulfilled, the parties should be remitted to the conditions existing before the contract was made. It was further covenanted, that upon

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*Collins' payment to Fleming, in Georgia bonds, as aforesaid, of the said notes, schedule A., or any part of them, or either of them, Fleming should give him an order on the Ocmulgee Bank, (without recourse) to operate as a transfer, pro tanto, to Collins of the debt on said Bank; and when the whole of said Ocmulgee Bank debt should thus be paid to Fleming, all sums afterwards paid by Collins on the notes, schedule A., should count, in double said sums, as credits upon the debt of Collins, and Collins & Cleaveland, until the same should be satisfied. Finally, it was agreed, that upon Collins fully discharging the notes in schedule A., in the manner aforesaid, Fleming should give him up his note of \$35,000, and all the evidences of his and Collins & Cleaveland's debt, together with the 220 shares of stock held as collateral security thereto, and also deliver to him all evidences of the Ocmulgee Bank debt remaining in his possession.¹³

13 Exhibit B.

Georgia, Bibb County.

Articles of agreement, made and concluded this first day of May, eighteen hundred and forty-two, between Daniel F. Fleming, of the City of Charleston and State of South Carolina, of the one part, and Robert Collins of the county and State first aforesaid, of the other part: Witnesseth, That whereas the said Daniel F. Fleming has become the owner in his own right of one thousand shares of the stock of the Ocmulgee Bank, of the State of Georgia, and of a debt due by said Bank, to the South Western Rail Road Bank of Charleston, amounting at this day, principal and interest, to the sum of fifty thousand three hundred and ninety-four, twenty-six one hundred dollars: and also of a debt due by said Robert Collins, and Collins & Cleaveland, to the said South Western Rail Road Bank of Charleston, amounting at this day to the sum of forty-two thousand two hundred and ninety-seven dollars, thirty-one cents; by transfer to him from said South Western Rail Road Bank of Charleston, duly made before execution of these presents. And whereas, said Robert Collins has this day purchased of said Daniel F. Fleming, the one thousand shares of the stock of the Ocmulgee Bank of the State of Georgia aforesaid; for which he has made and delivered to said Daniel F. Fleming, his note, bearing even date with these presents, and due one day after date, for the sum of thirty-five thousand dollars; and has also purchased of said Daniel F. Fleming, the said debt due to him by said Ocmulgee Bank of the State of Georgia, and in consideration thereof, and with a view to the gradual payment of the aforesaid debt, so due as aforesaid, to said Daniel F. Fleming, by said Robert Collins, and Collins & Cleaveland, he, the said Robert Collins, hath this day paid to said Daniel F. Fleming, in bonds of the State of Georgia, at par

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*This contract might have been stated in fewer words, for, stripped of burdensome technicalities, its evident intention was, that when Collins should pay the debt due by the Ocmulgee Bank, and half the debt due by himself, and his copartner, Cleaveland, (to which he was enforced by stringent conditions) a present should be made him of 1000 shares of Ocmulgee stock.

The answer of the South Western Rail Road Bank proceeds:

That after the aforesaid agreement was made, the Ocmulgee Bank finding that this Bank was about to dispose of its whole stock in that institution, and to terminate its connexion therewith, did (as they believe,

value, bearing six per cent. interest, the sum of ten thousand dollars, the receipt whereof is hereby acknowledged; and hath made and delivered to him, said Fleming, his several promissory notes, due and in amount, according to the schedule of said notes hereto attached, (marked A.), all bearing even date with these articles, and amounting to the aggregate sum of twenty-one thousand three hundred and forty-five dollars, seventy-eight cents. Now, therefore, in consideration of all the aforesaid premises; it is agreed and understood by these presents, and the parties aforesaid of the first and second parts, do hereby agree, stipulate and covenant to and with each other, and to and with the heirs, executors, administrators and assigns of each, as follows, to wit: The said Robert Collins, on his part, doth covenant and agree to and with the said Daniel F. Fleming, that he shall retain in his possession, the evidence of the aforesaid debt due to him as aforesaid, by the said the Ocmulgee Bank of the State of Georgia; together with all the evidences of the debt due to him as aforesaid, by said Collins, and Collins & Cleaveland, a schedule of which is hereunto attached, (marked B.) Also, two hundred and twenty shares of the stock of the Central Rail Road and Banking Company, heretofore delivered to him as collateral security, for said last named debt; together with the thirty-five thousand dollar note,

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this *day made to him by said Collins in purchase of the aforesaid stock of the Ocmulgee Bank of the State of Georgia.

That he will pay to said Daniel F. Fleming, respectively, at maturity, the notes herein before referred to, and hereto attached in schedule A. in bonds of the State of Georgia, at par value, bearing interest at six per centum.

That in the event that the said Robert Collins shall fail to pay as aforesaid, any one of said notes embraced in schedule A. at their maturity respectively; or within fifteen days thereafter; then all his rights in and by virtue of this entire contract, shall cease and determine, and the said Fleming shall, in that event, retain as his own property, the ten thousand dollars advanced to him as hereinbefore described; shall retain, as his own property, the aforesaid note of thirty-five thousand dollars, given for stock as aforesaid; together with whatever amount of said debt, due by said Ocmulgee Bank of the State of Georgia, and by said Robert Collins, and Collins & Cleaveland, shall remain due at the time of such failure, as also the two hundred and twenty shares of the stock of the Central Rail Road and Banking Company, as collateral security, for the debt last aforesaid. It being expressly understood, that upon failure to pay any one of the aforesaid notes in schedule A. as herein provided, this contract shall be held, according to the

at the instigation of the plaintiff) adopt the resolution of the 14th of May, 1842; not (as

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*defendants believe) from any regard to the bill holders and other creditors of the Ocmul-

stipulations in this covenant, as fully executed, so far as at the time of such failure it has been fulfilled, as to both parties, and as void in relation to all parts of it at that time remaining unfulfilled, and that so far as relates to all such parts of the same as then, are unexecuted, the parties to this agreement are remitted to their respective conditions, as existing before the execution of these articles. And the said Daniel F. Fleming, on his part, doth hereby covenant and agree to and with the said Robert Collins, that upon payment to him in bonds of the State of Georgia at par, bearing interest at six per centum, at any time, of any one or more of said notes in schedule A. or of any part of any one of said notes, he will give to said Robert Collins, or to his order, an order for such sum of money as may be at any time, as aforesaid, paid upon said last named notes upon the Ocmulgee Bank of the State of Georgia, without recourse upon him, and which order shall be a transfer to said Robert Collins, to the amount thereof, of all right or title in and to the debt due by said bank to him, as herein set forth.

And the said Daniel F. Fleming doth hereby further stipulate and agree on his part, that when the whole debt due to him by said Ocmulgee Bank of the State of Georgia, shall be, as herein stated, extinguished as to him, and transferred to the said Robert Collins, all payments thereafter made upon said notes in schedule A. by said Collins, shall pass in double the amounts of said payments, respectively, as a credit upon the debt due to him by said Collins, and Collins & Cleaveland, until the whole of said debt shall be extinguished.

And that upon payment in full of the whole amount, principal and interest, due upon all the said notes in schedule A. according to the stipulations herein provided, he will deliver to said Robert Collins, or his order, the aforesaid note of thirty-five thousand dollars—all the evidences of debt due by the Ocmulgee Bank of the State of Georgia, in his possession; and also

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all the evidences of *the debt due by said Collins, and Collins & Cleaveland, mentioned in schedule B. together with the two hundred and seventy shares of the stock of the Central Rail Road and Banking Company, held now as collateral security for the same.

In testimony whereof, the said parties have hereto set their hands and seals, the day and year aforesaid.

Executed in duplicate.

In presence of { Rob't. Collins, [Seal.]
E. A. Nesbit, { D. F. Fleming, [Seal.]
C. A. Higgins, J. P.

Schedule A. referred to in the annexed Agreement.

Dr. Robert Collins's Notes to Daniel F. Fleming.		
One Note, dated 1st May, 1842, due 13th Oct. 1842		\$10,000 00
One Note, dated 1st May, 1842, due 13th Dec. 1842		10,000 00
One Note, dated 1st May, 1842, due 13th Jan. 1843		4,500 00
One Note, dated 1st May, 1842, due 13th Feb. 1843		10,500 00
One Note, dated 1st May, 1842, due 13th April, 1843		10,000 00
One Note, dated 1st May, 1842, due 13th Nov. 1843		15,000 00
One Note, dated 1st May, 1842, due 13th Jan. 1844		10,345 78
		<hr/> \$71,345 78

gee Bank, but in order to prevent the South Western Rail Road Bank from dissolving a connexion which was so profitable to the Directors of the Ocmulgee Bank.

Further answering, they say, that afterwards (about the 2d of November, 1842,) Collins not having performed his part of either of his aforesaid contracts, and the stock held by the South Western Rail Road Bank still standing as at the date of Fleming's contract, Fleming was again sent to Macon, as agent of the South Western Rail Road

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Bank, to effect a *settlement of their affairs, as connected with the Ocmulgee Bank, both in relation to the stock therein held by the South Western Rail Road Bank, and in relation to the bonds of the Central Rail Road and Banking Company for 30,000 dollars, which Collins had delivered as aforesaid, to J. A. White, cashier of the Ocmulgee Bank, for the South Western Rail Road Bank, and by the Directors of the former disposed of for their own purposes without authority. Fleming was present at the election of directors, in November, 1842, held proxies for the 1750 shares, standing in the name of his Bank, and voted for these shares.

"They admit that the complainant was, at the time of the said election, Cashier of the Ocmulgee Bank, but they cannot admit that Fleming proposed to any of the directors that if they should put in such a direction as he would select, the South Western Rail Road Bank would place funds in the Ocmulgee Bank, to enable it to carry on its business—nor that he agreed with others of the directors and the President, that the stock held by them should be taken at par, to extinguish their indebtedness; and they positively declare that he was not instructed, nor authorized, nor employed, by the South Western Rail Road Bank, to make any such promises or agreements." They say it may be true that Fleming did, for the purpose of

Schedule B. referred to in the annexed Agreement.

Debts Due by Robert Collins, and Collins & Cleaveland, to D. F. Fleming.

Collins & Cleaveland's Note, dated 26th April, 1841, at 60 days.....	\$ 995 00
Collins & Cleaveland's Note, dated 25th May, 1841, at 60 days.....	1,075 00
Collins & Cleaveland's Note, dated 12th June, 1841, at 90 days.....	4,990 00
Robert Collins's Note, dated 1st June, 1841, 6 months	3,508 38
Robert Collins's Note, dated 1st June, 1841, 6 months	25,000 00
E. Sinclair's Bill, endorsed by Charles and Robert Collins, 13th Sept. 1839, at 7 months	2,390 00
R. Carns's Bill, endorsed by Jewitt & Burch, and R. Collins, due 10th April, 1839	2,500 00
	<hr/> \$40,458 38
Interest to 1st of May, 1842.....	1,838 93
	<hr/> \$42,297 31

qualifying some of the newly elected directors, transfer to them some of the shares previously transferred by the South Western Rail Road Bank to him.

They admit that, upon plaintiff's resignation of the office of Cashier, Breese was elected Cashier, and the South Western Rail Road Bank became surety on his official bond. He had been, but was not then, an officer of the South Western Rail Road Bank, and knowing his integrity and capacity, they deemed it important to all persons interested in the honest and skillful management of the Ocmulgee Bank, that he should be Cashier; and, therefore, were willing to become his surety.

"And these defendants, further answering, say, that the said D. F. Fleming not having effected the transfer of the stock of the Ocmulgee Bank, formerly held by the South Western Rail Road Bank, in conformity with the contracts of sale, made with the said Robert Collins, as aforesaid, and a settlement with the Ocmulgee Bank for the 30,000 dollars of Central Rail Road Bonds, received by them as above mentioned—Mr. M. C. Mordecai, another director of the South Western Rail Road Bank, was sent to Macon to complete said transfer and settlement, and did transfer the said shares to the said Robert Collins, and the same were immediately afterwards forfeited by the Board of Directors, for the indebtedness of the said Robert Collins to the Ocmulgee Bank; and the President and Directors of the Ocmulgee Bank

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(having *parted with the said 30,000 dollars of bonds of the Central Rail Road and Banking Company, and being unable to replace them by the like amounts of the same bonds) were induced by Mr. Mordecai, in consideration thereof, as the nearest approach to replacing their value which they were able to make, and for the further consideration of \$5000 cash, then and there paid them by Mr. Mordecai, to assign to the South Western Rail Road Bank, the securities set forth in an exhibit accompanying their answer marked C."

This exhibit sets forth 7 mortgages—3 by George Jewitt, 3 by Jewitt & Burch, and 1 by Mortin N. Burch—on all of which the equity of redemption was released.¹⁴

¹⁴ Exhibit C.

Received from Mr. M. C. Mordecai, agent and attorney of the South Western Rail Road Bank, for foreclosure, the following mortgage Deeds, to wit:—

A mortgage made by Jewitt & Burch, to the Ocmulgee Bank of the State of Georgia, bearing date on the 29th day of December, 1840, and recorded on the 6th January, 1841.

A mortgage made by George Jewitt to the Ocmulgee Bank, dated on 29th December, 1840, and recorded the 6th January, 1841.

A mortgage made by Jewitt & Burch, to the Ocmulgee Bank, dated 29th December, 1840, and recorded 6th January, 1841.

A mortgage made by George Jewitt to the Oc-

These defendants for further answer say, that these securities, (exhibit C) were placed in the hands of Eugenius A. Nesbit, the Attorney of the South Western Rail Road Bank, at Macon, where they still are, and that nothing, so far as they know or believe, has been received on account of the same; and that said securities have been attached, in the hands of said Nesbit, in a suit instituted in the Superior Court of Georgia, by (Blank) against the South Western Rail Road Bank. "And these defendants are advised, that they have no right to hold the said assets against the bona fide creditors of the Ocmulgee Bank."

And they further say, that soon after the said settlement was completed as aforesaid, the Ocmulgee Bank stopped payment and closed its doors, but at what precise time this stoppage took place, they do not now remember. And before the said settlement and stoppage, the President and Directors (of the South Western Rail Road Bank) were

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aware, from *the representations of Mr. Fleming and Mr. Breese, that the condition of the Ocmulgee Bank was very unsound, but they had made no particular examination of the same, and were incapable, from their ignorance of the circumstances of its debtors, of forming a correct judgment as to the extent of its insolvency—"and these defendants deny that they are accountable to the complainant at all; but if accountable, it must be only pro rata with the other stockholders."

Collins' answer states, that about the 23d of February, 1842, he entered into an agreement with the South Western Rail Road Bank for the purchase of 1750 Ocmulgee Bank shares amounting to \$122,500—at its par value of 70 dollars per share, the amount paid in on said stock—upon the terms and conditions, and with the object and intentions set forth in the resolution of the Directors of the said South Western Rail Road Bank, and transmitted to him by James Rose, in the following words.

South Western Rail Road Bank, }
Charleston, S. C. Feb'y 23, 1842. }
Robert Collins, Esq.

Dear Sir:—I have sent Col. Lamar the res-

mulgee Bank, dated 29th December, 1840, and recorded 6th January, 1841.

A mortgage made by Jewitt & Burch to the Ocmulgee Bank, on the 25th day of March, 1840, and recorded 3d April, 1840.

A mortgage made by George Jewitt to the Ocmulgee Bank, dated the 25th March, 1840, recorded 3d April, 1840.

A mortgage made by Mortin N. Burch to the Ocmulgee Bank, on the 29th December, 1840—also a relinquishment from George Jewitt and Mortin N. Burch, of their equity of redemption in and to all the before described mortgages, dated on the 26th October, 1842, made to the Ocmulgee Bank.

(Signed) E. A. Nesbit,
Attorney at Law, Macon, Ga.

November 22, 1842.

olution of the Board on your offer; and he is authorized to act under it, on our part, if the Ocmulgee Bank consents. Resolved, that this Bank will sell to R. Collins \$122,500—stock of the Ocmulgee Bank—or 1750 shares, in the following manner, viz:—That he pays \$61,250, in Central Rail Road and 8 per cent. bonds, and that H. G. Lamar, Esq. shall select such liabilities of R. Collins, as drawer, endorser, or guarantee to the Ocmulgee Bank, as he may deem to the interest of the institution, to the amount of \$122,500, and upon R. Collins' paying \$61,250 in said Central Rail Road bonds, the stock will be vested in him, and the Ocmulgee Bank will declare it forfeited to the payment of debts, so selected—\$30,000 of the bonds to be delivered at once, and not less than \$5,000 every ninety days, until the whole is paid. The purchase to be a cash transaction.

Very respectfully,

James Rose, President.

This defendant further answering, says, that according to such agreement, he did, a few days after receiving the above resolution, say about the 1st of March, 1842, deliver at the Ocmulgee Bank, \$30,000 Central Rail Road bonds, and took from J. A. White, their Cashier, a receipt therefor, specifying that he was entitled to a credit on his liabilities accordingly, but no stock was transferred to him, nor anything else done at that time. But that soon thereafter, a difficulty seemed to arise between the Ocmulgee Bank and the South Western Rail Road Bank respecting

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the disposition and possession of *the \$30,000 bonds above referred to, which difficulty appeared to result in the determination on the part of the Ocmulgee Bank, not to allow the transfer and forfeiture of said stock; and, therefore, nothing further was done in relation to the 1750 shares, until after Fleming came to Macon, as agent of the South Western Rail Road Bank, and by the election of new directors, got possession of the Ocmulgee Bank, as stated in the bill—after which, on or about the 23d of Nov. 1842, Mordecai also came to Macon as agent of the South Western Rail Road Bank, and among other things, as stated in the bill, he transferred the 1750 shares to this defendant, and, at the same time, caused them to be declared forfeited in payment of this defendant's liabilities to said Ocmulgee Bank; and took out of said Bank about \$60,000 of the liabilities of this defendant, (all or mostly endorsements) which he took in place of the stock which he had just caused to be forfeited in payment of said papers. He then came to this defendant and proposed to carry out the original resolution of the 23d of February, by giving up said papers upon one-half of their amount in Rail Road bonds. But this defendant not having the bonds in hand, gave his notes, payable in said bonds, at different periods, for \$30,000 or thereabouts,

and took a receipt or obligation from Mordecai, as agent of the South Western Rail Road Bank, stating that when said notes should be paid, the South Western Rail Road Bank would deliver to this defendant the notes (for about \$60,000) taken by them from the Ocmulgee Bank; but in consequence of the Ocmulgee Bank failing, two days afterwards, this defendant never made any attempt to pay any of the notes he gave Mordecai, considering them void in law, nor has any attempt ever been made to collect any part of them.

This defendant further answering, says, that in addition to the transaction before related, Fleming, acting as agent of the South Western Rail Road Bank, came to Macon about the month of May, 1842, and sold to this defendant 1000 shares in the Ocmulgee Bank, upon the same terms and conditions as had been agreed upon for the 1750 shares, and transferred the 1000 shares to him in the books of the Ocmulgee Bank; for which he gave his notes; which was included in a general settlement, then agreed upon between himself and Fleming, agent as aforesaid, embracing various other matters. This general settlement had been but partially carried into effect at the time the Ocmulgee Bank failed, and nothing has been done about it since. Of the 1000 shares then transferred to him, between 600 and 700 still stand in his name, the rest were declared forfeited in the fall of 1842, to pay some liabilities of this defendant on Messrs. Jewitt & Hamilton's paper.

It will appear from this statement of the

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pleadings, (which *I have made very full, in order that the parties shall be allowed to speak for themselves,) that if the evidence establishes the plaintiff's advances to the Ocmulgee Bank, and the hypothecation of its bills to him as collateral thereto, the defence of the South Western Rail Road Bank is,

1. That by fraudulent misrepresentations made by him, he imposed the stock upon them, as holders of which he seeks to make them liable to him; and that they are released, in Equity, from liability to him by this fraud, and also by the concealment and misrepresentations of its condition, in the Bank's statements and returns.

2. That he has not such a right in the bills of the Ocmulgee Bank on which he now claims, as entitles him to payment thereof from them, as stockholders.

3. That, as a general creditor for advances, he cannot maintain his bill as now filed.

The preliminary question is, therefore, whether the plaintiff is a creditor for advances to the Ocmulgee Bank, and to what amount. After this is disposed of, the defences of the Bank will be considered.

In relation to this question, there is an unbroken current of testimony. It appears that in the year 1840, there was a general

suspension of specie payments by the banks of Georgia, including the Ocmulgee Bank. There seems to have been an apprehension of these difficulties in the minds of the directors of this bank for some time before they actually took place. The bank appears, from the evidence, to have done a safe business, until some time in 1839; but between the middle of June and the latter end of October of that year, the discounts were increased from \$199,152.26 to \$303,928.90. It may be material to observe, by the way, that the plaintiff, who was one of the directors at the time, is probably not chargeable with this mismanagement, having been absent from the board on a visit to the north, from the 2d of July to the 21st of October. To provide for the exigencies of the bank, (according to the testimony of Mr. Lamar, the President, and others of the direction, who have been examined,) a requisition was made upon the stockholders for an instalment of 30 per cent. upon their shares, as early as the 10th of September, 1839. To this the South Western Rail Road Bank objected, (the Ocmulgee Bank being then considerably in arrears to her;) and at her instance, the requisition was postponed at different meetings in November, December, January, February, and March. The suspension, at length, took place, and continued until the 1st Feb. 1841, when the Legislature, by stringent enactments, required the banks to resume specie payments. To meet this requirement, it became necessary for this bank to obtain aid; and, accordingly, in January, 1841, Mr. Lamar, the President, to-

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gether with the *plaintiff, proceeded to Charleston, and on behalf of the Ocmulgee Bank obtained assistance from the South Western Rail Road Bank, to the extent of about \$40,000. Specie payments were resumed on the 1st of February, but by March or April, it was discovered that without further assistance, they could not be maintained. Application was, then, made by the Board of Directors, to the firm of William B. Johnston & Co. to enable them to redeem their bills as they were presented, and they advanced them in specie and in bills of exchange, payable at sight, to an amount exceeding \$70,000, under a stipulation that they should be well secured for the advances thus made. It is in evidence that, at this time, exchanges were very high, and specie difficult to obtain. The bank agreed to place in the hands of these lenders, a package of about 50,000 dollars of its own bills, as collateral security, for the repayment of the advances made and to be made, stipulating that they should not be put into general circulation, until the bank should fail to reimburse the advances made to them. These bills were afterwards regularly brought in by the plaintiff's firm on counting days, and counted with the other issues, and remained on deposit to the credit of the pledges, un-

til the count and semi-annual returns of the bank were completed, when the depositor withdrew them again. The advances are proved to have been actually made, and the whole arrangement entered into in good faith, and for the benefit of the bank. The bills pledged were actually delivered to the lenders and placed in their control, and beyond that of the bank. "The sums borrowed went to enable the bank to continue cash payments."—The advances continued, from time to time, until they amounted to a very large sum. On the 30th of August, 1842, the plaintiff laid an account of them before the directors, and a committee, consisting of Messrs. Winn, McLaughlin, and Flanders, was appointed to examine it.

The plaintiff's charges were, for

Principal	\$77,094 83
Exchange	12,335 17
Interest	10,513 02

Sum	\$99,943 02
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On the 7th of September, 1842, the committee reported "that the average of 16 per cent. charged as exchange, was probably over the customary rates current, at the dates in the account," and that having taken pains to ascertain the correct value of the different kinds of funds advanced, they had reported accordingly.

For principal	\$77,094 83
Interest to 1st September	10,204 13
Exchange	9,652 09

\$96,951 05

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*and which sum we consider due to them in specie, or its equivalent,"—which report was confirmed by the board. It will be observed that in this account thus stated by the bank, there is no dispute as to the principal advanced, nor probably about the interest, and that as to the exchange, it was adjusted at the rates customary and current at the dates of the advances.

Certainly the bank was competent to state an account with its creditor; and we must regard the adjustment as conclusive of their indebtedness at the time it was made; more especially as every witness concurs in its justness.

But the amount was afterwards reduced; and the ascertainment of what remains due, will be a fit subject for reference. There were also advances made subsequent to the transactions of November, 1842, referred to in the pleadings, which will also be taken into the inquiry.

This brings us to the inquiry, 1st. As to the fraudulent misrepresentations alleged to have been made use of to impose the stock on the defendants; and the fraudulent concealment and misrepresentations of the condition of the bank in its statements and returns to them.

The charges of the misrepresentation by which the answer of the South Western Rail Road Bank alleges the plaintiff imposed the

stock on them, are very ambiguous. At one time it is said that he and his associates represented that 40 per cent. had been paid in upon those shares; and then it is intimated, rather than averred, that this was not true. Again, the charge is more general, that the condition of the Ocmulgee Bank was misrepresented. The argument assumed a still wider range, and the representation of the plaintiff was treated as if it had been that 40 per cent. had been paid in, (and in specie too,) not only upon the shares transferred to the Rail Road Bank, but upon every share in the Ocmulgee Bank.

It is sufficient that no representation whatever is proved to have been made, except the one set forth in the contract of the 25th of February, 1839, to wit: that 40 per cent. had been paid in on the shares transferred. Besides this, there is a covenant in that contract, from which a further representation may be implied, that the debts then owing to the Georgia bank, were good.

There is no evidence in the case, so far as I can see, that 40 per cent. was not paid in on the shares transferred on the 25th of February, 1839. But if the representation of the plaintiff had gone to all the stock of the Ocmulgee Bank, the proof, it appears to me, would bear it out. The evidence is, that the stockholders paid 5 per cent. at the time of the subscription, and 25 per cent. on or before the 10th of April, 1837, when the first Board of Directors was elected.

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These *instalments, amounting to 30 per cent. or \$150,000, were all paid to the commissioners, and by them turned over to the directors, at the organization of the company. It is true they were not paid (except to a limited extent) in specie, nor did the charter require it. By the charter, the subscribers or stockholders were required to pay in specie or in the notes of specie paying banks, and this is proved to have been substantially and in good faith complied with. The requisition of the charter as to specie was, that the company should not proceed to banking until 25 per cent. in specie should be paid in.

The instalments I have spoken of were paid in, as I have stated, by the 10th of April; and the company was organized on that day, but it did not proceed to banking until the 22d June; and in the mean time had converted its funds into specie. That is, having no vaults of its own, and not being fully prepared for business, the funds were employed in the purchase of specie certificates, from two of the banks in the town, in which the specie was deposited. A committee was appointed to verify the fact, and to count the money, and reported accordingly. It seems to me this was a full and substantial compliance with the charter. Then, on the 7th of December, 1838, the stockholders paid in another instalment of 10 per cent. making 40 contributed by them.

There is a transaction connected with the payment of the second instalment of 25 per cent. out of which something was attempted to be made in argument. Several of the stockholders had enabled themselves to pay their instalments by discounting their notes at the two neighboring banks, before mentioned. On the 10th of May, the Ocmulgee Bank, having as yet neither banking house nor vaults, and no bills having been struck or ready for issuing, it was resolved that the President be authorized to loan its funds to the Central Railroad Bank for an indefinite time, provided it could be done at an interest of six per cent. This proposal was declined by the latter bank, but led to a negotiation not previously contemplated, and proved to have been conducted in good faith, by which the notes given by the aforesaid stockholders were discounted at the Ocmulgee Bank, on the 22d of June, by the banks then holding them, and the specie certificates thus taken up. The effect of this was, to realize interest on the funds of the bank, until it should be ready to do a regular business. The preponderating proof is positive that this transaction was not the effect of any previous arrangement, nor intended to be evasive; that the notes thus discounted were good, and were all paid, so that no loss whatever arose from what was done.

I do not doubt, if the specie certificates had been procured under an agreement that they

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should be merely illusory, *and that they should be withdrawn as soon as they had served a deceptive purpose, that no stratagem by which this was done, would have sanctified the fraud, nor entitled the transaction to stand as a compliance with the charter. I mean if the public authorities chose to question it.

But the evidence is clear that nothing of this sort was contemplated; indeed what was done was not intended nor considered as a regular banking transaction. It was a loan of the funds, until the company should be ready to go into regular business, which was not until November or December of that year.

The result of this inquiry, then, is, that the stockholders had, at the time of the transfer to the Rail Road Bank, paid in 40 per cent. of the shares, as required by the charter, and the bank had not proceeded to business until it had 25 per cent. in specie.

But the view most satisfactory to the conscience, is this: that the defendants who object to this measure, have suffered no loss nor injury from it. If it was technically a breach of the charter, it was for the State to take notice of that.—But can a complaint be listened to on behalf of an individual, who it is conceded has suffered no detriment? We may even suppose that the plaintiff made a misrepresentation, varying the condition of the bank on the 22d of June, 1837, from that in which this transaction placed it. Even

that would not make out a case for these defendants; for the principle is clear that it is not immaterial, but material, misrepresentation; not falsity, merely, but falsity producing injury to the party complaining, that lays the ground for relief in this Court.

The other representation contained in the contract of the 25th of February, 1839, is, that the debts then due the bank, were good. There is no proof that any one debt then existing was bad, or was lost; and as to the general condition of the bank at that time, the whole testimony conspires to prove it sound and prosperous. The officers best acquainted with its condition prove this. It was only after the South Western Rail Road Bank became a leading stockholder that the foundation of its embarrassments was laid in the overissues of the summer and autumn of 1839. Indeed, the defendant's own witness, Mr. President Lamar, after stating that up to the time of this connexion, the Ocmulgee Bank was in as sound a condition as any in Georgia, goes so far as to ascribe the over issues which ensued, to the temptation generated by the manifest confidence with which this new accession of strength had inspired the community.

There still remains to be considered, under this head, the false returns and statements ascribed to the Ocmulgee Bank, and imputed in argument to the plaintiff, by which it is

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said *the real condition of the bank, and particularly its indebtedness to the plaintiff, and its pledge of notes to him, were concealed from the South Western Rail Road Bank.

I do not perceive, in the testimony, any evidence that the concealment of the general condition of the Ocmulgee Bank, if concealment there was, is ascribable to the plaintiff individually; or that he contributed, in any manner, to create its difficulties. From the time the South Western Rail Road Bank became a stockholder, it resulted, from the compact of February, 1839, that the appointment of directors, and the whole administration of the Ocmulgee Bank, was under her control. It is difficult to perceive, therefore, how any course of management could have been adopted without her authority; could have been concealed from her; or could not have been arrested by her.

Weekly statements were made up and frequently transmitted to her. She was furnished with copies of the semi-annual statements, made to the Governor: she had, at all times, access to the books and papers of the Georgia institution, and frequently availed herself of it; and by her special agents, investigated its condition,—a steady correspondence was kept up with its officers, and, in all respects, it was supervised as a branch bank.

The returns made to the Governor were required to be very minute; embracing, among other things, the amount of bullion

and specie funds, the bills in circulation, and the amount of circulating bills on deposit. We have evidence that in these returns, there was frequent misrepresentation to the Governor and to the public, in relation to the specie; but the Rail Road Bank was not deceived by it. So far from it, she was consulted on the subject, and assisted in the public deception. On various occasions, from 1840 (which was before the plaintiff's advances to the bank) to 1841-2, inclusive—the correspondence put in evidence, shows that applications were made by the Ocmulgee Bank to the South Western Rail Road Bank,—and granted,—for the loan of specie or specie certificates, to be used by the former, in her semi-annual returns; and on one of these occasions (the preparation for the return of April, 1841,) it is ludicrous to observe the distress which the application occasioned. The Cashier of the South Western Rail Road Bank was obliged to answer. "We have to make a statement for our Comptroller General, to be made public, which will prevent my sending you, before to-morrow, the certificates you desire—I will then do so."

But the misstatements and concealments most relied on at the hearing, were in relation to the plaintiff's debt, and the pledge of bills, made by the Bank to secure it; particularly the latter. One of the returns was

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much commented on. It *is impossible to describe it here, or to make the inferences which were drawn from it, clearly understood, without setting out the return itself, at length. It is supposed to have deceived the South Western Rail Road Bank, by setting forth the bills issued as far less in amount than the sum pledged to the plaintiff, which representation, it was said, must necessarily have tended to conceal from the South Western Rail Road Bank, the fact that such a pledge of bills had been made. It is, as I have said, difficult to explain the matter without the exhibition of the return; but it may be stated thus: The evidence is, that on each day of counting, preparatory to the semi-annual returns, the plaintiff was required to bring in the bills pledged to him, which were then credited to him as deposits, until the count and return were made, upon which he withdrew them. In the return specified, if we add to the bills in circulation, those specially deposited, the whole amount of bills issued, is manifest:—There is much force in an observation of Mr. Memminger. That the fact that Johnston's bills were brought in and set down among the deposits, in the returns, does not necessarily infer a fraudulent intention, or an intention to deceive the public. By the terms of his pledge, he was not to pass away the bills. How could the Bank know that he had kept his agreement, unless the bills were brought in and counted? While in Bank, for that purpose, it was necessary to the preservation of

Mr. Johnston's right in them, that they should be entered as a deposit by him.

But what puts this matter in the most satisfactory light is this: that there is plenary proof from the witnesses of both parties (and no proof to the contrary) that the agents and officers of the South Western Rail Road Bank had repeated and explicit notice, both of the advances of the plaintiff and the pledge made to secure him; and were not, and could not be, deceived in the matter.

White says, "that on the 1st of June, 1841, Messrs. Fleming & Breese, as a committee of the South Western Rail Road Bank, came to examine into the condition of the (Ocmulgee) Bank." "The whole condition of the Bank was exposed to them fully; they were allowed access to the books and vaults of the Bank, and nothing was concealed from them. That, on the 31st of May, 1841, appears a statement of bonds, due by the Bank, of \$80,000, which included the amount due Mr. Johnston. The same item appears in each statement of the Bank, from the 1st of April, 1841. The statements were weekly. This item, appears by the Journal of the Bank, or Teller's settlement book, 5th April, 1841, to be to William B. Johnston & Co., (made up of bonds) \$80,000. This debt is taken from a settlement made with Mr. Johnston's account for advances to the Bank. This ap-

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pears to be the first time *the debt appears in this form in the books. This item was in the weekly statement account, when the committee examined the books. The committee took a very special list of the assets and liabilities of the Bank."

It appears by a letter from the President of the South Western Rail Road Bank to the President of the Ocmulgee Bank, dated 24th of May, 1841, that Fleming and Breese were sent up to investigate the condition of the latter. The letter says, "various and contradictory rumors are afloat respecting your institution, and I should be glad to answer, satisfactorily, the numerous enquiries which were made relative to its condition;" and by a letter from the same to the same, dated June 4, 1841, upon the return of Fleming and Breese, it appears that the facilities which had been afforded them, to arrive at a correct understanding of the affairs of the Ocmulgee Bank, were satisfactory. As the investigation was prompted by various contradictory rumors, and was made with a view to satisfy numerous inquiries, we may presume that it was thorough and minute.

Breese says, that he was sent with Fleming in May, 1841, to examine the condition of the Ocmulgee Bank. "In this investigation, it appeared from the books that Wm. B. Johnston & Co. were creditors of the Bank to the amount of \$80,000, by bonds issued by the Bank to Wm. B. Johnston & Co. Witness understood from the President and Directors of the Ocmulgee Bank that the

debt arose from monies advanced by them from time to time. Witness made a communication to the Rail Road Bank, in which he thinks he stated the facts above mentioned. When witness went to make the examination, he understood that the bills of the Bank had been given to Mr. Johnston as collateral security; but they were to remain in Bank, and not to be sued or circulated; not to go out of Bank." In relation to the latter matter, by the way, (that of the bills being retained by the Bank,) the witness, according to the current of testimony, is mistaken.

McLaughlin testifies that the South Western Rail Road Bank were notified of the advances made by plaintiff. "Mr. Rose, as President of the South Western Rail Road Bank, when in Macon, had frequent conversations with the officers of the Ocmulgee Bank, and with witness—in reference to said advances, and the general condition of the Ocmulgee Bank,"—"and witness is certain he must have known of the bills having been deposited with plaintiff, as it was a matter of conversation." "The Books of the Ocmulgee Bank were submitted to the examination of Mr. Rose, he was acquainted with every thing connected with the Bank, and made no protest against said debt, or the security given, although he was disappointed in the general condition of the Bank." "Mr. Rose urged the burning of the redeemed

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notes in hand, which was *done;—but the \$50,000 in plaintiff's hands, he was notified could not be controlled for that purpose." "The committee of the South Western Rail Road Bank were advised of the deposit of the bills of the Ocmulgee Bank, made to plaintiff."

Bennet testifies, that the South Western Rail Road Bank knew of the debt due to the plaintiff, and of the delivery of the Ocmulgee bills to him as security, "which information was communicated to Wm. C. Breese, an officer of the South Western Rail Road Bank, and D. F. Fleming, a director, in the month of May, 1841, while at Macon, as a committee from the South Western Rail Road Bank to examine the affairs of the Ocmulgee Bank." "On the 18th January, 1842, James Rose, President of the South Western Rail Road Bank, was at Macon, and attended a meeting of the Board of Directors of the Ocmulgee Bank, when the subject of burning the notes of the Ocmulgee Bank was introduced by him. He was informed that the plaintiff held \$50,000, or about that sum, of the notes of the Ocmulgee Bank, as security for his advances, which he would not surrender to the Bank, and which plaintiff had held ever since the Bank had resumed, except at the semi-annual reports, they were brought in, to make the returns to the Governor." "The South Western Rail Road

Bank knew of the facts and object of bringing in said notes." "The books of the Ocmulgee Bank were submitted to Mr. Rose for his examination. He was acquainted with the indebtedness of the Ocmulgee Bank to plaintiff, and the security he held, and made no objection to the debt or the security given. There was a conversation by Mr. Rose with the Directors of the Ocmulgee Bank in relation to burning the notes of the Ocmulgee Bank, and he was informed that plaintiff held \$50,000, or about that sum, as security for his advances, and they could not be burned."

Lamar says (see answers to 13th and 15th cross interrogatories:) "There was at no time any concealment as to Wm. B. Johnston & Co's loan. I am not able to answer when the South Western Rail Road Bank, or its officers, first became advised of it. As near as I recollect, in 1841, the South Western Rail Road Bank sent up Messrs. Fleming and Breese to examine into the condition of the Ocmulgee Bank. They did so thoroughly, and they were advised then and knew of Messrs. Johnston & Co's loan. In the spring of 1842, when Mr. Rose visited this place" (Macon) "he was advised fully of it, and how the notes or bills were held; and when he proposed burning all the bills, mention was made to him of bills of the Bank in the Treasury of the State, and the nature of their deposit there, as well as those held by Wm. B. Johnston & Co., which could not be burned."—"I have already answered" (says he, "as to the South Western Rail Road Bank being advised of the loan,

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and knew how it stood and appeared in the return—most of the stockholders knew the same, also; I do not know whether any one interested was deceived or not; but I cannot conceive how the South Western Rail Road Bank or its managers could be."

In the face of this evidence, how is it possible to believe that the South Western Rail Road Bank was deceived by the non-exhibition of these bills, as bills issued, or bills circulating, in the returns of the Georgia institution? Besides, how is the plaintiff,—one out of many directors,—all under the control of the Rail Road Bank, to be singled out as the author of whatever deceptions may have appeared in the returns to the Governor? Did he vote for the measure, or oppose it? We have no evidence upon the subject. And is he to lose his claim equally whether he did the one or the other? It deserves also to be considered that he was not only a director, but a creditor; and is a creditor to lose his debt, because the debtor, who is bound by law to make an exposition of his affairs to a third party, makes a false one?

I observe that it is roundly charged in the Bank's answer, that the plaintiff was at the date of the last return, Cashier of the Oc-

mulgee Bank, implying that he must at least be charged with that return, which by law was to be made on the oath of the cashier. But this allegation must have been made at a venture, for the evidence shows that the plaintiff did not become cashier until after that time.

I have found in no part of the evidence, any trace of fraud or misrepresentation on the part of the plaintiff. He appears to be a creditor for advances actually and bona fide made; which advances were employed in redeeming the bills and circulation of the Georgia Bank. The pledge of bills made to him for his security, appears to have been made in good faith. We are, then, to enquire—

2. Whether he is entitled to claim payment of these bills, as against the stockholders, under the 9th section of the charter of the Ocmulgee Bank?

A question was rather intimated than raised in the argument: whether the plaintiff's remedy, as bill holder, (if he is a bill holder,) is not at law. But there is no difficulty in this. Claiming against the Rail Road Bank, as a stockholder, it would have been necessary for him to have shown on the trial, that the title of the stock was in them at the commencement of his action. It was necessary to come into this Court to set aside the fraudulent transfer of it to Collins, and reinstate the liability of the Rail Road Bank. The real question must therefore be considered and decided:—whether the plaintiff is entitled to rank as a bill holder, and, as such, to call on the stockholders to redeem the bills in his hands.

If the bills had been paid to him, towards satisfying his advances to the Ocmulgee

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Bank, there could have been no question in the case. If, instead of loaning his funds to that institution to redeem its bills in circulation, he had employed the same funds directly in taking up the bills for the credit of the Bank, and had then presented the bills thus taken up by him, there would have been as little difficulty. In either of these cases it would be readily conceded, that he took the bills upon their credit as bank notes; and was, therefore, entitled to the same remedies upon them as any other person who might have taken them in the course of trade. The difference is, that instead of having taken the bills in payment, or purchased them from those who had taken them from others in payment;—(in either of which cases the bills would have come into his hands as absolute property,) he took them with a qualified right, as a pledge or security. The whole question turns upon this distinction. Under the evidence, there can be no objection of want of consideration advanced for these bank notes; no objection of want of good faith in the transaction;

none that the Bank and its stockholders were not benefited by it; none that in taking the bills as a security, the plaintiff did not give full credit to them as bills, and rely on them as bills, with all the remedies incident to them as such, whenever, under the contract, made with the Bank, the contingency should happen, entitling him to enforce them. The objection is simply, that he did not receive them in present payment, but as a pledge.

The argument is, that the object of chartering Banks is to secure a currency capable of displacing specie, as the ordinary medium of exchange; thereby increasing the productive income of the community. That in order to effect this end, it is necessary that those who are to receive the Bank currency, in their daily business, should be assured that it is as good as money. That a credit must be estamped upon it, so that it shall pass from hand to hand without doubt or question, as money.

From this it was inferred, that the object of the legislature in providing so fully for the redemption of the Ocmulgee Bank bills, was to secure those who should receive them as currency, or money, in payment; and not those who should receive them, under circumstances implying that when they took them they did not consider them as money.

No doubt is felt that the great object of creating Banks is truly stated in this argument; nor that while bank bills, in themselves, are not money, but merely contracts for money, the object of the legislature, in authorising the issue of them, is, that they shall, in circulation, and as a medium of exchange, represent money.—Nor that the design is that they shall circulate as constantly and as freely as the exigencies of commerce may require—nor that the remedies on them are given in order to this circulation, and

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to lend them credit for *that purpose. I have, still, very considerable doubts whether any of these considerations throw the plaintiff without the remedies provided by the legislature of Georgia, for holders of bills on the Ocmulgee Bank.

His contract with the Bank was, in effect, that the bills delivered to him should be retained by him as security for his advances, and not circulated nor enforced by him until the loan expired. In what respect does this vary the principle which would have obtained, if the bills had been paid to him on his advances, and thereupon he had immediately presented them for payment, but consented to forbear for a given time, upon condition of recovering interest from the time of the demand? I suppose that contract would have been lawful; and that in such a case, not only the Bank, but the stockholders, would have been bound for the bills,—with this distinction, that the latter possibly might not have been bound for the interest,—though I doubt that. It seems to me that he who re-

ceives the bills of a Bank, with a view or under an arrangement to retain them, or to forbear their present collection, extends even a greater degree of confidence to the bills, and the security which they import, than he who receives and passes them off in the course of a rapid circulation; and that the protection extended by the legislature, was not meant to be withheld from those who might receive the bills of the Banks, but might be under no necessity to make a present use of them, or to pass them away. Bank notes, so far as the contract they import and the remedies on that contract are concerned, are nothing but a security for money; and whoever receives them, receives them trusting to the security they afford. If he takes them for present use, he is entitled to a present remedy on them. If he takes them under an agreement to postpone his remedy, or to suspend it upon a contingency, he is a bill holder in present, entitled to his remedy whenever the contingency happens.

In receiving these bills, Mr. Johnston obtained possession of a legal obligation, executed in the form which, according to the charter, bound both the Bank and the stockholders. If there had been no stipulation binding him to retain them for a certain time, or for a certain purpose, he would have been at liberty to have put them instantly into general circulation, or to have sued the Bank and stockholders upon them. There was such a stipulation, however, but it did not in my conception cut down the bills in his hands to any thing less than legal obligations, according to their face.

He held, in each bill, a contract valid, at law, against the Bank and stockholders. Against that they held an equity to restrain him until the happening of a contingency. Suppose that, contrary to his stipulation, he had passed the bills away to a third person, ignorant of the existing equity; that

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third *person could have enforced them against any party bound by the charter for their redemption. This shows that the bills carry in them an inherent legal obligation against those parties. So, again, if before the happening of the contingency, he had endeavored to enforce the bills against the Bank or the stockholders, their defence could not have been that there was no binding legal obligation in the bills; but that the contract with Mr. Johnston created an equity to restrain him until the happening of a contingency. But when the contingency has happened, their equity is gone, and nothing remains but the legal obligation of the bills.

My opinion is, that Mr. Johnston took these bills upon a full and fair consideration, which entitles him in law and equity to enforce them according to the terms of the contract under which they came into his hands.

If the objection be urged that he did not

take them as money, the answer is, he took them for whatever they were, be they regarded as money or securities for money. He took them with all their qualities, and is entitled to circulate them as money, or insist on them as securities.

If it be further urged that he took them under a restricted right as to the free use of them, the answer to that is, that the restriction was suspended on a contingency which has happened, and therefore his right is now absolute.

It was argued that the bills intended to be sustained by the 9th section of the charter, were bills in circulation, and such only; and much ingenious argument was directed to the question, whether the bills were put in circulation by the Bank when deposited by them in the hands of Johnston & Co. I can frame no definition of bills in circulation which does not cover bills pledged or deposited. A Bank has issued or put in circulation her notes, whenever she has emitted them; imparted a right in them to a third person; and divested herself of the control over them. Such was the case as to these bills—they were not put into the general, but certainly into a qualified circulation. Did the bills lose their quality, because they were not actually passing from hand to hand?

In *Davenport v. The City Bank of Buffalo*, 9 Paige, 12, we have an opinion expressed, though not necessary to the case, that a Bank, by pledging her bills, puts them in circulation. Chancellor Walworth says, "when the bills of a Bank are legally pledged for the securing of a debt or demand, due to any other person or institution, so as to entitle the pledgee to hold and use such bills for his indemnity, in case the debt is not paid, such bills must be considered as issued and in circulation, within the true meaning and intent of the statute, limiting such issues—as such bills are no longer under the control of the Bank." In this opin-

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ion I concur, and, I apprehend, there could be no diversity of judgment upon this point, were it not for an authoritative construction of a different import which is supposed to have been put upon a similar statute of Georgia, by the Supreme Court of that State, in the case of *Collins v. The Central Bank*, 1 Kelly, 435.

The contest, in that case, was between the creditors of the Monroe Rail Road and Banking Company, for the payment of their demands out of the proceeds of the Company's Railway equipments, &c. which had been sold for the benefit of the creditors. The 11th section of the Company's charter provided that "the Rail Road to be built by said Company, from," &c. "together with all revenue arising therefrom, and all the property, equipments, and effects therewith connected, shall be pledged and bound for the redemption of the notes or bills issued by or from

said Company."¹⁵ Collins had constructed part of the Rail Way, under a contract with the Company; as security for which, he held a mortgage from the Company for the whole of the Rail Way. It had been adjudged that this mortgage was inferior in rank to the claims of the bill holders, so far as it extended to parts of the road not constructed by Collins. This decision left part of his demand unsatisfied. He then made it to appear, (says the report of the case) that contemporaneously with the mortgage, it was also agreed that \$300,000 of the Company's bills should be set apart, in the hands of a third party, to be held as further security, and to be delivered to him, Collins, in the event that it should be judicially determined that the bills of the Company were preferable over other claims, under the 11th section of its charter. Such a decision having been made, he caused the bills which had thus been set apart for his benefit, to be brought forward and delivered to the auditors, and required that his claim should be sustained on the score of these bills—but the auditors, supported by Mr. Justice Floyd, ruled, "that said bills could not be considered as bills issued by the said Company; and, therefore, they could not be admitted to receive from the fund any pro rata or other share with other bank bills." The case was brought before the Supreme Court, by appeal from the decision. The argument was very extensive, but the opinion of the Court on this point, was very summary. Warner, Justice, in delivering the judgment, says, "on looking into the manner in which this security was taken by the plaintiff in error, as disclosed by the record, we are decidedly of opinion he is not entitled to receive any portion of said fund as bill holder. The bills were not issued as was contemplated by the charter of the Company, and the manner in which they are now attempted to be used, for the purpose of placing the holder thereof on the same footing as the holder of bills issued and put into circulation as money, according to the terms of the

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*charter, cannot receive the sanction of this Court. To permit it, would be, in our judgment, to sanction a fraud on the rights of those bill holders whose bills are legitimately issued and put in circulation as money—according to the terms and provisions of the charter. On this ground of exception taken, we most cheerfully concur in opinion with the Court below."

Although the subjects bound by this charter are different from those bound by the charter of the Ocmulgee Bank, the contracts intended to be secured, are the same in both; in the one case, "the notes or bills issued by or from said company," in the other, "the bills or notes issued by or from said Bank:" and if this decision intended to affirm that

¹⁵ Prince, 272.

Monroe Rail Road bills, pledged by that company for a fair consideration, and placed under the control of the pledgee, and beyond that of the Company, were not "issued by or from said Company," so as to entitle the holder of them to all the securities provided by the charter for their redemption, then the very point before us in this case is decided, and such a construction put upon the words of the Ocmulgee charter, as this Court is bound to adopt.

In numerous cases, (see *McKeen v. Delancy*, 5 Cranch, 22, [3 L. Ed. 25;] *Polk v. Wendal*, 9 Cranch, 98, [3 L. Ed. 665;] *Mutual Assurance Society v. Watts*, 1 Wheat. 279, [4 L. Ed. 91;] *Elmendorf v. Taylor*, 10 Wheat. 152, [6 L. Ed. 289;] *Shelby v. Guy*, 11 Wheat. 361, [6 L. Ed. 495;] *Gardner v. Collins*, 2 Pet. 58, [7 L. Ed. 347;] *United States v. Morrison*, 4 Pet. 124, [7 L. Ed. 804;] *Cathcart v. Robinson*, 5 Pet. 280, [8 L. Ed. 120;] *Green v. Neal*, 6 Pet. 291, [8 L. Ed. 402;] and, *Coates v. Muse*, 1 Brock. 539, [Fed. Cas. No. 2,917,]) the deference which all courts, of all other countries, are bound to pay to the construction of a statute adopted by the judiciary of the country where it was enacted, is clearly pointed out.

In *Coates v. Muse*, one of these cases, a statute of Virginia, which had never yet been expounded by the State Judiciary, came before Chief Justice Marshall for construction. His language manifests the anxiety and distrust which the task thus imposed on him occasioned. "It is always," says he, "with extreme reluctance that I break the way in expounding the statute of a State; for the exposition of the Acts of any Legislature, is, I think, the peculiar and appropriate duty of the tribunals erected by that Legislature.—Although, if a case depending on a statute not yet construed by the appropriate tribunal, comes on to be tried, the Judge is under the necessity of construing the statute, because it forms part of the case, yet he will yield to this necessity only when it is real, and where the case depends on the statute."

In *Elmendorf v. Taylor*, 10 Wheat. 152, [6 L. Ed. 289,] depending upon the construction of statutes of Kentucky, the same great Judge observes, that it would be unnecessary to discuss the construction, if it should appear to have been settled in Kentucky. "This Court," says he, "has uniformly professed

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its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the Legislative acts of that government. Thus, no court in the universe which professed to be governed by principle, would, we presume, undertake to say, that the Courts

of Great Britain or France, or of any other nation, had misunderstood their own statutes, and, therefore, erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute."¹⁶

In several of the cases referred to, the Court adopted State constructions contrary to its own opinion; in some of them, it held that the principle under which it acted, extended so far as to compel it to put a different construction upon the same words of a statute, common to several States, according to the judicial construction adopted in those States respectively.¹⁷ In one of the cases, a State construction intervened, between the decision of the Circuit Court, and the hearing of the appeal in the Supreme Court; and the Court immediately and implicitly obeyed it.¹⁸ In another, it appears that the Court had, in previous cases, conformed its decisions to the construction given by the State Courts; but the Supreme Court of the State having recently changed the former construction, the Supreme Court of the United States instantly conformed to the recent decision.¹⁹

It is true that the cases in which this doctrine was thus applied, were nearly all of them cases in which the laws to be construed were local in their nature, as forming rules of property, or as applying to the forum; as, for instance, registry laws, laws of inheritance and distribution, statutes of limitation, or laws regulating the lien and operation of judgments, and the like. But the words of Chief Justice Marshall, in *Elmendorf v. Taylor*, are too emphatic to be mistaken. The principle announced by him goes to establish a comity which must extend to the implicit adoption of the construction put by the Courts of each nation or State, upon their own statutes, whatever their character. This, and this only, can give the same operation to the same statute in all parts of the world; and secure to those affected by it the same rights, and ensure that they shall be subjected to only the same degrees of liability under it.

But the obligation to follow the decisions of a State, implies that they shall be clearly understood; and for this purpose, their purport and meaning, and the extent and op-

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eration intended to be given to them, where dubious, must be investigated. Instances of such investigation occur in the cases from the United States Courts, to which I have referred.

If the ground upon which the Supreme

¹⁶ 5 Cranch, 22, [3 L. Ed. 25.]

¹⁷ 5 Peters, 280, [8 L. Ed. 120.]

¹⁸ 4 Peters 124, [7 L. Ed. 804.]

¹⁹ 6 Peters, 291, [8 L. Ed. 402.]

Court of Georgia degraded the bills presented by Collins, was not the mere fact that they had been pledged to him, but a conviction that the pledge had not been effectually created, or a persuasion, arising from the circumstances, that it was simulated and unreal; and if the Court, apart from the attending circumstances, would have held that a pledge had been actually and bona fide made, and was effectual to give Collins the rank of a bill holder, then, instead of conforming to the construction of that Court, we should contravene and defeat its true meaning, if we should rule Johnston out of the list of the bill holders in this case.

It is impossible to read the decisions of this newly organized Court, of which we have the first report in Kelly, without profound respect for the ability, diligence and research displayed by the Judges who determined the cases, as well as by the counsel who argued them. It is clearly impossible, however, where such a vast amount of business is despatched, as seems to have been transacted by this Court at each term, for any degree of care or assiduity, however great, to prevent occasional manifestations of ambiguity or want of precision in the judgments pronounced. We all know that in the hurry and ardor of the moment, general expressions escape a Judge, beyond his deliberate opinion and beyond the exigencies of the case. It would be unfair, both to him and to the cause of justice, in the subsequent application of his decision, to take hold of these expressions as the decision, or to allow them to pervert the judgment really intended. It would be equally unfair to the other members of the Court, concurring in the result of his judgment, to impute to them an assent to every expression dropped by him, though not necessary to that result. What we wish to know in this case is, what was intended to be decided in *Collins v. The Central Bank*; and what, in Georgia, is the known and accepted principle of that decision.

Now, in that case, Judge Warner delivered an opinion only for himself and Judge Nesbit—Judge Lumpkin being a bill holder, did not sit in the case. It is said by the Reporter, that “after the judgment was delivered, the same being adverse to his interest,” he gave it his approbation.²⁰ There is no intimation that he held the bills by way of pledge; and if not, I apprehend that the concurrence expressed by him, did not relate to the point now under discussion; upon which point the decision was favorable to his interest as a bill holder; but related to another point in the case, in which Collins’ mortgage lien was applied to the proceeds of

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so much *of the Rail Way as he had constructed, in exclusion of, and adverse to, the bill holders.

Judge Warner, speaking in very general terms, refers to “the manner in which this security was taken,” seeming to object not to the fact of taking the security, but to the manner of doing it.

Again, he says, “the bills were not issued as was contemplated by the charter.” Does he here mean that the bills were issued contrary to the spirit of the charter, and in a case not contemplated by it, or that the emission of them was incomplete?

These observations were made on the 6th exception taken to the judgment below, which judgment, as described in the exception, was, “that the said bills set apart as collateral security,” &c. “had not been legally issued by said Bank.” Does this mean that the bills were not parted from by the Bank, but only set apart and still retained under her control? In the affirmation that the bills had not been “legally issued,” was stress intended to be laid on the word “issued” or the word “legally?”

The statement by the Reporter,²¹ of the facts relating to this transaction, is vague and uncertain throughout. Occasionally we have glimpses at the facts in the argument of counsel, from which it would appear the Bank never parted from the bills; and that out of the \$300,000 set apart in the package, the Bank made use of \$100,000. The pledge is said to have been made in 1842, but Mr. Law, arguing in support of it, does not pretend that there was any delivery, or even schedule taken, till 1845, which was after the insolvency of the Company, and, possibly, after the decree for the sale of its property, which was made at May Term, 1845. If this was so, the case is like that of *Davenport v. The City Bank of Buffalo*, 9 Paige, 12, before referred to. In that case, the Bank had obtained from the plaintiffs an accommodation note, which was discounted at another institution for the benefit of the Bank. When it was delivered to the Cashier for that purpose, he sealed up a package, containing bills of the Bank, sufficient to cover the amount of the note, and endorsed on the package a memorandum, that it was intended to protect the plaintiffs against loss on the note; and placed the package thus endorsed, in the vaults of the Bank. But no entry of the transaction was made in the books of the Bank; nor were the bills entered on the books, as part of the bills issued or in circulation. The Bank failed, and a receiver was appointed; and the accommodation note being protested, the plaintiffs applied for a decree that the receiver deliver the package to them. The Chancellor decided that this was a “mere fictitious hypothecation of the bills of the Bank, contained in the package

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—while the same still remained under *the absolute control of the institution, in its own

²⁰ Kelly, 454, note.

²¹ 1 Kelly, 454.

vaults. And the plaintiffs, by such nominal hypothecation, obtained neither a legal nor an equitable lien on the bills in the package, even if the arrangement under which they were sealed up, was made with the sanction of the Directors of the Bank."

I am confirmed in the impression, that the bills were never delivered as a pledge to Collins, nor put out of the control of the company, by subsequent proceedings in the same case, in the Superior Court; and the view then taken by Judge Floyd, shows me what he understood to be the true meaning of the Supreme Court, when they affirmed his previous judgment.

A claim was filed by the Planters's Bank, and traversed before the auditors—the auditors, reporting upon it, say "the Monroe Rail Road and Banking Company, on the 20th of October, 1841, applied to and obtained, from the Planters's Bank, a loan of \$20,000; to secure which, the Monroe Rail Road and Banking Company gave to the said Planters's Bank four promissory notes, each for the sum of \$5000, with three endorsers, and also deposited, at the same time, \$20,000 of the bills of the Monroe Rail Road and Banking Company, with the Planters's Bank, as collateral security, for the repayment of the sum borrowed. Three of said notes have been paid by returning \$15,000 of the sum borrowed, leaving one of the notes unpaid. At the time of this transaction, the Monroe Rail Road Banking Company were paying out their bills to the contractors and other creditors of said company.

"The Planters' Bank claims the control of the whole \$20,000 of bills, to secure payment of the balance due said bank; and objected to, on the part of the contestant, because it is alleged that said bills deposited, were not issued by the bank; and it is insisted that the Planters's Bank stands, in regard to the bills deposited as collateral security, in the same situation that Dr. Robert Collins did, in relation to his claim to control \$200,000 of the bills of the said Monroe Rail Road and Banking Company, under contract with said bank. If this be so, the claim under consideration ought not to be allowed, as it has been determined both by the Superior Court," (Judge Floyd,) "and Supreme Court, that Dr. Collins, claiming to control said \$200,000, was not a bill holder under the charter of the bank.

"The auditors cannot admit that the case under consideration, is situated as the case of Collins. In the case of Collins there was no delivery, and the bills were left in the bank. Collins was not to control the bills until after it should be determined by the judicial authority of the State, that bill holders had a prior lien on the road and equipments to

bills were delivered, after being signed by the proper officers, to the Planters's Bank. The Monroe Rail Road and Banking Company parted with the bills. The Planters's Bank had the control and dominion of the bills, and could have passed them to others. The bills were, therefore, in the opinion of the auditors, issued by and from the bank."

This report was confirmed by the Superior Court, and so little does it appear to have contradicted the decision of the Supreme Court, as understood by the profession and the parties interested, that no appeal was taken.

When, in addition to this evidence of the accepted meaning of the judgment delivered in Collins's case, I find that, thus interpreted, it corresponds with the decision in Davenport's made by Chancellor Walworth, and I might add, with the justice of the case, I do not feel that I am putting an unwarranted construction upon the 9th section of the Ocmulgee charter, when I hold that Mr. Johnston has a good right to enforce the bills pledged to him.

It cannot be doubted that bank bills are capable of being pledged. They are so far bona et catalla, as contra-distinguished from choses, that a common carrier is liable for the loss of them. They have been likened to deeds, &c. "and if one brings a bag or chest of evidences into the inn, or obligations, deeds or other specialties, and by default of the inn-keeper, they are taken away, the inn-keeper shall answer for them, and the writ shall be bona et catalla, generally, and the declaration shall be special."²²

The objection has been made that though a bank may pledge the bills of other banks, it cannot pledge its own. I know no reason why any person, real or artificial, capable of making a note, and entering into a contract, may not deposit his note or promise, coupled with any condition, as to its present or future operation, which he may choose to stipulate.—Such transactions are not unknown among individuals; and I think the cases referred to show that they are not unfrequent among banks, or unacknowledged by the general sense of men engaged in trade. Suppose the Ocmulgee Bank had placed these bills in the hands of Mr. Johnston, as the security for the debt of a third person, to be used if that third person failed to pay; what objection could the bank or its stockholders make to their liability on the bills?

It has been argued, again, that the bank was not chartered to issue bills for such purposes, that it was a fraud upon the stockholders to issue them for such purposes, and that he who received them for such purposes, was a party to the fraud, and cannot enforce the bills against the party defrauded. The bank was chartered to issue bills for all

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other claimants. In the case under consideration, no such agreement was made. The

²² Allen & Sewall, 2 Ward, 327, 8 Co. 65.

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purposes, *which bills would answer; and the stockholders, by entering into the association, with the charter before them, constituted the directors their agents to issue bills in all such cases.

I cannot conceive how any fraud, upon the stockholders, can be seriously pretended in this case. The money advanced by Johnston was employed to redeem bills upon which the stockholders were indubitably liable. It would be singular if a Court of Equity should deny him the security of the bills purchased in by the bank, with his money. Can it make his case less equitable that the bills upon which he claims, although imposing the same degree of liability on the stockholders, are not the identical bills taken up with his money?

I shall close my observations upon this point of the case, by attending to an argument of Mr. Memminger. He contends that if the issue of bills, as money, and the taking them in payment or as money, be necessary to establish a liability on the stockholders, Johnston comes within these conditions. White says, "the item of bonds, \$80,000,"—(Johnston's debt.) "appears in every weekly statement to the 30th August, 1842. In the statement of 3d September, 1842, it does not appear, but was then considered as cash. On the 30th August, 1842, while the committee were investigating the accounts," (presented that day by Johnston,) "this item of \$80,000, was withdrawn from the weekly statements—as a balance to the debit of bonds—and deducted from the cash on hands—to be held to Mr. Johnston's order when the committee adjusted." "On the 3d of October, 1842, the amount reported by the committee," (the 7th of September, 1842.) viz: "\$96,951.65, is carried to the credit of Mr. Johnston, in the personal ledger, as cash, and in the weekly statement to the debit of the bank, as deposits bearing interest." In the examination of this witness, in reply, "the daily cash book is produced, and on the 30th August, 1842, to the credit of cash, are the following entries: bonds due to William B. Johnston & Co. cancelled and given up, \$80,000." "Witness says, that due bills or memoranda were given to Mr. Johnston, until his account was adjusted by the Board of Directors. On the 3d of October, 1842, there is a debit to cash in favor of Wm. B. Johnston & Co. as follows: cash, (see minute book) \$96,951.05."

The argument from this evidence is, that after this adjustment, Johnston carried his bills out of bank as cash paid him on account. There is great plausibility in this; but I cannot decide that to be a fact, which I do not, from the evidence, believe to be a fact. Whether bills delivered to a party, are a payment, depends upon the question whether they were delivered to, and accepted by, him as payment; and the case stated by the plaintiff himself, and it is borne out by all

the evidence,) is, that the bills, whenever re-

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ceived *back by Mr. Johnston, after being brought in and deposited by him, were received as a pledge or security, and not in payment. I understand the entries in the bank, to be a mere form of keeping the account between the parties. But, as I, have said, regarding the bills as pledged, I think the plaintiff is entitled to enforce them against the South Western Rail Road Bank, in proportion to their stock in the Ocmulgee Bank.

The question, then, is, whether the South Western Rail Road Bank is absolved from its liability as stockholder, in consequence of the transfer of its stock to Fleming & Mordecai, and ultimately to Collins, in whose hands it was declared forfeited. I apprehend it is not; because in the first two instances, as appears from the answer and the evidence, the transfer was to the parties as mere agents, and the last transfer, as well as the forfeiture, was fraudulent.²³

It appears that shortly after the Rail Road Bank became possessed of its stock, it was voted, at its Board of Directors, that it was desirable to dispose of it. A resolution to that effect was given in evidence; and this may serve to refute the suspicion expressed in the bill, that the determination of the Rail Road Bank to get rid of its shares, originated in a desire to evade the liability for Johnston's demand. But it is manifest from the circumstances, that when the general condition of the Ocmulgee Bank became known to the officers of the Rail Road Bank, the disposition to part from its shares became fixed. When it first proceeded to direct measures for accomplishing the sale, it appears that it hesitated to accept such offers as were made it. The evidence offered, is disjointed, and in some instances, shows that there has existed other evidence which has not reached the Court—probably lost or mislaid. It may be inferred from a MS. letter from President Lamar to President Rose, of the 8th of November, 1841, that when Mr. Lamar was in Charleston, in the preceding January, he had engaged to give his assistance in finding a purchaser of the stock belonging to the Rail Road Bank. In this letter, he speaks of aspersions which had been cast on the value of the stock, and states that after making several ineffectual efforts to dispose of it, he had desisted for a time. "Knowing," says he, "your solicitude to sell, I had encountered unparalleled difficulties, and made heavy sacrifices to maintain specie pay-

²³ The statement following was necessarily prolix, because the facts which appeared in the printed evidence, were not arranged; and other facts were added, by proofs at the hearing. A particular statement was, therefore, necessary to put the Appeal Court in possession of the facts of the case, and enable them to correct the legal positions ruled in the decree, if erroneous.

ments; conceiving it the only alternative, to redeem promptly the character of the bank;

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satisfied that, as its character and *credit were elevated, the prospect of a sale of your stock would be increased." He concludes thus: "I am authorized to make the subjoined proposition to you. We will give you 80 per cent. on the amount paid in by you, to be selected from any of the papers herein mentioned, with the lien stated in the schedule furnished Mr. Breese, all to be assigned without recourse on this bank, most of which is in suit and in progress of collection." November 16, 1841, the Rail Road Bank, in its minutes, declines this proposition, which it characterizes as "offering to purchase the stock held by the bank in that institution, by the tender of paper of the nominal value of \$187,000, of which \$130,000 is Robert Collins's paper, who is already under protest in this bank, and who has declared he will not pay the said paper. The remainder of the paper offered is unknown to this board, but is presumed to be of no better character." Then, we have Mr. Rose's visit to Macon, in January, 1842, and his investigation of the bank there, spoken of by the witnesses. It would seem that Mr. Mordecai went up to Macon upon the return of Mr. Rose, and that he was there when, on the 27th of January, 1842, Collins addressed the following letter to Mr. Rose in Charleston: "Dear sir,—In accordance with our understanding when you left here, I now make the following statement of what I am willing to undertake to give for so much of your stock in the Ocmulgee Bank, as may answer the purposes we design, say for \$120,000 of stock, I will undertake to give \$60,000 payable as follows:

Central Rail Road & Banking Co. Savannah, 8 per cent. bonds, and having less than five years to run.....	\$50,000
Stock of same company.....	10,000

"The stock and \$20,000 bonds to be delivered at once; and the remaining \$30,000 in bonds, to be delivered in sums of \$5,000 every 90 days, until all is paid.

"The stock in the Ocmulgee Bank, to be transferred, in proportion, as the payments are made. And the South Western Rail Road Bank, also, to take \$12,000 of their own stock, (which I transferred to the Ocmulgee Bank,) and give the same amount of Ocmulgee Bank stock, in its place. This, I believe, embraces the substance of our conversation, and is all I can do, or am able to do."

On the next day he dropped a note to Mr. Mordecai, to inform him that he had, by that day's mail, "made a direct proposition to your (his) bank for the purchase of as much stock as will answer the purpose intended." He then states the substance of his offer to Mr. Rose, and observes, "This is three times what the stock in the Ocmulgee Bank is worth, in reality, or to any other person; but, as it is to answer a certain purpose,

its real value is of no consequence to me; and I have, therefore, offered all that I am able to give."

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*Mr. Rose replies to Collins, under date of February 3, 1842, "The board declines accepting the proposals contained in your letter of the 27th ult. Neither Central Rail Road stock, nor the shares in our bank and road, which you transferred to the Ocmulgee Bank, and are liable to forfeiture on the 1st April next, would be taken. A simple proposition to give 50 cents in the dollar, payable in Central Rail Road 8 per cent. bonds, for \$120,000 of your debt, to be selected by Col. Lamar, might meet their views. Thirty thousand dollars of the bonds in hand; the balance every 90 days, in sums not less than \$5000. The indebtedness to the bank to be given up as the payments are made. The market value of these bonds being but \$60, you would, in fact, pay \$120,000 with 60, or more properly with \$36,000. If you think it for your interest to make the offer, I will submit it for the final consideration of the board, and inform you forthwith." Collins replies, on the 7th February, 1842, "I have determined to accept the proposition you suggest, to wit: to give 50 cents in the dollar for \$120,000 of the liabilities in the Ocmulgee Bank, or such other sums as may be necessary to relieve me. You may, therefore, direct Col. Lamar to receive the Central Rail Road bonds, and hand me over the papers, say one half now, and the balance in sums of \$5000 every 90 days. The papers to be handed over to me in proportion as the payments are made." He then appeals to the South Western Rail Road Bank, to "take the \$12,000 of stock in your own bank and road, and give me that amount of your stock, or my liability here. You have had the money, and I am not able to lose it, and I, therefore, ask this, to deal liberally with me, (as my situation requires it,) and relieve me from that amount of my liabilities here, and which, in fact, I am not, otherwise, able to pay." On the same day, (Feb. 7th, 1842,) Mr. President Lamar, answering a letter of Mr. Rose of the 31st of the preceding month, (which is not put in evidence,) says: "On examination of our penal Code, I discover that the directors of this institution are prohibited from purchasing the stock directly from you,—should you, therefore, consummate your arrangement with Dr. Collins, it will have to be done by your vesting the stock in him, and our declaring it forfeited to the payments of his debts; which will effect the same object to all parties, without our becoming liable, any way, to the criminal enactments of our code." Then followed the resolution of the South Western Rail Road Bank, communicated in Mr. President Rose's letter of the 23d Feb. 1842, as set out in Collins's answer. It appears that that letter, which was di-

rected to Mr. Lamar, the President of the Ocmulgee Bank, was received by White, the cashier, in his absence. White, in a letter to Rose, dated the 4th of March, informs him of that fact, and also advises him of the pay-

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*ment, on the part of Collins, of \$30,000, in Central Rail Road bonds, bearing 8 per cent. interest, as per your instructions, "Mr. C. claims the interest accruing on said bonds, to date of payment, which I will admit, unless otherwise instructed. It will be necessary for you to furnish Col. Lamar with a power of attorney, to transfer the stock, as per agreement."—The power was forwarded, but some minor difficulties impeded the arrangement. Mr. Rose gave instructions to allow Collins the interest claimed by him on the bonds he had delivered, and on the 10th of April, writes Mr. Lamar, "I will thank you to complete the arrangement with Dr. Collins."—But still it was not carried out; and on the 22d of April, a resolution was adopted by the Board of the South Western Rail Road Bank, that Fleming (who, it will be remembered, had been, in conjunction with Breese, a committee in May, 1841, to examine the Ocmulgee Bank,) proceed to Macon, as the agent of the Rail Road Bank, to settle with the Ocmulgee Bank, with Collins, and with Collins & Cleaveland.—What instructions he received, does not appear; but his mission resulted in the contract of the 1st May, 1842, already noticed; which he subsequently reported to his principals, in a report dated May, 1842, as having been made "under the instructions, and with the consent of the committee." This report is in MS. and will be found among the evidence. It was read and approved the 31st of May, 1842, and it appears that in the meantime, to wit: on the 16th of May, Jas. Rose transferred 1000 Ocmulgee shares to Fleming, who, on the same day, transferred them to Collins. But the resolution of the Board of the Ocmulgee Bank, of the 14th May, 1842, referred to in the bill, frustrated this contract; which it will be observed included 1750 shares standing in the name of the South Western Rail Road Bank, and the 1000 shares which had been held for them by Fleming the agent. This was not the only impediment. The Ocmulgee Bank laid claim to the \$30,000 of Central Rail Road bonds, which had been delivered by Collins. These difficulties were to be overcome; and on the 18th of October, 1842, the Board of the Rail Road Bank gave a direction, in conformity with which, on the 2d November, Mr. Rose constituted Fleming his "attorney, in fact, with full power and authority to settle with the Ocmulgee Bank, in relation to the stock of that bank, lately or now held by me, and also in relation to certain bonds received by the Ocmulgee Bank for me, and to do all other acts," &c. "he may deem necessary to effect the object of a full and final settle-

ment with the Ocmulgee Bank, and, if expedient to appoint," &c. for the purpose aforesaid, "and to take such legal and equitable proceedings as may be advisable to check the operations of the Ocmulgee Bank, so far as they may be deemed prejudicial to

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my interests." Fleming proceeded to Macon accordingly. Whether Breese went with him is not very clear. It is probable he did not go up till some time after. From the time Fleming arrived in that place, he was very active. The main difficulty had arisen from the opposition of the existing board of the Ocmulgee Bank. Fleming set himself to revolutionize that board at the approaching annual election, by bringing in directors who would conform to his wishes. He was fully provided with all necessary power, having, besides the power already mentioned, obtained the proxy of the President of the South Western Rail Road Bank, to represent him at the next meeting of the stockholders of the Ocmulgee Bank, to vote on all questions before that meeting, in any adjourned meetings thereof, and to vote for directors; and a separate power to transfer the shares in that institution, held by the Rail Road Bank.

The election was to come on shortly, and he was not sparing in his efforts to control it. He gave out that he had come, as the agent of the Rail Road Bank, to obtain the complete control of the Georgia institution, by purchasing shares and otherwise, for the purpose of paying off its debts, and then with funds, to be supplied by his principals, to carry on a sound and beneficial and profitable business, under the old charter. This was his general language. With some particular stockholders he made agreements to take their stock, and cause it to be forfeited in satisfaction of their debts, if they would vote for directors nominated by him. He sought out individuals upon whom he impressed it as for the good of the institution that stock should be declared forfeited agreeably to his desire, that thus the institution might be reduced within the control of his Bank, and the latter enabled, untrammelled, to proceed with more energy under the charter. When his representations and promises took effect, and the persons whom he wished to make directors were not qualified as stockholders, he transferred stock to them to qualify them. Having obtained the control of the stock of several stockholders, by purchases made upon the conditions that they would vote his ticket for directors, and that their stock should afterwards be forfeited to their debts, as already mentioned, and made all other necessary preparations, the election came on, on the 7th of November, and resulted according to his wishes. After it was over, he stated that "a board of directors had been elected such as suited him," Fleming himself was one of them, Breese

was another; and him, with such others as were unqualified, he qualified, by transfers of stock.

Breese was, without any previous solicitation on his part, elected cashier, on the nom-

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ination of Fleming. A bond, of *which he had no previous intimation, was entered into by the Rail Road Bank as his surety.

The revolution was complete.

On the day the old Board of refractory directors was turned out, one of the witnesses enquired of Fleming, "what he proposed doing with Johnston's debt," to which he replied, "we intend to pay him, we intend to pay every body." Having put matters in a train to suit him, he returned to Charleston to make preparations, as he said, for the more energetic and sounder administration of the Ocmulgee Bank, under the new order of things. It was on this occasion that he drew further advances from the plaintiff, Johnston. "When," says Mr. Lamar, "Fleming was on the eve of starting for Charleston, he came to Washington Hall, where I was standing, and requested me," (Mr. Lamar had been re-elected President,) "to go with him to the store of Wm. B. Johnston & Co., on the opposite side of the street. After reaching the place, he stated that he was about to set off for Charleston, for the purpose of procuring means to redeem the entire circulation of the Ocmulgee Bank. Although the condition of the Bank was not as good as he expected, yet he intended to carry out his engagements. That the South Western Rail Road Bank had the means to do it; and he requested Wm. B. Johnston, of the firm of Wm. B. Johnston & Co., to make the necessary advances to sustain the Ocmulgee Bank until his return. Wm. B. Johnston promised to do so, and did make some advances for Wm. B. Johnston & Co., but the amount I do not now recollect, without referring to the book of the Bank." There is some other evidence to the same effect.

It appears that Fleming did not leave Macon until the 14th of the month.

On the 19th of November, 1842, Mr. Rose gave Mr. M. C. Mordecai a power of attorney to transfer the stock standing in his name in the Ocmulgee Bank, "to any person or persons whomsoever." And on the 22d, he "reported, that under the advice of the committee of stockholders, he had employed him to proceed to Macon for the purpose of completing a sale of the Ocmulgee stock." In the mean time, to wit, on the 14th, Fleming, Breese, and Warren, three of the new directors of the Ocmulgee Bank, had been appointed a committee to examine the cash assets of the institution; and on the 16th, Breese had written to the South Western Rail Road Bank, that "the immediate liability of the (Ocmulgee) Bank, for notes actually in circulation, and to depositors, will near-

ly absorb the whole of the assets as they now stand, that is to say, if the information I have obtained can be relied on, exclusive of the debt due by Collins. Whether he has property enough to pay his own debts, is considered by many very questionable; some say he can—others say he cannot."

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*Mordecai proceeded to Macon. One important object to which he attended, among others, was the securing the debt which his Bank claimed for the \$30,000 of Central Rail Road Bonds which Collins had delivered to the Ocmulgee Bank. "He proposed," says Nesbit, "that if the Board would transfer certain real estate, which it owned, as security for the \$15,000 debt, before spoken of" (the estimated value of the Central Rail Road Bonds,) "and also as security for the advance, the South Western Rail Road Bank would advance \$5000 for its present relief; which was done; both the advance and the transfer. He also held out inducements to believe that further means would be furnished in a few days, to prevent a failure."

On the 22d of November, 1842, the Board of the Ocmulgee Bank assembled, and it was,

"On motion, ordered, that this Bank does hereby recognize the contract made by the South Western Rail Road Bank, with Dr. Robert Collins, in the sale of 1750 shares of the stock of the Ocmulgee Bank of the State of Georgia to him, made and entered into on the 23d day of February, 1842, and hereby declares the said shares to be forfeited to this institution—said forfeiture to take effect on the 23d day of February, 1842, as though the forfeiture had been on that day declared. Ordered, that inasmuch as Dr. Collins has paid on the contract above named, in bonds of the Central Rail Road and Banking Company, the sum of \$61,250,—a credit is hereby allowed to him on his indebtedness to this Bank, to the amount of \$58,187.50, it being at the rate of 95 per centum upon the sum aforesaid, so paid by him.

"Ordered, that notes or other evidences of debts due by Dr. Robert Collins to this Bank, to the amount of \$58,187.50, be transferred to the South Western Rail Road Bank, or its agents, to be held by that corporation for the purpose of further and finally executing their aforesaid contract with Dr. Collins.

"Ordered, that the President transfer to the South Western Rail Road Bank, all the mortgages executed to this institution by George Jewitt, Jewitt & Burch, together with the notes upon which the same are respectively predicated, as security for \$30,000 in bonds of the Central Rail Road and Banking Company due by this Bank to said South Western Rail Road Bank, and for the payment of \$5000, this day advanced by said South Western Rail Road Bank, for and on account of the Ocmulgee Bank of the State of Georgia; it being understood, that when the

sum of \$15,000, with interest thereon, from the 23d day of February, 1842, (being the value of said bonds in market,) and the sum of \$5000, with interest thereon from this date, are realized upon said mortgages, the balance, if any, raised from the sale of the

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mortgaged premises, shall be subject to the order of this Bank; and that said South Western Rail Road Bank shall bring said mortgaged property into the market, at such time and in such manner as they may think conducive to their interest."

Then the Board proceeded to forfeit the stock which Fleming had contracted for, to the debts owing by those from whom he purchased it, as also the stock which had been transferred to certain directors to qualify them for office; and it was "Ordered, that a credit be, and the same is hereby allowed to the amount of \$32,000, upon the indebtedness of Col. H. G. Lamar to this institution, and that stock to the amount of that held by him, of this Bank, be and the same is hereby declared forfeited." "Ordered, that the stock held by A. P. Powers, John D. Winn, and A. R. McLaughlin, be and the same is hereby declared forfeited, in payment of their notes in Bank, due and lying over, the same being stock notes. Ordered, that inasmuch as Wm. W. Chapman became a director under assurances that the stock, held by him, should revert to the Bank in payment of his note given for the same, the Board does hereby confirm this agreement, and does declare said stock forfeited whenever he shall tender his resignation as director of this Bank. And that the stock held by E. A. Nesbit and G. L. Warren, be declared for like reason in like manner forfeited, whenever they shall tender their resignations, as directors of this Board."

The next day (November 23, 1842,) a Board was formed again, and at the request of Messrs. Nesbit and Warren, the order of the preceding day, forfeiting their stock, was rescinded, and Mr. Nesbit gave in his resignation, as a director, to take effect from the adjournment of that meeting, and his stock was subsequently re-transferred. At this meeting, it was "Ordered, that the President pro tem. of this Board be, and is hereby authorized and instructed (in addition to the mortgages heretofore transferred to the South Western Rail Road Bank, made by Jewitt & Burch and George Jewitt,) to transfer to that Bank a mortgage deed, executed by Mortin N. Burch to this Bank, dated 29th December, 1840, and recorded 27th March, 1841. Ordered, that the notes of George Jewitt, and George Jewitt & Co., and Jewitt & Burch, secured by mortgage from said parties, and Mortin N. Burch, to this Bank, and which has heretofore been placed in the hands of Col. Powers, for collection, be handed to E. A. Nesbit, attorney for the South

Western Rail Road Bank, for the purpose of foreclosing said mortgage.

"Ordered, that the balance of the stock held by Robert Collins in this Bank, not heretofore forfeited, and not to be applied in extinguishment of the indebtedness of G. Jewitt & Co., R. Carver & Co., W. J. Ander-

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son & Co., and Jewitt & Burch, *upon which R. Collins, and Collins & Cleaveland, are liable in pursuance of an order of this Board, passed 22d day of November, (Nov.) 1842, be, and the same is hereby declared forfeited, in extinguishment of his (R. Collins') indebtedness to this Bank, so far as it will go, at the rate of 95 per centum to the dollar."

The latter order, relating to the forfeiture of Collins' stock, was rescinded at a meeting of the Board the 25th of November, (1842.)

At the same meeting, a letter from Fleming, dated the 15th of the same month, was handed in; and his resignation as a director, therein tendered, was accepted. And it was voted that the rents and profits of the premises under mortgage from Jewitt, and Jewitt & Burch, since the 23d instant, belonged to the S. W. R. R. Bank, and that the securities therefor be turned over to Mr. Nesbit, their agent. Mr. Lamar resigned as President and director, and Mr. Chapman was elected President, and Mr. Wakeman, director, in his place, and the Bank suspended.

It should have been mentioned that the several transfers of stock and of assets, and forfeitures of stock, contemplated by the proceedings already narrated, were carried into execution; of which a particular account is given in the evidence.

The Bank lingered from the 25th of November, 1842, till the 30th of March, 1843, but it did no effectual business. On the 26th Mr. Warren resigned as a director, at a meeting in the morning. At a meeting in the afternoon, a committee reported that it had counted and burned \$170,150 of the Bank's issues. On the 29th Nov. Chapman resigned as President and director, by letter dated the 20th. No action was taken on it.

This was the last meeting that could be obtained of the Board of Directors.

On the 10th of March, 1843, a limited number of stockholders convened upon the call of Mr. Breese, the Cashier to whom he addressed a written communication, excusing himself for calling them together, a duty imposed upon him, as he said, by "the peculiarity of his situation, being the Cashier of a Bank without President or directors." The Stockholders, without taking any action, agreed to adjourn over to the 30th. On the day last mentioned, (March 30, 1843,) a limited number of stockholders assembled, but did not organize their meeting; but before they dispersed, Mr. A. Fleming, the teller and book keeper, offered them his resigna-

tion. Mr. Breese also addressed them a note: "Gentlemen, I tender this day my resignation as Cashier of the institution, and surrender the cash, other assets, books, papers, &c., for your examination and control."

Thus ended this business.

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*On the 25th Nov. 1842, Mr. Mordecai addressed a letter to the President of the S. W. R. R. Bank, by way of report, in which he speaks of a letter from the President to himself and of another addressed by a committee of stockholders to the President, which have not been produced.

The minutes of the Bank shew that "Mr. Mordecai offered the report of his mission to the Ocmulgee Bank, at Macon, the consideration of which was postponed until the next meeting." At an adjourned meeting of the Board of Directors, held at 1 o'clock P. M. the same day, (Nov. 25th, 1842,) "the report of Mr. M. C. Mordecai, of the result of his mission to Macon, to complete the sale of the Ocmulgee Bank, was read, and ordered to be placed on the minutes."

If we look to the charter of the Ocmulgee Bank, and to its condition when the stock held in it by the Rail Road Bank was passed off, and the assets of that institution selected and received by the Rail Road Bank, there is great reason to question the propriety of the transaction. There was a large circulation existing, of which the Rail Road Bank, as stockholders, were bound to take notice, and of which I think they had notice, and for the redemption of this they were proportionably bound. The evidence is, that the assets of the Georgia Bank were entirely insufficient to meet these liabilities. I think there is reasonable proof that this was known to, or strongly suspected by, the Rail Road Bank, before the contract was completed, if not before it was entered into. Certainly Breese's letter, which was before the execution of the contract, should have created hesitation. On the contrary, it seems to have been only an incentive to "prompt action." The duty of these stockholders, under these circumstances, a duty arising from the plainest principles of justice, having reference to the charter, was this:—they should have wound up the concern, at least for a time, by using their control of the Bank, to compel an application of its assets to the creditors indifferently, and if any demand, consisting of bills of the Bank, remained, to have paid their proportion of them. But to pass off their stock with a condition that it be forfeited was both a clear evasion of their liability to bill holders, and a shocking perversion of that clause of the charter under which the forfeiture was declared. And their selection of the assets of the institution, in its manifestly failing condition, was as palpable an infraction of that clause in the statute of December, 1833, prohibiting undue preferences.

If the matter stopped here, I should hold the transaction fraudulent. But when we contemplate the means adopted by the agent, they are sufficient to stamp an unfavorable impression on it, though it were, in itself, less questionable. Can there be any doubt

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that all the transfers of stock, in *respect to which the South Western Rail Road Bank was liable to bill holders, was fraudulent, as against the plaintiff and all others in possession of bills, and, therefore, void as to them? I shall not stop to argue such a question.

Can there be any doubt that the assets of the Ocmulgee Bank, received by the South Western Rail Road Bank, remained in their hands as liable to the debts of the former, as if no transfer had been made of them? This was conceded in the argument—and if it had not been conceded, it admits of no question. They were received through the Rail Road Bank's agent; and they can take no benefit through that fraud. A party is bound, civiliter, by the fraud of his agent, whether he concurred in it or not. Certainly, in Equity, he will not be permitted to retain advantages gained through the fraud of his agent; and without deeming it necessary to say, in this place, (though I shall say so hereafter) that he is bound to make good the representations of his agent, or to answer positively for his acts, it may be affirmed that he cannot resist the unravelling of transactions brought about by his misconduct.²⁴

It is necessary, however, to enquire further, whether the Rail Road Bank is not bound for all the assets of the Georgia institution, which were squandered by the different forfeitures made and declared after the 7th November, 1842, and for the promises made by their agent, in consequence of which the plaintiff was drawn in to make further advances. I think this Bank is bound for these latter assets, as well as for those she received herself, (and at their value when they were withdrawn from the Ocmulgee Bank) and that she is also bound for the advances just mentioned.

It is a familiar principle, that though a principal is not answerable, criminaliter, for the conduct of his agent, he is responsible, civilly, for all acts done by him in the course of his employment. For acts wholly foreign to the business in which the agent is engaged, the principal is not bound. But that cannot be extrinsic to the employment, which is adopted as a means of accomplishing the object of the agency. Where an agent is limited as to the means to be employed by him, those who deal with him in reference to the power under which he acts, cannot, indeed, hold his principal liable where the means selected are beyond the limits of the agent's authority.

²⁴ 1 Camp. 127.

But where, as in this case, the end only is pointed out, while the means are left to the agent's discretion, the principals are bound not only as to the end, but the means also; and all third persons dealing with the agent, (I mean dealing in good faith, so far as themselves are concerned) have a right to insist upon their responsibility to this extent. As to all such persons, the agent shall be regarded as acting within his authority, not

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only in relation to the object of his *agency, but in relation to the means selected by him for its attainment; as to which he has been entrusted with discretionary powers.

To apply these observations to the promises made to Johnston, by which he was induced to make further advances. There was nothing unlawful or fraudulent in these engagements, in themselves considered; though with reference to the intention of Fleming, in the making of them, there was. Had it been true that the South Western Rail Road Bank intended to put in its funds and continue its branch in Macon, under the charter of the Ocmulgee Bank, the application to Johnston for temporary advances was natural and proper, under the circumstances; and no doubt the Rail Road Bank would have been responsible for the accommodation extended at the request of its agent. I think they are bound, though the application was a mere ruse to gain time, and to keep up appearances, until the transfers, mainly desired by Fleming and his principals, could be completed. Johnston, on his part, for any thing that appears, acted fairly, and was deceived, in common with Nesbit—and, it may be, others; and should not lose his money.

Is the Rail Road Bank liable for the assets squandered by the forfeiture of the stock of Lamar and others? I think she is. It was brought about by her agent. These forfeitures may have been honestly declared by those who were induced to believe that the Rail Road Bank intended to clear out the institution, and begin a new business. But on the part of Fleming, unless his representations were based on previous assurances of his principals, the measure was most fraudulent, and the benefits accruing to the parties whose debts were thus cancelled, were nothing but lures held out by him to induce them to concur in his own peculiar design. Whether he had the representations from his Bank, of which I have spoken, or had them not, in either case they are bound for what followed from his arrangements.

The assets of the institution represented its capital, and were a trust fund for its creditors. The combination was to diminish it at the expense of the creditors.

If this had been done by the Board of Directors alone, and of their own head, can it be doubted that they would have been responsible? They were trustees in respect to the funds. The cestui que trusts were their

creditors, to the extent of their demands, and the stockholders, for any balance that might have remained beyond the debts.

The case is, that instead of the trustees alone perpetrating this fraud upon the creditors, it has been effected by a combination between them and some of the stockholders, the ultimate cestui que trusts. All the parties to it are liable for its consequences. These defendants, (the Rail Road Bank)

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*received, in the assets transferred to themselves, the equivalent which they contemplated for the other assets wasted. For the former, they are clearly liable. But it would be a defect of justice to confine their liability to the benefits they received in the assets which came to their own hands. The creditors have lost the others also, and have a right to redress against those by whom this result was brought about. It may be said the primary remedy is against the Ocmulgee Bank. Where is that to be found? where are its officers? where are its stockholders? in whom is the stock now vested? Every party to a fraud is answerable to the party defrauded, and when he has got hold of one of them, he is not to be turned round to a vain litigation with the others,—to a suit against a broken institution, without a President and without a Director.

The general result of this investigation, then, is, that the defendants (the South Western Rail Road Bank) are liable directly to the plaintiff for the advances made by him after the 7th November, 1842, with interest; and this without reference to their character of stockholders in the Ocmulgee Bank, or the assets of the same which they assisted to waste.

That the plaintiff is entitled to his prior advances, (with interest) as settled by the Ocmulgee Bank; which settlement, (there being no proof of fraud) is conclusive on the defendants, as stockholders, represented by the Directors in said settlement. That the Rail Road Bank is bound, in proportion to its stock, to pay the bills held by the plaintiff, with interest from the filing of the bill, so far as they may extend towards satisfying the advances for which said bills were pledged.

On this latter point, the case of Wood v. Dummer, 3 Mason, 308, [Fed. Cas. No. 17,944.] is a full and satisfactory authority. In that case, it was held that the capital stock of the Bank was a trust fund, for the payment of Bank notes, and might be followed into the hands of the stockholders; that a bill in Equity for such purpose might be maintained by some of the holders of the Bank notes, against some of the stockholders, the impossibility of bringing all before the Court being sufficient to dispense with the ordinary rule of making all parties in interest parties to the suit; and that, in such case, the decree against the stockholders be-

fore the Court, should be only for their contributory share of the debt, in the proportion which their stock bore to the whole capital stock. So far there is little difficulty.

But in this case there will remain a portion of the plaintiff's claim for advances, after the share of the bills for which the South Western Rail Road Bank is bound, is paid, and for this balance the plaintiff must claim as a general creditor against these defendants, in respect to the assets of the Ocmulgee Bank, for which I have said they are liable.

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*The case of *Wood v. Dummer* does not reach this latter point. A bill holder may maintain a bill under such circumstances, without bringing in all interested parties. The reason is, that the bills, themselves, in his hands, serve to ascertain the quantum of liability to which the stockholder is to be subjected. Can a general creditor maintain such a bill? I think he can, if he bring the other creditors before the Court, who may have claims similar to his own. The dispensing with the Bank and all its stockholders, as parties, is extended to the bill holders in *Wood v. Dummer*, not because they are bill holders, but because of the impracticability of bringing those parties into Court. Any other creditor would have been entitled to the same indulgence, provided his claim, when presented, carried on its face evidence that no other claimant could come forward entitled to participate in the sum demanded.

The misfortune of a general creditor is, that there may be other creditors equally entitled to a decree against the defendants. In *Wood v. Dummer*, the stockholders were secure against any other claim to be made on the bills in the plaintiff's hands; and the degree of their liability to him was ascertained by a simple inquiry into the proportion of stock held by them, and making them liable to a corresponding portion of the bills held by him. In the case before us, two things are to be ascertained—the value of assets chargeable to the Rail Road Bank, and the portion of those assets to which Johnston is entitled as a general creditor. The former can be ascertained without the addition of other parties, the latter cannot, without giving other creditors a right to come in and prove their demands. And so I think the decree must be.

It was contended that the Rail Road Bank is entitled to come in as a creditor *pari passu* with other creditors against this fund. It does not appear, that in the transactions of Nov. 1842, she pretended to be a creditor for any thing beyond \$15,000, the estimated value of the bonds deposited by Collins. For that, and for the \$5000 advanced by Mordecai, she took her security. If the Ocmulgee Bank was, at any prior time, indebted to her, the presumption is, the demand was settled; otherwise, why was it omitted to be secured on this occasion? According to the view I

have taken, the security taken, as well as the contract with Collins, upon which it was founded, the whole transaction was fraudulent and void, as against this plaintiff and all other creditors of the Ocmulgee Bank; and no debt, so far as they are concerned, can be predicated of it. But if the Rail Road Bank, contrary to appearances, had any other demand, I think, according to the recognized principles of this Court, the assets which came to their hands by fraud, and the other

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assets for which *they are chargeable on the ground of fraud, cannot be allowed to stand as a security for it, to the prejudice of bona fide creditors. As between the parties to the fraud the matter stands differently, and therefore their demands, if any, must be postponed until bona fide creditors are paid; after which it may be allowed.

It is adjudged and decreed that the South-western Rail Road Bank do pay to the plaintiff the sums advanced by him to the Ocmulgee bank, after the 7th of November, 1842, with interest, according to the laws of Georgia, from the dates of said advancement; to be ascertained and reported by the commissioner.

And it is also decreed that the several transfers of the stock held by the South-western Rail Road Bank, in the Ocmulgee Bank, as also the forfeitures of said stock, as well as those of other Stockholders, herein before mentioned, and the assignment of the assets of said Ocmulgee Bank to said Rail Road Bank, as well as the cancelling or delivery of notes or other evidences of debt to persons indebted to the Ocmulgee Bank, in consequence of the forfeiture of their stock, are fraudulent and void as against the plaintiff.

That the plaintiff is entitled to the repayment of advances made by him prior to the 7th of November, 1842, (as stated by the Ocmulgee Bank) with interest thereon, according to the laws of Georgia, but subject to proof of reductions on the amount of said account,—as stated after the date of said statement, to be ascertained and reported by the Commissioner, on reference.

That for the amount of bills held by the plaintiff (proved to be \$49,165) with Georgia interest thereon from the filing of this bill, the South-western Rail Road Bank are bound to contribute as Stockholders, in the proportion their stock, 2750 shares, bears to the whole 5000 shares of the Ocmulgee Bank, to be applied towards satisfying the advances for which said bills were pledged to the plaintiff.

That, for whatever of said advances may still remain after said contribution, the South-western Rail road Bank are bound to account to him for the assets of the Ocmulgee Bank, assigned to them, at their value when assigned, and for the assets delivered up or cancelled, in consequence of the forfeiture of the stock of the debtors, at their

value, when this was done, with interest from the time of the assignment, delivery, or cancelling, as the case may be; and that when the amount of this account is taken and established, a call be made, by publication in the newspapers of Macon as well as of Charleston, by the Commissioner, for all creditors of the Ocmulgee Bank, interested in said assets, to come in and prove their demands or claims against the same,

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to be report*ed by the Commissioner, with the proportion of said assets properly allowable to said claimants, including the plaintiff.

That the South-western Rail road Bank pay the costs of this suit, up to this time. Further costs to abide further order. Ordered that the accounts be referred to the Commissioner.

The South-western Rail Road Bank, by their counsel, appealed from the decree of Chancellor Johnston, and moved that the same be modified, upon the following grounds.

1st. Because the plaintiff was not entitled to relief, on account of the misrepresentations and concealments in regard to the condition of the Ocmulgee Bank, to which he was a party.

2d. Because the evidence, as to the manner in which the plaintiff received, and the circumstances under which he retained, the bills of the Ocmulgee Bank, showed that they were not issued as contemplated by the provision of the charter of the company, making the Stockholders individually liable for their redemption—the said bills not having been received or put into circulation as money.

3d. Because the relief decreed to him as a general creditor, was not authorized by the pleadings.

4th. Because the decree required of the S. W. R. R. Bank to account for the value of assets shown to have been wrested from them by the laws of Georgia—which are now in the custody of the law in Georgia, for the benefit of the creditors generally of the Ocmulgee Bank, and to which defendants have renounced all claim.

5th. Because relief for other creditors than the complainant was not sought by the bill, nor was there any motion to that effect before the Court.

6th. Because the relief given by the decree was extended beyond the objects of complainant's bill, in making the S. W. R. R. Bank liable for the extinguished debts of Lamar, &c. and no decree was made against Collins, although a party to this suit, and a principal in the transactions.

7th. Because it is respectfully submitted that his Honor's decree is otherwise contrary to the evidence and the equity and justice of the case.

8th. Because complainant's claim was not

an ascertained demand, as supposed in the decree.

9th. Because the decree makes no allowance to the Rail Road Bank for the debt of the Ocmulgee Bank to them.

Petigru, Hayne, for the motion.
McCready, Memminger, contra.

Curia, per DUNKIN, Ch. This Court is well satisfied with the judgment of the Chancellor, that whatever might have been the irregularities in the organization of the Oc-

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*mulgee Bank, they afford no ground of defence to the claims of the complainant.

The question, which has been most elaborately discussed, and which is of most importance to the parties interested, is the claim of the complainant as a bill holder under the ninth clause of the charter of the Ocmulgee Bank. The difficulties of the question were felt by the presiding Chancellor, who, after stating the facts, and the objections of the defendants, commences the discussion of the point by observing, "I have, still, very considerable doubts whether any of these considerations throw the plaintiff without the remedies provided by the Legislature of Georgia for holders of bills on the Ocmulgee Bank;" and he ultimately adopted the conclusion, that he was entitled to the rank of a bill holder under the provisions of the charter.

This statute provides that "the persons and property of the stockholders, for the time being, of said Bank, shall be pledged and bound, over and above the amount of said stock paid in, in proportion to the amount of the shares that each individual, copartnership, corporation or body politic, may hold in said Bank, for the ultimate redemption of the bills or notes issued by or from said Bank, in the same manner as in common commercial cases, or cases of debt."

The principal object of obtaining an Act of incorporation, in ordinary cases, is that the liability of the stockholders should be limited to the amount of their stock, and that their liability should cease when they cease to be stockholders. This clause would, therefore, in ordinary cases, defeat the leading purpose of the charter. But the laws of Georgia, with a view to the protection of her citizens from a spurious currency, render it an offence highly penal for any individual or incorporation, other than a chartered Bank, to issue bills or promissory notes as private Bankers, "unless thereunto specially authorized by law." In Georgia, therefore, an Act of incorporation vests in the stockholders of a Bank high and exclusive privileges, and the Legislature thought proper to guard against the abuse of the privilege, and secure the interests of the public, by this stringent provision.²⁵

A standard authority upon such subjects

²⁵ A. A. 1818. Prince's Dig. 61.

has stated that, "Banks are of three kinds, viz:—of deposit, of discount, and of circulation." After defining the appropriate functions of a Bank of deposit, as well as of a Bank of discount, he proceeds to the third class—"a Bank of circulation issues bills or notes of its own, intended to be the circulating currency or medium of exchanges, instead of gold and silver." He adds that, "in the United States, most of the Banks are public, and, in some of the States, private Banks of circulation are prohibited by law."²⁶ It might also have been added that, in this country, one Bank ordinarily unites the of-

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fice of the three, and serves as an office of discount and deposit, as well as a Bank of circulation. In order to preserve the Banks in a safe condition, and to prevent the currency from being debased and the community defrauded by an amount of Bank bills in circulation disproportioned to the means of redeeming them, the Act of 1832 provided that every Bank should make semi-annual returns to the Governor, upon the oath of the President and Cashier, in April and October, setting forth, among other things, the issues of the Banks, the amount of bills in circulation, &c. To this provision, some reference may hereafter be necessary.

It is quite obvious that, by the ninth clause of the charter, it was not intended to render the stockholders liable, as individuals or partners, for all the debts or contracts of the Bank, nor is it so contended; a bond creditor would, confessedly, have no claim beyond the assets of the corporation. If the complainant had built the banking house, or had sold it to the Bank, for which they had given him an unnegotiable note, or due bill, for five thousand dollars, signed by the President and countersigned by the Cashier, this, by the express terms of the fifth clause, would be binding and obligatory on the company, and might be termed, literally, "a note or bill issued by said Bank," in the terms of the ninth clause, yet no one would affirm that the stockholders were personally liable for this note or due bill, more than for a bond of the corporation. For the payment of such debts, the Legislature left every one to the protection of his own sagacity or vigilance. It was not, then, every bill or note of the Bank for which the stockholders were rendered liable, but only for those bills or notes which chartered Banks had the exclusive privilege of issuing; for Bank bills issued by virtue of its charter as a Bank of circulation—for, "bills intended to be the circulating currency or medium of exchanges, instead of gold and silver." Against bills thus put in circulation, as part of the currency, instead of gold and silver, it was well known the community had no practical means of protecting themselves, and those who asked for the privilege of thus supply-

ing the circulating medium, were rendered personally responsible for the ultimate redemption of the bills. If the bills were not issued by the Bank by virtue of the privilege thus conferred upon them—if they were not bills issued for the purpose of forming part of the circulating medium of the country, they do not induce the mischief against which the law intended to provide, by fixing the personal responsibility of the stockholders. Ordinarily, the stockholders are responsible for the acts of the directors of the Bank, only to the extent of the loss of their stock. But for creating a fictitious currency, for putting in circulation Bank bills to an amount which they have not the

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means of redeeming, the misconduct of the directors is visited upon the stockholders in their persons and property. The inquiry then is, whether the bills in the possession of the complainant came within this description.

The facts are detailed in the testimony of Joseph A. White, the first and principal witness of the complainant. He was clerk to the Commissioners who received subscriptions to the Ocmulgee Bank. In November, 1839, he was elected Cashier, in which office he continued until 22d October, 1842, when he was succeeded by the complainant. The complainant was always a director of the Bank from its organization in April, 1837, until November, 1842. There seem to have been six directors besides the President. Mr. White testifies that Wm. B. Johnston & Co. commenced to make advances to the Bank as early as March or April, 1841. On the 31st May, 1841, the amount due to the complainant appeared in the weekly statement of the Bank, under the head of Bonds, and amounted to \$80,000. In the latter part of May or beginning of June, 1841, a committee was sent from the South Western Rail Road Bank in Charleston, to examine the condition of the bank, which they did, and reported to their principals. "In the latter part of June, or beginning of July, 1841," continues Mr. White, "Mr. Johnston, being so much in advance, required security, and called on the Bank for it, and the Bank put in his possession \$50,000 of the bills of the Bank, on condition that he was not to put them in circulation. Witness delivered them to him by order of the Board." It will be thus observed that this was not an original agreement when the complainant commenced to make advances, but that his advances had been for some time at \$80,000 before he required security. It will also be remarked, that security was not asked, nor were the bills put in his possession, until a month after the examination of the committee of the Rail Road Bank had closed. Although, if these circumstances had been different, it would not have varied the result. There can be no doubt of the fact, (for in this all the

²⁶ Am. Enc. Tit. Banks.

witnesses concur) that it was an express stipulation that the bills were not to be put in circulation. They were put in his possession, says White, on this condition. It is perfectly manifest that, so long as this condition attached, the bills constituted no part of the circulating medium of the country, and were not so intended, but that the contrary was expressly stipulated. Accordingly, when the semi-annual statements were prepared under the oath of the President and Cashier, as required by law, these bills were always brought in, and never appear in the return as 'bills in circulation.' Until they became a part of the circulation, the mischief contemplated by the ninth clause of the charter could not arise, and the liability

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of the stockholders would not, therefore, attach. Whatever may have been the object of the complainant, or the views of the other directors, it would be great injustice to the stockholders, not only to make them liable for an excessive circulation, but for the contract of the directors that they should be liable as if there had been an excessive circulation. Seeing this obstacle, it is suggested that this condition against the circulation of the bills was to cease when the bonds to the complainant became due. It is very difficult to suppose that any bond was given to the complainant, although the amount due him appeared in the statement under the head of 'Bonds.' His bill makes no such allegation. It is not stated nor charged that he ever held the bond or bonds of the Bank for his debt. But this condition was of an extraordinary character. It is incumbent on the complainant to shew that it was limited as to time. If he held the bond of the company, which was not yet due, it was altogether unnecessary to make a special stipulation that he should not use the collateral pledge until there had been a default of payment on the part of the Bank. Ordinary good faith would have held him to this condition without any promise or agreement. And the same reply may be made to the suggestion that the condition was to be removed so soon as his account with the Bank was closed and adjusted. It was not so stated in the original agreement. When his account was adjusted in September, 1842, the only change made was, that his demand appears as "a deposit bearing interest." He still held the bills, and the Bank was still liable to him for the accruing interest on the debt due to him. When the Bank broke up in November following, the balance of his debt still existed and the bills remained in his possession, so far as the Court can perceive from the evidence, with the original condition still attaching, that they were not to be put in circulation. The indebtedness of the Bank, as such, to the complainant, nor the proof of it, did not depend on these bills,

but on the personal ledger, and his bank book, which was a transcript from it. For the payment of this debt, he is entitled to an account of all the assets of the corporation. But his demand on the stockholders for the ultimate redemption of the bills depends on the proof, not of the indebtedness of the Bank, but that the bills have been in circulation. The evidence of the agreement is, that they were deposited on condition that they were not to be put in circulation—and the fact is, that they have not been circulated. The mere possession of the complainant is, in itself, not very important. If he had the right to circulate the bills whenever he thought proper, or when his debt became due and unpaid, although he had placed the bills for safe keeping as a special deposit in the custody of the Bank, his right, as a bill holder, would have been as perfect as if

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they had remained in his own strong box. But if he held them, in that box, or in the Bank, on the express condition that they should not be circulated, they were no part of the circulation or circulating medium, and had not acquired that character which would subject the stockholders to individual liability. One other view remains to be considered. It was strongly urged that, if no other termination to this condition was to be inferred, it must have been understood by the parties that it was to end when the doors of the Bank were closed in November, 1842, and it virtually ceased to exist. It is necessary to analyze this proposition, or, rather, suggestion, and the effect of it. The complainant was a director, and one of the agents of the stockholders, in July, 1841. By the terms of the charter, the stockholders are only ultimately responsible for the redemption of the bills issued by the Bank. They are only responsible when the assets of the Bank are exhausted and it has become insolvent. The agreement then, or understanding of the parties, according to this proposition, was that the complainant should not be at liberty to avail himself of his collateral security, should not be permitted to circulate these bills so as to render the stockholders liable, except in the event that the Bank failed or became insolvent. If there was any limitation to the condition, that the bills were not to be put in circulation, (and none certainly was specified) I think this would be the most probable inference. It was not like a deposit of any property of the Bank, but it was a deposit of paper, the peculiar benefit of which as a security to the party, could only be rendered available on the insolvency of the Bank, and it was stipulated that the bills should not be put in circulation but in that event. But the 40th section of the Act of 1833 declares that all contracts made by any Bank in contemplation of insolvency, except for the benefit of all the creditors and stockholders of the Bank, shall be void, and

the President and Directors or any of them, making, or consenting to, such contract, shall be deemed guilty of a misdemeanor, and be subjected to punishment. It may be, that the penalties of this Act would only attach on contracts made in relation to the assets of the Bank. But the manifest policy of the law is to guard against all preferences in contemplation of insolvency. Assignments or other contracts, made in contemplation of insolvency, must be for the benefit of all the creditors and stockholders, or they are void. How can the directors make a contract that bills shall be put in circulation only in the event of insolvency, and that, not for the purpose of creating or adding to the circulating medium, an end which they can no longer accomplish, but for the purpose of giving a security to one of their own body, who is also a creditor of the institution? If the case were *res integra*, a ma-

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majority of the Court are of opinion that the complainant is not a bill holder within the purview of the ninth section of the charter.

But we agree with the Chancellor in the proposition which he has so fully sustained, both by reason and authority, that all other countries are bound to follow the construction of a statute which has been adopted by the Judiciary of the country where it was enacted. In the case of *Collins v. The Central Bank*, the report of the auditors has been submitted to us, but it does not, in any material point, vary the case as reported in *1 Kelly*. It seems difficult to peruse the statement there presented, the able argument of the counsel, and the judgment of the Court, without clearly perceiving that, although the bills may have been considered as substantially placed in the custody of the stockholder as a conditional security, they were not entitled to the character of "bills issued as contemplated by the charter of the company," because they were "not issued and put into circulation as money." The language of the Judge is clear and emphatic. "The bills were not issued as contemplated by the charter of the company, and the manner in which they are now attempted to be used for the purpose of placing the holders thereof on the same footing as the holders of bills issued and put into circulation as money, according to the terms of the charter, cannot receive the sanction of this Court. To permit it, would be, in our judgment, to sanction a fraud on the right of those bill holders whose bills are legitimately issued and put in circulation as money, according to the terms and provisions of the charter. On this ground of exception, we most cheerfully concur in opinion with the Court below."

Nor does the subsequent case, *Monroe R. R. and Banking Co. v. the Planters Bank*, appear to the Court to afford any authority for the claim of the complainant as bill-

holder under this clause of the charter. The *Munroe R. R. Bank* borrowed \$20,000 from the *Planters Bank*, in four promissory notes of \$5000 each, and, at the same time, deposited with them, as collateral security for the repayment of the sum borrowed, \$20,000 of the bills of the *Munroe Bank*. There was no stipulation whatever in regard to these bills. The fourth note not having been paid, the *Planters Bank* claimed the benefit of their pledge as bill holders, and it was sustained. The report of the auditors says "the *Munroe Rail Road and Banking Company* parted with the bills. The *Planters Bank* had the control and dominion of the bills, and could have passed them to others. The bills were, therefore, in the opinion of the auditors, issued by and from the Bank;" and this was confirmed by the Court. How can it be said in this case that the complainant had the control and dominion of the bills, and could have passed them to others, when

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*by the express terms of his agreement he was "not to put the bills in circulation," "not to pass them to others?" If it had been part of the agreement with the *Planters Bank* that the bills were not to be put in circulation, and they received them on that condition, would not the same Court that decided *Collins* and the *Central Rail Road Company* have held that they, i. e. the holders of bills which were not to be put in circulation, were not on "the same footing as the holders of bills issued and put into circulation as money according to the terms of the charter?" The course of decisions in Georgia seems, then, entirely in accordance with the conclusions of this Court, that the complainant is not entitled to the extraordinary remedies provided for a bill holder under the ninth clause of the Act.

But the complainant was a creditor of the *Ocmulgee Bank* for the amount ascertained by the directors to be due to him in September 1842, and is entitled, as such, to his proportion of the assets of that institution. This Court concurs with the Chancellor that the assignment of the assets of the institution to the *South-western Rail Road Bank*, under the orders of 22d November, 1842, was an infraction of the statute of December, 1833, prohibiting undue preferences, and is void. But it is insisted on the part of the appellants that the relief granted to the complainant as a general creditor is not warranted by the pleadings, and that relief to the other creditors of the *Ocmulgee Bank* is not sought by the bill. It is not questioned that all the creditors of the Bank are interested in this fund, and it is a general rule of this Court that all parties interested should be represented, if it be practicable or be not attended with extraordinary difficulty. This rule and the reason of it is thus stated by Mr. Justice Story, at s. 76, a. The general rule in Courts of Equity, as to parties, is

that all persons materially interested in the subject matter ought to be made parties to the suit, either as plaintiffs or defendants, in order that complete justice may be done, and that multiplicity of suits may be prevented, or, as Lord Hardwicke once said, in order to make the determination complete, and to quiet the question. The rigid observance of this rule would frequently be attended with inconvenience, and many exceptions have been engrafted on it. And where parties are all interested in a common fund, the Courts have adopted a course which enables them to do substantial justice, and that is by requiring the bill to be filed not only in behalf of the plaintiff, but also in behalf of all other persons interested who are not directly made parties (although, in a sense, they are thus made so) so that they may come in under the decree and take the benefit of it, or shew it to be erroneous, or entitle themselves to a re-hearing.²⁷ At s. 103, it is said, a single creditor, in cases of this sort, would

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not be permitted by a Court of Equity to sue for his own single demand without bringing the other creditors, in some form or manner, before the Court, from the obvious inconvenience and apparent injustice in deciding upon the extent of their rights and interest in their absence. The substitution, therefore, of a few to sue for the benefit of the whole, at the same time that it subserves the interests of all the creditors, by enabling them to make themselves active in the final apportionment and distribution of the trust funds, gives to the watchful and diligent an opportunity of having prompt justice done to them without any wanton sacrifice of the rights of others, or any sacrifice not caused by the laches or indifference of the latter. These are principles not only well founded in reason but have been sustained by the general practice of Courts of Equity. Formerly much strictness was observed; and a creditor, who had sued only for his own debt, was not permitted to convert it into a bill in behalf of himself and all other creditors, as may be seen by reference to the cases of *Leigh v. Thomas*, 2 Ves. Sen. 312, *Baldwin v. Lawrence*, 2 Sim. & Stu. 18. But in *Milligan v. Mitchell*, 1 M. & Craig, 511, it is said by the Chancellor that the Court had, at the hearing, been in the frequent habit of permitting a creditor who sued in his own name, to alter the title of his bill so as to make it a suit in behalf of himself and all other persons interested as creditors. We think the plaintiff is entitled to leave so to amend his bill in this case, and that it should be remanded to the Circuit Court for that purpose—and this is the more readily done as, on the further hearing, the effect of the proceedings in the Courts of Georgia in relation to the assets of the Ocmulgee Bank may

be more fully and distinctly considered and determined.

Although the attempt on the part of the agents of the S. W. Rail Road Bank to secure a preference out of the assets of their debtor, the Ocmulgee Bank, has proved entirely ineffectual, and the assignment set aside as against the provisions of the law, this does not, in the judgment of the Court, operate a forfeiture of their debt also. It is not so declared by the statute, nor is the Court aware of any principle of Equity which exacts this penalty. A party can be permitted to derive no advantage from his own wrong. This seems the extent of the rule. The S. W. Rail Road Bank must be permitted to establish their claim like any other creditor of the Ocmulgee Bank.

The Court concurs also in the judgment of the Chancellor in relation to the irregularity of the proceedings by which the stock of Dr. Collins was forfeited and his notes, &c. given up, and the liability of the S. W. Rail Road Bank for any losses sustained in consequence of such surrender. But in relation to the transactions with H. G. Lamar and others, there is no charge in the bill, and the defendants had

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no opportunity of answering in relation to these matters. It is enough that, in giving the complainant leave to amend the pleadings by converting his bill into a creditor's bill, he have leave also to make such charges as will put these matters properly in issue, and to make such other parties defendant as he may be advised. This, in the judgment of the Court, he should be permitted to do, if a motion to that effect be submitted to the Circuit Court.

No objection was made at the hearing, nor is there any specific ground of appeal, in relation to that part of the decree which declares the liability of the S. W. Rail Road Bank for the advances made to the Ocmulgee Bank after the 7 Nov. 1842. It is only necessary to say, that in this respect the decree is affirmed, and on all other matters it is affirmed, modified or reformed as expressed in this opinion.

O'NEALL, J.—EVANS, J.—WARDLAW, J., and DARGAN, Ch., concurred.

Decree modified.

CALDWELL, Ch., on account of interest as a stockholder in the S. W. R. R. Bank, did not hear the case.

JOHNSTON, Ch., dissenting. The decree in this case evidently regarded the plaintiff's bill,

(1.) As the bill of a general creditor, claiming for advances made to the Ocmulgee Bank; and seeking a decree against the Rail Road Bank, which, by fraudulent interference

²⁷ Story Eq. Plead. s. 96.

with the assets of the debtor, had frustrated the creditor's remedy:—and

(2.) As the bill of a creditor, holding bills, issued by the Ocmulgee Bank, and placed in his hands, as a collateral security for his advances:—and claiming a decree against the Rail Road Bank, as a stockholder, for such portion of said bills as the charter obliges them to redeem;—so far as such decree may be necessary to the complete repayment of the sums advanced by him—after exhausting the accountability of these defendants under the first head.

The decree, upon conclusive evidence, establishes the fact, that the advances were actually and bona fide made; and that these defendants did, by their agents, fraudulently interfere with the assets of the debtor, by taking a very large portion of them to themselves, and by conniving at the delivery of other portions to parties bound for their payment; thus leaving the debtor utterly insolvent, and the plaintiff remediless. Under these circumstances, the decree held the Rail Road Bank accountable to the plaintiff, in respect to his advances, not only for the assets which they took to themselves, but also for the obligations which they assisted to cancel and deliver up to Lamar and others.

The decree also establishes, that the bills

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held by the *plaintiff were issued to him by the Ocmulgee Bank, as collateral security for the money advanced by him to them: and, setting aside, as fraudulent, a transfer of their shares, by which the Rail Road Bank attempted to throw off their liabilities as stockholders, to redeem bills of the Ocmulgee Bank, holds them liable, in proportion to their stock, for the redemption of the bills in the plaintiff's hands.

The decree was, at the same time, careful of the other creditors of the Ocmulgee Bank; and such an order was made as enables them to come in, with the plaintiff, as a general creditor. But the Rail Road Bank, in respect to any demand she may have against the Ocmulgee Bank, was postponed to all other creditors, on account of the fraud established against her.

The appeal draws in question the correctness of this judgment, upon grounds, many which are strictly technical, and having little to do with the merits; and I am now to examine the force and validity of the objections thus presented, and see whether they are sufficient to set aside the decree.

The first objection is, that the plaintiff, though he be a creditor, and though he hold bills of the Ocmulgee Bank, binding both on the Bank and its Stockholders, is, nevertheless, entitled to no remedy; because the bank was not legally constituted, by the payment in of the amount of specie, required by the charter, before proceeding to business. Nothing that has been pointed out in the evidence has shaken my conviction that the terms of

the charter were substantially and faithfully complied with. But, if it were otherwise, it is very clear, that it is not the privilege, either of the Bank or of its Stockholders, to avail themselves of the illegality of their own institution, as a ground to avoid their own contracts.

Further;—it is not the privilege of any third party, contracting with them, to avoid his contracts, upon such a ground. We have decided, in *Van Lew v. Parr*, 2 Rich. Eq. 321, and in conformity to what was advanced in *Whitworth v. Stuckey*, 1 Rich. Eq. 406, that the purchaser of lands, let into possession, and undisturbed in his possession, cannot avail himself of a flaw in his vendor's title, to avoid payment of the purchase money. And upon the very same principle, but with stronger reason, defects in the charter of this Bank, which the sovereign authority by which it was granted has suffered to remain, unquestioned, in the lands of the corporators, are no ground for excusing the corporation or the corporators from the performance of their corporate contracts.²⁸

The objection just disposed of went to the whole bill.

The next applies only to the plaintiff's claim, as a general creditor, for advances made.

This objection is that the bill is not so framed as to set forth the plaintiff's advances as a ground of relief.

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*The bill expressly states the advances, and the issue of the bills of the Bank, as collateral security for the debt thus contracted; and, moreover, that the Rail Road Bank was informed both of the indebtedness and the security taken.

It then charges, in general terms, the plan adopted by this stockholder, to rid herself of her liability to bill holders, and her interference with the assets of the Ocmulgee Bank, some of which she took to herself, and others she procured to be delivered up to the debtors; "thus, at the same time," says the bill, "giving up the assets of the bank, to a very large amount, and relieving the stock from liability to creditors of the said bank."

It is further charged, that the Rail Road Bank "induced the Board of Directors of the Ocmulgee Bank to make a selection of the best assets of the said Ocmulgee Bank, amounting, in the whole, to \$137,764,—and transfer the same to the said S. W. R. R. Bank." "And your orator," says the bill, "distinctly charges, that the said transfer by the Ocmulgee Bank was made in contemplation of the insolvency of the said bank, and with full notice to the S. W. R. R. Bank, and was not intended to be for the benefit of the stockholders or creditors of the Ocmulgee

²⁸ And see also *Regina v. Boucher*, 43 Eng. Com. L. 904, and *Banks v. Poitiaux*, 3 Randolph, 136.

Bank, other than the said S. W. R. R. Bank." Then the statute of 1833 is set forth; "and your orator charges, that the assignment and transfer, so made, as aforesaid, by the Ocmulgee Bank, was made in fraud of said law, and with a knowledge, on the part of the said S. W. R. R. Bank, of the insolvent condition of the Ocmulgee Bank: and your orator insists, that the said assignment and transfer are null and void; and that the said S. W. R. R. Bank is bound to account for the said assets to your orator, as one of the creditors of the Ocmulgee Bank."²⁹

Now, it has been twice argued that a plaintiff is only entitled to a decree according to the drift or frame of his bill; and that the exclusive object of this bill was to obtain a decree against the Rail Road Bank, as stockholder, for her rateable proportion of the bills held by the plaintiff, as collateral to his principal demand for advances; to the utter neglect of the principal demand, itself, and the liability for it, incurred by these defendants, by their improper abstraction of the assets of the Georgia Bank. But what say the passages I have quoted from the bill? Do they not conclusively shew that the object of the bill was twofold: (1st.) to charge these defendants with the assets withdrawn, by their contrivance, from the Ocmulgee Bank,—and thus obtain satisfaction,—so far as this accountability might extend—for the plaintiff's principal demand? and (2ndly,) to supply whatever deficiency might be left, or might exist, by calling in requisition their contributory liability as stockholders for the bills held as collateral?

And what is the prayer of the bill? That

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the transfers of *assets be declared null, and the Rail Road Bank decreed "to account for said assets to the creditors of the Ocmulgee Bank." That the plaintiff's claim against the Bank be established, and that, in addition to this, the bills in plaintiff's possession be ascertained; and the Rail Road Bank "decreed to pay upon the same, in average and proportion to the amount of stock held by them."

This statement, accompanied by the prayer for general relief, contained in the bill, certainly sets forth the claims of the plaintiff as a general creditor.

A single passage from the answer of the Rail Road Bank, shows in what light they understood the matter: (1.) "These defendants are strangers to the circumstances under which the complainant advanced to the Ocmulgee Bank, the large sums of money for which he claims payment;" and (2.) "these defendants deny the right of the directors of the said bank, to bind these defendants to pay to one of their associates a further contribution, under pretence of a deposit of bank bills." Does it appear from this extract, that these defendants were ig-

norant that the bill was intended to set forth a compound claim on behalf of the plaintiff,—as general creditor, and as bill holder,—the latter being presented as collateral, merely, to the principal demand? Was there any ground for the surprise affected by counsel? Could it possibly be supposed that the plaintiff had stated his advances, and the defendant's interference with assets, liable for them, and had called on the defendants to account for those assets,—for no purpose at all? and that so far from seeking payment of the advances themselves,—for the entire satisfaction of which the assets might prove sufficient,—the plaintiff was so stupid as to come into Court claiming from the defendants, only as stockholders, payment on the bills held by him, according to their stock: that is, asking payment of only one half of his real debt?

The next objection is, that the bill is not, technically, a creditor's bill—i. e. the plaintiff does not sue on behalf of all other creditors of the Ocmulgee Bank, as well as himself.

The case of *Wood v. Dummer*, referred to in the decree, shows that this objection cannot apply to the plaintiff's claim as bill holder; and must, therefore, like the preceding, be applied exclusively to his claim as general creditor, for advances.

There is some confusion on this subject of a creditor's bill, which a little attention to general principles will be sufficient to remove.

The general rule is, that all persons interested in the subject of the suit, or directly affected by the decree, should be made parties.³⁰ To this rule there are various exceptions; many of which turn upon the

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fact, that from the numerousness of persons thus circumstanced, it would often be "impracticable to join them, without almost interminable delays and other inconveniences, which would obstruct, and probably defeat, the purposes of justice. In such cases the Court will not insist upon their being made parties; but will dispense with them, and proceed to a decree, if it can be done without injury to the persons not actually before the Court."

"The general rule being established for the convenient administration of justice, ought not to be adhered to in cases in which, consistently with practical convenience, it is incapable of application; for, then, it would destroy the very purposes for which it was established. The exceptions, therefore, turn upon the same principle upon which the rule is founded. They are resolvable into this: either that the Court must wholly deny the plaintiff the equitable relief to which he is entitled, or that relief must be granted without making other parties. The latter is deemed the least evil, whenever the Court

²⁹ Prince's Dig. 633.

³⁰ See Story Eq. Pl. §§ 88, 135.

can proceed to do justice between the parties before it, without disturbing the rights or injuring the interests of the absent parties, who are equally entitled to its protection. In such cases, it will generally require the bill to be filed not only in behalf of the plaintiff, but of all other persons interested.³¹

"The principle" (of the general rule) as observed by Lord Eldon, in *Cockburn v. Thompson*, 16 Ves. 329, "being founded in convenience, a departure from it has been said to be justifiable when necessary. And in all these cases, the Court has not hesitated to depart from it, with the view, by original and subsequent arrangements, to do all that can be done for the purposes of justice, rather than hold that no justice shall subsist among persons who may have entered into these contracts." Of what is meant by subsequent arrangement, we have an illustration in the remark of Lord Redesdale, that, "in some cases where it has appeared,"—not by the pleadings,—but, "at the hearing of the cause, that the personal representative of a deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative on the hearing, the Court has" (as was done in this case) "made a decree directing proceedings before one of the Masters of the Court, without requiring the representative to be made a party, by amendment or otherwise: and has given leave to the parties in the suit, to bring a representative before the Master, on taking the accounts or other proceedings directed by the decree, which may concern the rights of such representative; and a representative thus brought before the Master, is considered as a party to the case, in the subsequent proceedings."³²

There is a difference among cases, arising

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from their very *nature, which must govern the Court in its rules of practice. 1. There are, for instance, cases where the very right under which the plaintiff claims, implies that he is entitled to its enjoyment, only in conjunction with other persons. 2. There are cases where no such implication necessarily arises from the nature of the right; but yet it may be shown, by the pleadings or proofs, that other persons have, in fact, a community of interest with the plaintiff. 3. And there are still other cases in which the claim set up by the plaintiff, is, in its nature, exclusive of other persons.

Of the latter (or 3d) class, there are numberless instances in the books. Such as mortgagees or others holding a lien, or suing to establish some peculiar interest, or seeking a priority of right. In such cases it

would be error in the plaintiff to conjoin other creditors with him in the bill, or to sue in behalf of himself and other creditors. If it be necessary to take notice of the interests of the other creditors,—which are, in such cases, opposed to those of the plaintiff, they must be made defendants, or the Court must, on a proper case made by the answer, or acting of its own head, provide for their interests in its decree.³³

Of the first class of cases mentioned,—where the nature of the claim made by the plaintiff in his bill, shows that there are other persons jointly entitled with himself,—examples are furnished where suit is brought by a part of a privateer's crew, against prize agents, for an account of the prize money;³⁴ or where a portion of creditors, specially provided for in a deed of trust, for the payment of debts, come to claim an execution of the trust;³⁵ or where suit is brought by part of the proprietors and subscribers to a factory, against the agents for an account for misapplications and embezzlements of the partnership funds;³⁶ or where some share holders in a joint stock company, sue to compel the directors to refund monies improperly withdrawn by them from the joint stock, and applied to their own use;³⁷ or where a portion of persons, associated for specific purposes, come into Court asking a specific execution of the original articles of subscription at the hands of their agents,³⁸ or to set aside an agreement made contrary to their charter;³⁹ or, in short, wherever a portion of persons interested, as partners or otherwise, jointly with others, come to claim a judicial vindication of their joint rights. In all such cases, the primary rule is, in equity, as it is at law, that all the persons jointly interested, should join in the bill. But, as an indulgence, and to prevent intolerable delays and inconveniences, calculated to defeat the ends of justice, a few of them are permitted to sue on behalf of themselves and their companions, who are then regarded as parties.

In the two classes of cases we have been

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considering, the *general rule, as to parties—plaintiffs, is precisely the rule of the Courts of common law. He who comes to assert a peculiar or distinct claim, cannot sue in conjunction with other persons; and he who sues in a joint right, must (except where an exemption arises from convenience or necessity) join all other persons interested with him in that right.

The middle class of cases, (mentioned as the second,) is where the claim of the plain-

³¹ Story E. Pl. § 77 & § 94, and note 1.

³² Story Eq. Pl. § 96, and note, 1, 2, 3. See also *Wood v. Dummer*, 3 Mason, 317. [Fed. Cas. No. 17,944.] *Mit P.* by Jeremy, 178.

³³ Story's Eq. Pl. § 101.

³⁴ Story's Eq. Pl. § 98.

³⁵ *Id.* § 102.

³⁶ *Id.* § 108.

³⁷ Story's Eq. Pl. § 109.

³⁸ *Id.* § 110, 111.

³⁹ *Id.* § 113.

tiff does not, in its nature, imply that it is exclusive of other persons; nor is it a joint right in the plaintiff and others. The claim of the plaintiff, in this case, as a general creditor of the Ocmulgee Bank, is of this description. If there are other creditors, he has nothing to do with them; nor is the assertion of their claims by them, essential to the establishment or recovery of his. If it be a rule of practice, either at law or in equity, that a general creditor cannot sue for and recover his own demand from the debtor, or from those who, by fraudulently interfering with the debtor's property, have made themselves responsible, as trustees, for its payment, I confess my ignorance of the case or cases in which it has been established; and I am equally ignorant of the principle which should induce us to establish such a rule.

At law, certainly, every creditor must sue for himself, and cannot join the case of any other creditor. In equity, he may sue for himself; and the permission given him to sue, also, on behalf of others, is an indulgence which is partly recommended by its convenience, and partly arises from considerations which, without touching his right to maintain his bill singly, form, more properly speaking, a mere impediment to the making of a decree, if in the progress of the suit it becomes known to the Court that there are other creditors, without doing complete justice and protecting their interests.

Where a rightful trustee (for instance an executor) is sued for the debts of his testator, he is entitled to the protection of the Court, and has a claim that the decree shall be such as to defend him in the due administration of the estate: (in which respect, perhaps, trustees who have made themselves such by their own wrong, may stand differently,) yet, even in that case, a single creditor may sue on his own behalf.⁴⁰—Lord Redesdale lays it down, expressly, that such is the law of this Court; and says, "it is rather matter of convenience than of indulgence, to permit such a suit by a few, in behalf of all the creditors."

The same doctrine is recognized by Professor Story. (See St. Pl. § 100, note 1; and 2 Story Eq. § 890, note 2.)

And it appears that where a single creditor sues on his own behalf, the Court will protect the defendant, and prevent the plaintiff from obtaining an undue preference, by making a decree for an account, (if assets

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are not admitted,) and that *the plaintiff's demand be paid in the course of administration; in consequence of which the executor will be allowed, in discharge, for all proper payments, (see Story Eq. Pl. § 100, note 2, and the authorities there cited;) or

the Court may, upon such a bill, if occasion appear, either on the face of the bill or from the answer, or the proofs at the hearing, make such a decree as was made in this case, both for the protection of the defendants and of the other creditors—that is, it may call in the creditors before the Master, to take the benefit of a general account; and creditors thus coming in before the Master, are entitled to rehear the cause—though not technically parties—because the decree affects their interests.⁴¹

The case before us is, in principle, analogous to that of a creditor seeking satisfaction of his debt out of the assets of his debtor, in the hands of a personal representative.

"When," says Professor Story, "a single creditor sues for his debt, (as we have seen that he may,) he need not make any person but the personal representative of the deceased, a party. We have also seen that, in such a suit, the usual decree is not to direct a general account of the whole estate, but only a decree for an account of the personal assets, and the payment of the debt in the course of administration.—But, although this is the usual decree, it is not, therefore, to be considered as absolutely incompetent for the Court, upon such a bill, to make a more general decree, for a general account, as is done in case of a common bill for all the creditors. On the contrary, a case may be made out, upon the answer and proofs, which may render it, if not indispensable, at least highly expedient for the Court, for the purposes of justice, to adopt the latter course." (1 Story's Com. on Equity, § 546, and the authorities there cited.)⁴² "In this last case," he proceeds, "Mr. Chancellor Walworth used the following language: 'I apprehend the reason why one creditor, or one legatee, who has a specific claim against the estate, may sue in his own name only, and yet that a decree may be made on such bill, for a general distribution of the fund, to be this: It does not appear on the bill, that there are not assets to pay all creditors or legatees, and, therefore, no general account and distribution of the fund may be necessary. I understand the rule, in that case, to be, if the executor admits a sufficiency of assets, there is to be a decree for the payment of the particular debt or legacy, without any general decree for an account.' "But, if by the answer of the defendant, it appears there will be a deficiency of assets, so that all the creditors cannot be paid in full, or that there must be an abatement of the complainant's legacy, the Court will make a decree for the general administration

⁴¹ Story's Eq. Pl. § 100, note 1. Gifford v. Hort, 1 Sch. and Lef. 409; and see Story's Eq. Pl. § 99, note 1, and § 365, note 1.

⁴² See also Wiser v. Blakely, 1 Johns. Ch. Rep. 438; McKay v. —, 3 Johns. Rep. 38, and Hallet v. Hallet, 2 Paige Rep. 18, 19.

⁴⁰ Mitf. Eq. Pl. by Jeremy, 166, 167.

of the estate, and a distribution of the same, agreeably to equity."⁴³

In the case before the Court, a single

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creditor sues to recover his debt, out of assets, liable to it, in the hands of the defendants, whom he seeks to make liable, as trustees, for its payment. In such a case, if it appear upon the face of the bill, (as I think it does,) that there are other creditors, having pretensions to payment out of the fund, then the plaintiff has stated a case in which the defendants are liable to the other creditors upon the same grounds of Equity on which he asserts their liability to himself, and the Court, unwilling that the defendants should be subjected to various suits, resulting, perhaps, in their being made liable to an aggregate amount exceeding the assets in their hands, and out of which their liability arose, may, (if an account to creditors generally is not claimed, as I think it is in this bill) order a formal clerical amendment of the bill, so as to make it present a claim on behalf of the plaintiff and such other creditors as will come in and contribute to the expenses of the suit. In such case, all the creditors are considered parties, and the defendants are generally released from responsibility to such as neglect their privilege by failing to come forward and sustain their demands. This is as far as the Court ought to go, even where the plaintiff's bill shows the existence and claims of other creditors. But in that case, also, it is competent for the Court to direct the other creditors to be called in before the master, as was done in this case, and that affords just as effectual a protection to the defendants and to the creditors, and occasions no delay. Besides, it accords with a well known practice in our own Courts.

But if a plaintiff confines himself to the statement of his own particular demand, which may well happen,—(as, for instance, if he be ignorant of any other,) though his bill must be sustained, the defendants are not without remedy, but have it in their power by their answer to make known the existence of other creditors, and the probable insufficiency of the assets in their hands to satisfy them; and to claim a decree for their own protection by calling in the creditors. The attention of the Court may also be drawn to the necessity for such a decree, by the proofs at the hearing.

Surely these defendants have suffered no injustice by the form of the decree in this case, which, while endeavoring to protect them from further liability, took cognizance of the interest of other creditors, though the answer showed no solicitude upon the subject.

The next objection is, that the decree ex-

tends relief beyond the objects of the plaintiff's bill, in making the Rail Road Bank liable for the extinguished debts of Lamar, &c.

The bill charges a fraudulent interference with the assets of the Ocmulgee Bank, and though the plaintiff had learned enough of the *modus operandi* to be able to charge that these defendants had taken a part of the

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assets to themselves, *and had agreed to give up others to the debtors on them, he states his ignorance of the particulars of the fraud, and calls for a discovery. At the hearing, he was able, notwithstanding the meagerness of the answer, to prove the particulars embraced in the decree. I had always supposed that, upon a bill filed for discovery and relief, the plaintiff was entitled, under a prayer for general relief, to a decree according to the discovery obtained, and the other proofs made at the hearing; and my impression seems to be justified by a blasphemy which has obtained currency in the Court, and grown into a maxim; the merit of which is divided between Lord Hardwicke and one Robins or Dobbins.⁴⁴

It would be very strange to require a bill, filed for the discovery of facts, and for relief corresponding to the discovery to be amended, so as to tally, in its charges, with the information when obtained. This would appear like returning to the exploded practice, with all its delays, of filing one bill for the discovery, and another for relief grounded on the discovery made.

Under cover of this ground of appeal, the plaintiff, also, made an objection at the last argument, which it may be proper to notice here. It is, that the appeal opens the decree:—and the decree being opened, he is entitled to have the Rail Road Bank declared liable, as stockholder, for the stock of Lamar and others, which was, by their connivance, declared forfeited.

This objection, if well founded, would only go to shew that these defendants should be regarded as owners of the stock of Lamar and others, in addition to their own 2750 shares. And the relief arising to the plaintiff from that, would not be a liability to him as a general creditor, but a liability to contribute, in proportion to this additional stock, to take up the bills in his hands.

A decree is not opened generally by an appeal. It is opened to the extent of the appeal taken: and, so far as that disturbs the subject matters of the decree, the appellee is entitled to apply, incidentally, for its modification in his behalf, but no further.

But it is apparent that, regarding the forfeiture of Lamar's stock, and that of others, referred to in this objection, as fraudulent,

⁴³ See also Story's Eq. Pl. § 94, 105, and notes; Story's Eq. Pl. § 100, note 1.

⁴⁴ Story Eq. Pl. § 41, note 1; and see § 28 and note 1, and §§ 25 et seq. and see 1 Story Eq. § 69 to 74 and notes.

the stock did not vest in these defendants, but either reverted to the original owners, or now belongs to the Ocmulgee Bank. Neither these share holders nor that Bank are parties to this suit, and no decree can be made in relation to their stock. The original stock held by the Rail Road Bank, which was fraudulently forfeited, was held to have reverted to them, upon the same principle now announced.

The next objection, on behalf of the appel-

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lants (the Rail *Road Bank) is that the decree, in allowing creditors to prove against the funds for which these defendants are made liable, postpones the demands of these defendants to those of all other creditors.

I do not perceive that any such ground was set down for argument, and for that reason none such should be noticed. But as some of my brethren have suggested it, I shall consider this objection also.

The Rail Road Bank obtained possession of assets liable to creditors; and it is admitted that the fraud by which this was effected was such that they are not entitled to hold the funds, and yet it is claimed that they are entitled to prove as creditors, *pari passu* with other creditors, against them; in other words, that the funds in their hands are to be deemed a security for their own demands as creditors.

If this be allowed, it will, in my conception, be against the spirit of the authorities, and I am very sure it will be against justice and policy.

The well settled doctrine is that where a transaction is set aside as fraudulent, merely by implication, or where the evidence of intentional fraud is doubtful, the funds improperly diverted may be permitted to stand as a security for debts or advances; but where, as in this case, the fraud was intentional, and is established by clear evidence, the best authorities, supported by numerous undisputed cases of our own, have settled the principle, that no such decree can be made.

I shall select what is said by Ch. J. Kent, in *Sands v. Codwise*, 4 Johns. Rep. 598-9, to illustrate the doctrine. "I hold," says he, "the two deeds to be grossly fraudulent and absolutely void, and this brings me to consider the next question in this case, which was, whether the deeds ought not to stand as security to reimburse the sons for their advances, and to indemnify them against their outstanding paper." "On the ground of absolute fraud, the deeds are void to all intents and purposes. It is the same thing as if no such deeds had ever been executed. A fraudulent conveyance is no conveyance, as against the interest intended to be defrauded. It is impossible that these deeds can be permitted to stand as a security, if they are to be adjudged void *ab initio*. If they have no lawful existence, it would be

inconsistent and absurd to recognize them for any lawful purposes. I presume there is no instance to be met with, of any reimbursement or indemnity afforded by a Court of Chancery to a particeps criminis, in a case of positive fraud. In *Smith v. Loader*, Prec. in Chan. 80, a party advancing money to an agent, under a combination with him to cheat the principal, lost his whole security from the principal for the money actually advanced to his agent. It is fit and proper that this result should take place, as a con-

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trary course might afford some countenance to fraud, by giving it partial effect. It would not become a Court of Equity to take a single step to save harmless a party detected in a fraudulent combination to cheat."

Our own cases of *Miller v. Tollison*, Harp. Eq. 145, [14 Am. Dec. 712,] *McMeekin v. Edmonds*, 1 Hill Eq. 294, [26 Am. Dec. 203,] *Fryer v. Bryan*, 2 Hill Eq. 56, *Parker v. Holmes*, Id., 95, and *Anderson v. Fuller*, 1 McMullen Eq. R. 27, [36 Am. Dec. 290,] five cases decided in the order in which they have been stated, clearly establish the same doctrine as the doctrine of this State.

In *Miller v. Tollison*, Harp. Eq. 145, [14 Am. Dec. 712,] a house and lands were conveyed,—absolutely on the face of the deed,—to secure a debt actually due, at a nominally high price, and of value far beyond the amount of the debt; but the deed was further intended to cover the property from creditors. The conveyance was declared fraudulent and void, and not allowed to stand as a security for what was actually due. The circuit decree had allowed the deed to stand as security for the debt. "But," say the Appeal Court, "we are of opinion that the decree did not go far enough." "The Court is of opinion that, although there may be something due by Tollison to Holder, the latter is not entitled to the benefit of the conveyance as a security for what may be found due; because the deed, making an absolute conveyance of the land by Tollison, for a large nominal price, was intended as a fraud to cover his property from his creditors; and as Holder lent his name to this fraud, he ought not to derive any benefit from it." Harp. Eq. 151-2, [14 Am. Dec. 712.]

In *McMeekin v. Edmonds*, 1 Hill Eq. 294, [26 Am. Dec. 203,] Harper, J., delivering the opinion of the Court, said, "In several English cases, even where the defendant appears to have been a partaker of the fraud, but the proof was not entirely clear, the Court has set aside the conveyance, decreeing it to stand as a security for the money actually paid." *Herne v. Meeres*, 1 Vern. 465, was a case of this sort. The Chancellor says, "and so at law, where a case is found to be fraudulent, the creditor comes in and avoids it all, without repayment of any consideration money; and in equity, therefore, where

the Court can decree back the principal and interest, there is no hurt done; and a lesser matter, in such case, will serve to set a conveyance aside." *Addison v. Dawson*, 2 Vern. 678, and *Clarkson v. Hanway*, 2 P. Wms. 203, were cases in which, upon setting aside the conveyance, the Court decreed the defendants to be refunded what they had actually paid. In *Boyd v. Dunlap*, 1 Johns. Ch. Rep. 478, where the consideration was very inadequate, but the proof of actual fraud in the defendant doubtful, the Court set aside the conveyance, allowing it to stand as a security for the money actually paid. Chancellor Kent says, "Courts of law can hold no middle course. The entire claim of each party must rest and be determined at law, on the single point of the validity of the deed; but it is an ordinary case in this

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Court, that a deed, though not absolutely void, yet if obtained under inequitable circumstances, should stand as a security for the sum really due." In *How v. Weldon*, 2 Ves. Sr. 516, though there was actual fraud,—*dolus in re ipsa*, as the Master of the Rolls expresses it,—the deed was allowed to stand as a security for the money paid. I think, however, that our Court of Equity was right in determining, in *Miller v. Tollison*, *Harper's Rep. Eq. 145*, [14 Am. Dec. 712,] that where the defendant was a partaker of the fraud, he should not be allowed to derive any advantage from the conveyance: and therefore, where it was made to secure a previous debt, it should be set aside absolutely.

In *Fryer v. Bryan*, 2 Hill Eq. 56, a bond and judgment, fraudulently obtained, with a view to cover a debtor's property, were set aside, and not allowed to stand as security for a debt claimed by the defendant, who had taken them, (*Id.* 59-60) and upon appeal, the Court (*Johnson and O'Neill, JJ.*—*Harper, J.* absent,) said, "The fact that the bond and judgment were intended as a fraud on the creditors of Lemuel Bryan, is ascertained by the Chancellor's decree, and is fairly sustained by the evidence: and, as a party to that fraud, the defendant, Bryan, is entitled to no favor. The Court was not bound to disentangle a web of fraud, of his own manufacture, to ascertain that there may have been some good material mixed up with it." *Id.* 61.

In *Parker v. Holmes*, (2 Hill Eq. 95.) the whole Court of Appeals, in affirming the decree, said, per *Harper, J.* "when actual fraud—*dolus malus*—is clearly proved, the judgment or conveyance is wholly void, and will not be permitted to stand as a security for what is actually due. But where equity infers fraud from the circumstances and relation and character of the parties, it is at the discretion of the Court to allow the security to stand good for what is actually

due."⁴⁵ It was a judgment which was set aside in this case.

In *Anderson v. Fuller*, *McMullan's Eq. 32*, [36 Am. Dec. 290,] the same doctrine is recognized: and *Harper, Ch.*, speaking for the Court, said, "In general, when a conveyance is set aside for fraud, it is within the discretion of the Court to decree the conveyance to stand as a security for the money actually paid. This is done where there is no imputation of moral fraud, or the proof of actual fraud is, in any degree, doubtful. See *McMeekin v. Edmonds*, 1 Hill Eq. 294, [26 Am. Dec. 203,] and the cases there referred to. And this does not disagree with the case of *Miller v. Tollison* (*Harp. Eq. Rep. 145*, [14 Am. Dec. 712,] where a conveyance, absolute on its face, having been made to secure a previous debt,⁴⁶ and the grantee having attempted to

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set it up as an absolute conveyance against creditors, the Court would not allow it to stand as a security for money actually due." And referring to the case before him,—which, in some respects, was governed by *Smith v. Henry*, 1 Hill 16, he proceeds, "As the rule of *Smith v. Henry* is an inference of strict law, on account of the danger of any other construction; as it may be that there was no corrupt agreement between the parties, but an act of spontaneous kindness and indulgence on the part of the grantee, perhaps it would be, generally, proper, when setting aside a conveyance on the legal inference alone, to decree it to stand as a security for any consideration advanced at the time."

It appears to me that if we look to the spirit of these authorities, our own cases particularly, and consider that the suppression of fraud requires that no aid should be afforded to any party intentionally guilty of it, we are bound to declare, that in cases of moral and intentional fraud, no particeps criminis is entitled to have any part of his debts or advances out of property or funds improperly in his hands, until the innocent creditors, whom he attempted to injure, are made whole. It is not enough that he be deprived of the property, as a security giving him a preference over other creditors. He should lose his money or his debt, as against such creditors. The consideration proceeding from him, as the procuring cause of a corrupt assignment or conveyance, should savour of the transaction with which

⁴⁵ *Miller v. Tollison*, *Harp. Eq. Rep. 145*, [14 Am. Dec. 712,] 1 Johns. Ch. Rep. 479.]

⁴⁶ NOTE.—The fraudulent transfers, in the case at bar, having been made almost entirely in consideration of a pre-existing debt, it would seem that the doctrine here advanced, would confine the Rail Road Bank to a demand to have back, at all events, no more than the money she advanced at the time of the transfer. The debts, satisfied by the transfer, would require to be set up again and revived; which active interposition a party convicted of fraud, has no equity to claim.

it is connected; and should be considered as forfeited, as between him and the innocent parties, whom, if he had not been detected, he would have irreparably injured—perhaps ruined. It is enough that, after these are satisfied, the transaction should be recognized as between the confederates, and the advances or debts allowed. Indeed, if there is any thing questionable in the decree, it is not the postponement of the Rail Road Bank's demands to those of other creditors, but the allowing it against the Ocmulgee Bank, after the other creditors are paid. These demands were allowed, however, as between the parties, only because the Ocmulgee Bank was not deceived in the transaction. If it had been otherwise, if the assignment had been procured by a deception practised on that Bank, and she had filed her bill to set it aside, all the authorities concur as to the law. A party deceived and coming for relief, stands upon this footing—the conveyance is set aside absolutely, and is not allowed to stand as a security for advances. In other words, the fraudulent party loses his money. This must be the construction; for if it is intended that the money be repaid, why deprive the party entitled to re-payment, of a security to enforce it? If such be the rule where the party from whom the conveyance was obtained seeks

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the aid of the Court. *how much stronger the reason for such a decision, when creditors, and not the party himself, come to be relieved?

This is a doctrine conformable to justice and sound policy, and goes not a whit beyond the spirit of the decisions by which they were intended to be upheld and supported. The contrary doctrine is an actual encouragement to fraud; for what restraint is left to fetter the dishonest, or terrify the cunning, if they are to have all the profits of their corrupt enterprizes, if not detected in them, and are to lose nothing if they are?

If the doctrines which I have endeavoured to vindicate are recognized, the only question is, whether the fraud perpetrated here, is of the character I have described; and whether the Rail Road Bank is to be exonerated from the consequences of it, on the ground that it was perpetrated by its agents, and not by itself. I speak of it only as the act of the agents; and am willing to assume that it was done without special instructions, though it is in proof that there were instructions of some sort, which have not been produced or accounted for; and though what was done, when made known to the principals, was approved by them. But that parties are bound, civiliter, by the conduct of their agents, does not admit of doubt; and has not been questioned by counsel. Would the Rail Road Bank dispute the ability of their officers and directors to bind them? These are but agents;

and upon the very same grounds and principles which would excuse them from responsibility for the acts of their agents sent by them to Macon, they must be excused from every contract and transaction of their institution.⁴⁷

Then, as to the character of the fraud—is there any doubt about that? Why, these defendants, themselves being judges, have declared the enormity to be such, as totally to corrupt and destroy all rights arising to them under it!

What are the circumstances? When these defendants entered into the Ocmulgee Bank, it is proved by their own witnesses to have been as sound as any Bank in Georgia. They obtained the control of it, and in the first year of their administration, its issues were distended beyond the ordinary means of the Bank to sustain. A call is made upon the stockholders to pay in further instalments, agreeably to the charter, in order to maintain the issues. This these defendants resist and protract, until, in their own opinion, the credit of the institution is in danger. They then make advances; but too scanty for the purpose. The plaintiff is then applied to, to supply the deficiency. They are informed of the fact, and make no objection. The plaintiff proceeds with his advances; the benefits of which were received by these stockholders, in the proportion which their 2,750 shares bore to the 5,000 shares of which the Bank was com-

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posed—more *than one-half. They were informed of these advances as they were made, and might have stopped them, if they deemed them in any respect objectionable. But they were silent, and permitted their Bank to draw money, from time to time, from Johnston, until his advances amounted to one-fifth of the whole capital stock. These advances were made to take up bills on which these defendants were liable, to more than one-half their amount; and were so applied.

One would suppose that, under these circumstances, and by ordinary men, such a debt as this would have been held sacred. And yet it was not so regarded by these parties. With a full knowledge of its existence, and a full knowledge of the securities given for ensuring its payment, and with a very shrewd suspicion of the condition of the Bank, these defendants proceeded, in the persons of their agents, by trick and contrivance, by insincere promises and hollow representations, and by bargains, only the more corrupt because sufficiently specious to impose upon some, whom it was necessary to deceive, in order to make them unsuspecting instruments, to divest themselves of their

⁴⁷ Paley on Agency by 2 Loyd, 362, note; 1 Phil. Ev. 99; Carter v. Bocher, 2 Burr. 1905; Crockford v. Wenter, 1 Camp. 127; Grammar v. Nixon, 1 Stra. 653.

stock, and, with it, to rid themselves of their liability to bill holders; and, at the same time, and in the face of an express statutory prohibition, to serve themselves out of the larger and more valuable portion of the assets, liable to the plaintiff and other creditors, and to give the rest away.

Now, every member of this statement is founded on the evidence in the case: and how shall we characterize this transaction, otherwise than as an actual, intentional fraud, condemned alike by conscience and by law? Instead of encouraging it by impunity, and restoring those to whom it is legally chargeable, to the same condition as if it had never been perpetrated, it is the duty of a judicial tribunal to meet it with all the energy of the law; and by a firm and manly exercise of authority, so to rebuke it, that, so far as human laws can effect such an object, all men, whether weak or wicked or avaricious, may be deterred and deprived of all motive for following its pernicious example.

On this branch of the case I feel more solicitude than upon any other; because I am firmly persuaded that justice and true policy are more concerned.

If, however, I am mistaken in supposing that the Rail Road Bank should be postponed as a creditor, upon the grounds I have taken, there is another ground, to which I shall hereafter advert, in another connexion, which is sufficient to postpone her. It is that the interference with and wasting of the assets of the Ocmulgee Bank was a breach of trust, produced by a combination between the directors, who were trustees of the funds in their hands, and these defendants, who, as stockholders, and as cred-

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itors, (if they were such) *were cestui que trusts; and in such a result, produced by such a combination, the primary liability is upon the cestui que trust who was a party.

There is but one more objection to be noticed, before proceeding to consider the plaintiff's claim as bill holder. It is contained in the fourth ground of appeal, which is singular: "Because the decree requires the South Western Rail Road Bank to account for the value of assets shewn to have been wrested from them by the laws of Georgia, —which are now in the custody of the law in Georgia, for the benefit of the creditors, generally, of the Ocmulgee Bank, and to which these defendants have renounced all claim."

When I pronounced the decree, I did not conceive myself to have had any evidence before me, that the assets referred to were wrested from the hands of the Rail Road Bank, or were in the custody of the law of Georgia, or that they were there for the benefit of the creditors, generally, of the Ocmulgee Bank. The fragment of a record was offered to prove these facts, or some

of them, but, on account of its imperfection, it was objected to, and rejected; and in the argument of the case, no further allusion was made to the subject, so far as I remember. I, therefore, supposed these was no evidence. It appears, however, that there is some incidental testimony; though not sufficient to bear out, at least very fully, the statements contained in this ground.

It appears that a receiver has been appointed, at whose suit a portion of the assets, probably the larger part or the whole, have been attached in the hands of Mr. Nesbit, the Rail Road Bank's attorney. But I see no evidence that the Rail Road Bank ever renounced their claim to the assets before the filing of their answer, if, indeed, the answer makes a renunciation of claim. It would rather appear from the evidence, which was taken in this case after the filing of the answer, that they were still claiming them, in some way or other; for it is said that the Rail Road Bank had not realized any thing on them; and the reason given is, that they were attached in the attorney's hands, and were ever since in litigation.

But admitting that they were attached and are in the hands of the law for administration; whose fault was it that they were in these defendants' hands to be attached? Is this plaintiff, or any other creditor, who was defrauded by the taking possession of them, obliged to quit his hold of these wrongdoers, who have made themselves liable to them, and whom they have caught in the very act; and to resort to another forum, for redress against other parties, perhaps less capable of responding to them; and to take as the measure of their relief, the eventual value of the assets, perhaps depreciated by the laches of these defendants, or in

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consequence of the im*pediments to their collection, while good, which were created by the incidents of the attachment suit? Was it ever heard before, that the responsibility of a tortfeasor was discharged, by an attachment taken out against him? Or by his renouncing claim? What matters it to the plaintiff what these defendants have done, or intend to do, with the securities they improperly possessed themselves of? Suppose they had burned them, or thrown them away. Suppose their motive for taking them was not to profit themselves, but to do him an injury, what then? It is not the use made of them, but the taking them, which constitutes the wrong; and creates the liability: and the wrong, and the liability for it, were both complete when the assets were abstracted, and the plaintiff's remedy impeded; and the liability is not removed by any subsequent proceeding. It would be very different with respect to persons rightfully in possession: but that is not the predicament of the Rail Road Bank.

Besides, it may be observed that the assets in the hands of a receiver, for the benefit of creditors generally, may not afford the plaintiff as ample a remedy as I think he is entitled to at the hands of these defendants. As against a receiver, the defendants may, probably, come in *pari passu* with other creditors: whereas, I think, in this suit, their demands should be postponed.

In this connection, it may be observed that the plaintiff's remedy, through a receiver, must necessarily be limited to the assets of the institution that come to his hands, and will not involve a full administration of the affairs of the bank; and, therefore, the remedy may not be more ample, indeed may not prove as ample, as that which he may obtain in this suit; in which the Court, without assuming the general administration of all the assets of the bank, undertakes to administer that portion of them for which these defendants have made themselves responsible.

There is another principle, well settled, which shows that the primary liability is on the Rail Road Bank. If the plaintiff proceeds against the funds in the hands of the receiver, the latter is to be regarded, in some respects, as the successor of the Directors of the Ocmulgee Bank. But these officers were trustees, for creditors and stockholders, of the assets in their hands, and the Rail Road Bank were, as stockholders, a portion of the *cestui que trusts*. The wasting of the assets, by a combination between these parties, constituted a breach of trust, in fraud of the creditors and other stockholders: and it is a clear principle that where a portion of *cestui que trusts* join with a trustee in a breach of the trust, the primary liability is upon the former: that they are estopped by their concurrence, from claiming from the trustee, but on the contrary, are bound to indemnify him; and that the trustee is

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*liable to other *cestui que trusts*, is admitted law. If this position is true, we should, in sending the plaintiff to the receiver, be turning him round from a primary to a secondary liability.⁴⁸

And, after all, why should not the defendants make compensation, here, for the assets, at their value when they received them; and take them there as they may turn out? The plaintiff might probably have made his debt out of them long ago, if they had not interfered with them. As it is, the assets will be as valuable to them as to him: and as they have chosen to take them, it is no injustice that they should abide by them.

Upon all the subjects which I have hitherto noticed, I can see no room for a division of opinion. I think there should be no division.

I come, now, to consider the plaintiff's claim as a bill holder; and when I have concluded my observations upon it, I shall cheerfully submit to those who will give them a candid consideration, whether they leave any more ground for diversity of judgment.

Before I proceed to the more direct questions upon this point, I shall notice one which the counsel did not touch in their argument, but which was brought into discussion afterwards. I apprehend there is no great difficulty in it; and for that reason, perhaps, it was not raised or discussed by counsel.

Assuming that the stockholders are bound for the bills in the plaintiff's hands, the question is as to the nature of their obligation,—in respect to time. The charter declares them bound "for the ultimate redemption of the bills." Are they bound only after the plaintiff shall have sued the Ocmulgee Bank, and failed to realize the amount of the bills held by him? Conceding that the charter contemplated this order of liability, it certainly presupposed that there should be a bank and a corporation to be sued. But when it is considered that these defendants, by their own wrongful act, disorganized and dissolved the corporation, and took away or abstracted the primary remedy against it, will it do for them to excuse themselves from their secondary obligation, because resort has not been had to the institution primarily liable? Had they, themselves, not extinguished it, it would still have existed for their exoneration. But, surely, he who wrongfully obstructs a remedy, has no cause to complain that it has not been resorted to: and those standing in the condition of sureties, have no ground to complain that they are made liable according to the contract by which they are bound, when it is shown that they have removed their principal out of the reach of the creditors.

If it be said that it is in the power of the plaintiff, as a creditor of the bank, to implead

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the stockholders, and compel them to pay in further instalments, and thus provide a fund to satisfy his demand: the answer is, that the words of the charter, declaring the stockholders ultimately liable for the redemption of the bank bills, are not to be understood in a sense that renders such a proceeding a prerequisite to the stockholder's liability. Ultimate, in the charter, (if it signifies a postponement of the stockholder's liability,) plainly means, after resort to the institution, as it existed when the bills were issued. It was the business of the stockholders to see that all the stock was paid in which was necessary to the redemption of the bills issued; and if they permitted bills to go out, upon which they were to be personally bound, without having brought in sufficient stock to redeem them, it was their own fault, and they have no cause to complain when made liable

⁴⁸ Brice v. Stokes, 11 Ves. 319; Booth v. Booth, 1 Bea. 126; Montfort v. Cadegan, 19 Ves. 639.

on them. And, if it were otherwise, who are the stockholders? Has the Rail Road Bank, by her pleadings, told us who or where they were; or given the plaintiff "a better writ?" She has extinguished the corporation, which, according to the charter, was the artificial person to be called on to redeem its bills; and should, therefore, stand ready to redeem them herself.

When it is considered how numerous the stockholders probably are, and the inconvenience of the remedy pointed out by this objection, is it too much to say that these defendants are not entitled, under the circumstances of this case, to turn the plaintiff round to it? Besides, they have indicated no desire to do so. They have not, either by their answer or at the hearing, or at any subsequent stage of this case, intimated any desire that the stockholders should be compelled to pay in all their instalments; and possibly it might be the last thing they would wish to do on their own part, though not averse to its being done by others: and I think they should be left to their own choice in this matter.

Having disposed of this preliminary matter, I come, now, to consider whether the plaintiff is entitled to a remedy on the bills in his hands.

It may be well to state, in the first place, some of the legal qualities of bank bills.

They are so far regarded as money that it is criminal to steal them.⁴⁹

There is no difference between such bills and common negotiable notes, in respect to the title and power over them, which the holder acquires.

They may be pledged or specially deposited.

But they are not in reality money: their real legal quality is that of promissory notes.⁵⁰

They are not a lawful tender, if objected to.

Though treated, in common business, as cash, they are distinguishable from it; and often pass at a variable discount.⁵¹

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*A promissory note, payable in such bills, is not a note for money: (resembling in that respect a note payable in paper medium;) and is, therefore, not a good note under the statute.

A payment in bank bills is not unqualifiedly a payment in money. Such bills are governed by the same rules that are applicable to negotiable notes and bank checks; and where the bank, whose bills are received in

payment, has stopped payment, neither party knowing it, it is no payment.⁵²

Now these are the qualities which the law has affixed to, and the purposes which the law has declared are to be accomplished by, bank bills. The subserving the purposes which the law has determined may be accomplished by such paper, is the object for which its issue is authorized. The public policy is, that it shall answer this object and design, by fulfilling, not one purpose alone, but all or any of the purposes which its legal qualities fit it to accomplish, as the occasion may require. It is vain, then, to talk vaguely and indefinitely about public policy, without looking into all the particulars in which it is concerned. The man who does not take a bank bill as money, but who purchases it at a depreciation, according to its marketable value, is a part of the public, and entitled to rely on his security. He would be no less one of the public, and equally entitled to rely on the security of the bill, though he bought it at a depreciation, at the counter of the bank itself. The man is a part of the public, and to be recognized and protected as such, who does not take bank bills as money, to pass them off as money, but receives them upon pledge and as securities. He does not cease to be a part of the public, nor lose his right to be protected as of the public, though the pledge be made to him by the bank itself. The things received in all these cases, are still bank bills: without any mutation of the legal qualities or incidents inherent in them, produced by the manner in which, or the purpose for which, they are received. If the purpose is lawful, and bank bills, according to their legal effect and qualities, whether regarded as money, or as securities for money, will accomplish it, and the contract be upon a good and lawful consideration, the law must, upon grounds of public policy, uphold the transaction, and, when called on, enforce the bills for the benefit of him who has received them.

It is equally inconclusive to distinguish between banks of deposit and banks of circulation, and to tell us that the object of the latter is to furnish a par currency. The currency which is to be furnished by them, it should be remembered, is to consist of securities, and not money; and the circulation of it, in its true philosophical as well as legal sense, is the application of these securities to the purposes of trade, according to the exigencies and purposes of those into whose

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*hands they come. If the condition of one individual induces him to receive them for the purpose of passing them off, or demanding payment at the bank, it may be the inter-

⁴⁹ *Miller v. Ball*, 1 Burr. 452. *Byles on Bills*, 120.

⁵⁰ *Danfott v. Buffalo*, 9 Paige, 14; *Story on Bills*, § 88.

⁵¹ *Story on Prom. Notes*, § 18, note 8.

⁵² *Story on Prom. Notes*, § 18, note 8; *Bailey on Bills*, 10; 3 Kent, 76, part 5, § 44; *Lange v. Kohne*, 1 McC. Rep. 115; *Harley v. Thornton*, 2 Hill Rep. 509; *Ontario v. Lightbody*, 13 Wend. 101.

est of another, and quite as suitable to his convenience, to hold them as a security without demanding payment; or to retain them from the general circulation. Still they are nothing but securities; and still they are in circulation while in the hands of the one or the other of these persons.

Nor is the value of these securities, as a medium of commerce, in the slightest degree affected, whether their circulation be of the one kind which I have described, or the other. The man who has occasion for securities, will look as closely to the value of the security he takes, as he will who, having occasion for money, receives the bill to pass it off.

Equally idle is it to argue, that because the Georgia Legislature, which emanated this charter, has prohibited individuals from issuing current notes; therefore, the notes of her incorporated banks are invested with the peculiar qualities of money, and have none other, and shall be put to no other use. What she has authorized her banks to issue, are, in law and in reason, notes and not money; and whether, in business, they are capable of standing as money, does not depend upon their being issued by the bank, nor upon their being issued as money, but upon their being, when issued, a good security for it, however they may be received or applied. It is this which gives them credit; and their credit depends upon the means of the institution, and the remedies provided by the Legislature, for the redemption of the bills. The evident design of making the stockholders collaterally liable for the bills issued, was to uphold their credit; and if we refuse to enforce their liability, in this case, (the bills being issued by the bank, and binding upon her,) we are not promoting the design of the Legislature, but flying in the very teeth of her enactment.

It has been urged that in order to bring in requisition the liability of the stockholders, the bank must issue their bills as money. The charter contains no such provision, and we have no right to interpolate it. The charter declares that the obligation arises upon "bills issued by and from the bank." The question, then, is not, did the bank issue these bills as money, but, did she issue them? She has made the bills in the form which the statute requires; and she passed the property in them to a third party, upon a lawful consideration; and I apprehend that no other definition can be given of an issue by the bank, than a transfer of right and dominion. What is demanded by the defendants, as the requisite of a perfect issue, is, that the bills should be parted from as money. But that is what no bank (except under governments which declare such bills to be money, and a

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*lawful tender as such,) ever did or can do. The issue is of securities; which, when issued and found capable of standing as securi-

ties in the various positions to which the necessities or convenience of the community may consign them, are, by the consent of business men, applied to the purposes of money in exchanges.

Were the bills, in the hands of the plaintiff, issued by the Ocmulgee Bank? They were issued, if, by putting them in his hands, the bank created a liability against herself upon them, either presently or prospectively. If he obtained a property in the bills, beyond the control of the bank, how can it be said that the bills were not obligatory on the bank, according to their import and legal effect, whenever, by the terms of his contract, he became entitled to enforce them?—The agreement, not to pass them off, did not make the bills less his property, nor did it change the legal qualities, nor alter the contract, which their face imported. The agreement was altogether outside of the bills. The pledging of a thing does not alter the nature of the thing pledged. If bullion is pledged, it remains bullion; if coin, it continues to be coin; and if bills are pledged, they are still bills as before.—If bank bills be money, as has been earnestly contended, then, emphatically, these bills were well pledged. Can it be doubted that a bank may pledge her coin as well as her bullion? Nor (by the way) can the argument advanced be maintained, that if the bills were hypothecated, then they operated as a payment, pro tanto, of the plaintiff's advances. They were not paid to him, but pledged as a collateral security, to be enforced as such. His principal demand, therefore, remained until it should be satisfied by a direct payment, or until the collateral security was taken up.

But to return; as I said, if the bills pledged be regarded as money, the pledge was undoubtedly good. The only doubt arises from their being not money, but securities merely.

Bank bills may be pledged, as we have already seen. This bank could have pledged the bills of any other bank. She could have done the same with any other property she owned; and she could pledge her own bills, if the pledging amounted to an issue of them, so as to make her liable upon them.

Now we have examples, in the case cited in the decree from New York, and the two cases also referred to in the decree from Georgia, all going to show that such a proceeding is not unfamiliar elsewhere; and it is a practice not unknown among ourselves.

We have, also, the authority of the New York case, that it does create a legal obligation, as against the bank by which the pledge is made.

What is more material is, that in the sec-

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ond Georgia case, *mentioned in the decree, we have an undisputed and express decision from Georgia, whose judicial determinations are conclusive upon us, that the pledge of her own bills by a bank, is not only an issuing

of them, so as to make them valid against herself, but that it draws with it the collateral securities, provided by her charter, for the ultimate redemption of the hypothecated bills. And this judgment was rendered in the administration of the same subject matter, and by the same Judge who decided Collins's case, and upon the report of the same auditors, who are understood to be professional men. And let it be added, that though the decree made provision for an appeal, no appeal was taken. Yet, we are asked to doubt here the soundness of this Georgia judgment, though not doubted by professional men in Georgia, having the best opportunities to know the real meaning of the decision in Collins's case, with which it is supposed to conflict.

But what is the evidence of this conflict? The surmise has no better foundation than loose expressions dropped by Judge Warner, (evidently without weighing their import,) in the decision of Collins's case; expressions not necessary to the actual facts of that case; and which, to make the most of them, were equivocal. To give point and tendency to judicial phrases, thus roundly and hastily uttered, we are requested to make a substantial ground out of the argument of Mr. Law,—that there was an executory agreement to mortgage, which should be regarded as executed,—when the Court, so far from intending to support his position, or make it the ground of its decision, did not notice it in its judgment.

The record of Collins's case is now before us, and it turns out, as I conjectured in the decree, that the bills were never delivered to him, but remained the property of the bank, and under its control; and were, therefore, never issued by the bank. And it appears that the distinction between that case and the subsequent one, was, as the auditors and Judge Floyd determined, that in Collins's case the bills were held not to be issued or obligatory, because never pledged or delivered, whereas in the latter case, they were held to be issued, because they were pledged and delivered. That in the one case, the agreement to pledge was executory, and did not pass the property in the bills,—which were, therefore, not issued,—while in the other case, the agreement was executed by an actual delivery, which passed the property in the bills, to the pledgee—and amounted, in the judgment of the Court, to an issue of them under the charter.

I have a brief remark to make here upon the expressions of Judge Warner; which will shew his real meaning, and that his observations, in relation to the fraud of supporting Collins's claim, as against bill holders, how-

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ever applicable to that case, under that charter, can have no application to this case, under the charter of the Ocmulgee Bank. When I pronounced the decree, I supposed

there was a perfect analogy between the charter of the Monroe Rail Road and Banking Company, which creates a lien, for the redemption of the bills, upon the Rail Way and equipments, and the charter of the Ocmulgee Bank, which charges the stockholder rateably, with an obligation to redeem her issues. But there is no real analogy. In the case of the Monroe Bills, every bill was a charge on the equipments, the security provided being a common security for all of them. The bringing forward, therefore, any bill not issued, tended to diminish the amount to be received out of the security on the other bills, which were issued: and was, therefore, a fraud on them, whether their bills were taken by them as money, or not. It is different with the bills under the Ocmulgee charter. Every bill holder has a several claim against every stockholder, according to the amount of his stock, and only in that proportion: and if every bill held by Johnston were disallowed, or burned, it would neither increase nor diminish the amount to which other bill holders are entitled. The observations, therefore, of Judge Warner in relation to the interests of other bill holders, though well applied by the Judge in that case, have no place whatever in this. The material question in both cases was the fact of issue, and not the character in which the paper was received: and it is a misapprehension of Judge Warner's observations, to apply them otherwise.

The defendants, in this case, in taking upon themselves the defence of the interests of bill holders, are assuming a task wholly gratuitous, and performing a duty no way incumbent upon them. The interests of bill holders are in no way implicated; and, if it were otherwise, there are no bill holders before the Court, or objecting, as in Collins's case.

Looking at the Georgia decisions, therefore, as decisive of the question whether the pledging of a bank bill amounts to an issue of it, and finding that they answer that question affirmatively; what can we desire more? Do they not establish that the bank is bound; and that the collateral security provided to make its obligations good, follows, as of course? Surely if the bank is bound, the stockholders are bound, also. It was with the express view of accumulating their liability to that of the bank, that they were made liable for bills issued by her. Upon what ground are they to escape this liability? Why, upon this; that such an issue of the bills was fraudulent! How, fraudulent? The alleged fraud upon bill holders has been already refuted. Well, but it tended to deceive the public. If it were so, that is no objection for the stockholders to make. The principle of this objection is precisely the same with that involved in the objection of these defend-

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*ants in relation to the bank's having pro-

ceeded to business before it had the specie in hand, required by its charter; the futility of which I have already exposed. The business of these defendants it not to protect the public, but to perform their contracts; and the public will be much better protected by the performance of these, than by the strongest professions of attachment to its interests, unaccompanied by the evidence of acts. But if we are to look to the public; who are the public? Is not Johnston one of them? These pretenses are entirely insufficient, as a defence for these stockholders. There are more persons constituting the public than the share holders of this institution. The charter was intended to protect others than the bank and its corporators. They are no part of the public, that was intended to be protected. On the contrary, the public, by the charter, is intended to be set over, in direct antagonism, against them. It is the public interest that they should be held liable. The only persons concerned in their exemption are the stockholders themselves; and to excuse themselves it is necessary for them to show, not that the public, but that they, themselves, have been defrauded. And how can they show this? Is it not true that the stockholders of every bank have it in their power to know every bill which is signed, and every bill which, after being signed goes out of the bank? It is true that, in practice, stockholders do not find it convenient to avail themselves of this power. But it exists: and they must therefore be held to know the whole extent of the issues; and cannot be allowed to say they are surprised by the amount of bills issued. Were not these bills issued? Yes. Was the bank bound? Yes. And what was it that made the issue a good issue so as to bind the bank? Was it not that, in making it, the directors were acting under the powers conferred on them by the charter? Though not the agents of the stockholders, as individuals, were not the directors their agents, as corporators, to the extent of the powers conferred on them by the charter? Was not the power to issue bills, one of these powers? Did not these defendants, by entering into the institution, voluntarily assent to the charter, with all the powers vested by it in the directors? Then, finally, was the exercise of the powers thus voluntarily assented to and expressly conferred, a fraud on those conferring them?

It is true, that in the decree, I took it for granted, that the bills in this case were to be at the disposal of the plaintiff whenever his account for advances was settled, and not paid. The contrary was not intimated in argument, so far as I can recollect. But suppose it were otherwise, if the observations I have made are entitled to weight, the security of the bills was good, though they were never to be circulated.

One reason, I apprehend, for doubting this

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position is, that the bills would be taken to have been intended as a security only in case of the insolvency of the bank. That is, however, the only case in which the liability of the stockholders would be necessary to the perfect security of the bills, let them be issued or pledged upon any terms you can imagine. The argument that these bills created a preference over other creditors, in case of insolvency, and that the issue of them was a breach of the Georgia Statute, on that subject, stated in the decree, is merely verbal. Any bill, issued under any circumstances, would serve to create such a preference, if these bills have that effect. Surely the authorizing the issuing of bills, was a legislative modification of the statute on the subject of preferences; if, indeed, as I have said, they do create a preference. But is it not manifest that the preferences intended to be inhibited were to consist of an unequal distribution of the assets of the debtor? which debtor was, in this case, the bank. No inequality as among her creditors, whether by bills or otherwise, in the distribution of her assets, was produced by the issue of these bills: and no creditor, who was still entitled to come in *pari passu* against her assets, as all creditors were, was defrauded by the circumstance that some creditors were, as bill holders, better secured than others, by having third persons bound, also, for their debts.

Another reason for the doubt is that for contracts, other than by bills, the stockholders are not bound by their charter. It has been supposed that there could not legally exist, at the same time, two obligations for the same matter: the liability of the bank by simple contract for the advances, and the superadded special liability under the charter for bills. But an example to the contrary is presented in every promissory note. And no further authority for this is needed than the case of *Toby v. Barber*, 5 J. R. 68, cited in *Wardlaw v. Gray*, 2 Hill Eq. 651.

But I do not think I was in error when I considered it as the true contract between the plaintiff and the bank, that he was to deal with the bills as he pleased, when his advances terminated, and were not paid.

There was nothing in the interrogatories put to the witnesses calculated to draw their attention to the duration of the restraint which the agreement imposed upon the circulation of the bills pledged; and I do not think it a fair interpretation of their testimony to give emphasis to any expression loosely made by them which may import that the restraint was perpetual. One witness, and only one, I believe, does say that the plaintiff was never to circulate the bills. The others say simply he was not to circulate them. If this were an important distinction, its having escaped both the Chancellor and the counsel, is some evidence that

it may not have been perceived by the wit-

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nesses; and before overruling a decision upon a matter of fact, and where the subject is of the value of \$50,000, it appears to me that this matter should be left open, and the judgment reserved, and given only upon further enquiry, allowing the witnesses to be re-examined.

But whether what the one witness says, or what the others say, be now taken as evidence: whether the words of the agreement were that the plaintiff was not to circulate, or never to circulate, the bills: is it not a very narrow interpretation of them, not to apply them to the subject matter of the contract, the debt for which the bills were given as collateral; but to leave the subject entirely out of consideration? If such a loose contract as this were before a Court for construction, would not the end and object of the agreement be considered, and the agreement be interpreted in reference to its subject matter? And would not the natural, prima facie interpretation be that the bills were not to be circulated, or never circulated, until the advances were ended, and there was a failure to satisfy them?

But why resort, on behalf of the Railroad Bank, to a very critical scrutiny on this subject, when the testimony shews there was a receipt given by the plaintiff to them, setting forth the precise terms upon which he received the bills? Why was not this receipt produced! If the contract restraining the circulation is not ended, the bank must have held this receipt when these stockholders took possession of it. If it was ended, the bills then became liable to Johnston's absolute control; and by the interpretation on all hands of the second Georgia decision, he was a bill holder.⁵³

That the restraint, whatever it was, was ended, seems extremely probable from the bank's having settled his account, and carried the balance to his credit as cash, subject to his demand on the personal ledger. I think that though he did carry out the bills after this settlement, he did not take them in payment, but his possession of them was continued as collateral security for the debt settled and freed from all restraint. That debt was never paid.

But apart from these considerations, and assuming, now, that the contract was, that the bills should never be passed off: was it not, also, a part of that contract that the principal debt should be paid? If no time was previously fixed, by bond or otherwise, for its payment, was not that effectually done when the account was settled, and the amount declared then payable? Was that contract for its payment ever fulfilled? And when the bank broke her part of the agreement, was Johnston still bound by his? Was

he not then put at liberty to sue, or circulate the bills, according to his interest or pleasure? And, as to these defendants, are they entitled to the full benefit of the most literal fulfilment of the pledgee's agreement, when,

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by their own interference, they destroyed all hope of the performance of the counter stipulation—which constituted the consideration for its performance?

I here conclude my view of the case of the plaintiff.

I abstain from all remark upon the justice of his claims; of its being known to these defendants that the advances were being made, for their benefit, upon the faith of the collateral security; and suffering the advances to proceed without a word of disapprobation, when a single word might have saved him. I say nothing of the steps taken to ward off the liability and defeat the claims. But in closing my observations on this painful subject, I must be allowed to declare, that in my opinion, this suit presents one of the strongest appeals ever exhibited on our records, for a firm and inflexible judicial interposition to put down fraud, and to discountenance trick and chicanery: and, if this appeal be not heard, if the defense in this case succeeds, justice will have lost much of its sanctity, and a sense of its obligations will be in danger of being greatly impaired among us! And public policy, the theme of the defense, will have irreparably suffered.

RICHARDSON, J., concurred.

FROST, J.—I concur, except in so much of this opinion as postpones the Rail Road Bank to other creditors, as claimants on the funds, for the payment of their debt against the Ocmulgee Bank.

WITHERS, J., (absent at extra Courts,) delivered, per FROST, J., the following dissenting opinion:

Not knowing what may be said in behalf of the minority of the Court of Errors, I desire to express some views in vindication of the conclusion to which my mind has been conducted upon the leading question presented by this cause.

I shall leave untouched whatever concerns the pleadings, as they are, or as they should be. The equity jurisdiction, from which this case comes, is more competent to adjust the pleadings than the law Court itself, and infinitely more so than an ill-informed member of it. I do not, therefore, presume to consider whether the complainant's bill will sustain, without amendment, a decree in his behalf, for the sum of \$3800 advanced by him, to the Ocmulgee Bank, after the 7th Nov. 1842: nor whether all bill holders and other creditors shall be made parties in these proceedings; nor whether a full payment of

⁵³ Allen Fleming's evidence, p. 56, int. 5.

stock subscribed should not be required, as constituting a corporate fund, primarily liable, before an "ultimate" liability can be enforced against an individual stockholder in his personal character, and so forth.

The only question I intend to discuss, is that alone, as I am informed, which brought

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the case before this Court, to *wit: whether the complainant is one who holds bills issued by or from the Ocmulgee Bank. If he does not, he has no redress against the individual stockholder whom he now pursues; if he does, he is entitled to the relief provided for him in the circuit decree.

The defendant holds near fifty thousand dollars of the bills of the Ocmulgee Bank—bills in the ordinary form of that species of circulating currency of that and other banks, and so executed as to conform to the directions of the charter touching the execution of contracts, that should be binding upon the company; that is, they were signed by the President and Cashier. He received them as a security, when they first came into his possession, for cash advanced to the bank, that its existence might be saved against the destructive legislation of Georgia, in case it failed to maintain specie payments, resumed in 1841. The utmost good faith is conceded to him as a most meritorious creditor. He seeks to enforce against the South Western Rail Road Bank the liability arising under the following clause in the charter of the Ocmulgee Bank, to wit:

"The persons and property of the stockholders, for the time being, of said bank, shall be pledged and bound, over and above the amount of said stocks paid in, in proportion to the amount of the shares that each individual, copartnership, corporation or body politic, may hold, in said bank, for the ultimate redemption of the bills or notes issued by or from said bank, in the same manner as in common commercial cases, or simple cases of debt."

According to my apprehension of the ground work upon which the majority of the Court found themselves, it is this: The elemental functions of modern banking, all being combined in the charter of the Ocmulgee Bank, are, 1st. to receive deposits; 2d. to make discounts; 3d. to furnish a circulation that shall stand instead of money. They hold that the personal liability imposed upon the stockholder by virtue of the foregoing clause, is confined to the circulating currency proceeding from the Ocmulgee Bank; and that the idea of the circulating currency, so guarded, is to be restricted to those bills or notes that are not merely issued by the bank, but that are thrown, without restraint, into the volume of circulating bank bills. They draw the conclusion that inasmuch as Johnston took the bills he has produced, with an agreement or understanding that they should

not go into circulation, according to their understanding of circulation and currency, these are not the bills or notes issued by or from the bank, within the contemplation of the charter. It is supposed we thus have an elemental, definite idea of the philosophy of banking, in its modern acceptation, much recommended by its precision, since it goes.

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pari passu, with *bank circulation, offered and received as money, not beyond it; and greatly commended also by its conformity to high public policy.

What is the root of this doctrine? I conceive it to be this: Since the constitution of the United States, conforming to the practice of the commercial world, ordains as money, certain metals exhibiting the stamp of government, if a banking corporation be enfranchised by law, with a capacity and a credit that enables it to supplant the functions of that constitutional currency by another of its own, the same law will give to those who part with their metallic currency for the substitute, the guaranty, for its ultimate redemption, of the persons and property of the individual stockholders.

I believe this to be good and sound doctrine, whether we examine language or policy. But where is the reason or authority that obliges or warrants us in restricting it to that particular banking substitute for money—that bank currency only—which takes the form of a common bank note, payable to bearer on demand, at a particular place? and to that even, only when it goes forth as free as the air, clogged by no restraint that may withhold it from the great channel of circulation? If one or a limited number, by agreement, take bank bills as money, and for money exchanges, are they not within the reason which provided the special protection? If one or a given number agree to hold bank bills received for money and as money, for the accommodation of the stockholder, where is the reason or policy that should render him, (the stockholder,) in law or morals, less obliged to such friend than he would be to the adversary who clamors for redemption? Currency implies motion: but how much motion? Shall it be through the whole circle? was there no motion to the currency that Johnston holds, when it proceeded from the fountain to his reservoir? I have said, why confine the personal security to a bank note? It is to be answered, I presume, because that is currency for everybody, and the object is to guaranty the currency. Is there any doubt that bank notes afford but one species of currency issued by banking corporations, and that they represent a smaller amount of coin, by far, than another currency, equally in universal use, called bills of exchange and bank checks?—(the latter being, according to modern construction, also bills of exchange.) Bills of exchange or checks are not the species of currency, as I suppose, which, in the

opinion of the majority, draws to it that protection of the charter now under consideration. Why is this? The charter speaks of "bills or notes issued by or from the Bank." How can it be said that a bill of exchange does not fulfil the definition? It is a most important description of bank currency, and more frequently used as a substi-

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tute for actual coin than *bank bills. It must be within the reason, as it is within the letter, of the law. Yet, a bill of exchange is payable to order—it is restrained from the utmost freedom of circulation, by the necessity of indorsement. The legal interest does not pass by delivery merely. It follows that if the personal liability of the stockholder is not secured to the bill of exchange, it must be because it is not payable to bearer. What word is to be found in the charter that confines such liability to currency, "bills or notes," payable to bearer? Nay, what is there in the law that requires a bank note to be payable to bearer? If the Ocmulgee Bank had issued each of its notes payable to order, or payable to a specified person only, would it not have been a bill or note issued by or from the bank? Suppose the bank had made each of its notes, though payable to bearer, in the sum of five thousand or even five hundred dollars, it could not be said that such notes would not be guaranteed by the personal liability; and yet there is no difficulty in perceiving that such a currency would not have been very nimble in its circulation, and would have served very few persons. The convenience and interest of the bank, no doubt, suggested other and lower denominations; but the supposition serves to aid all the suggestions I have hitherto made, to show that the security of ultimate personal liability cannot safely be tested by the idea that it was intended to apply only to such bills, issued by the Ocmulgee Bank, as might be free from every circumstance that might clog their course into the general current of bank circulation.

Waiving, however, the pursuit of such topics, and conceding (for the present purpose) what the view of the majority claims, to wit: that the personal liability relates to a bank bill unclogged by any restraint, in point of form, upon a free circulation as money, let us enquire when is a bank bill in circulation. Resorting to our common observation, we may state its qualities thus: it is a paper that does not differ in form or legal effect from a promissory note, payable to bearer, (though, in the case of bank notes, at a particular place;) it is calculated to carry the obligation to pay, at that place, to any one who may hold it by delivery: it is subject to no equity, as between the various holders, when regularly transferred: it is, in short, the element to the monetary system which the atmosphere is to organized creatures. The great quality, it seems, which commends

the bank bill to the special protection of the charter in question, is its capacity for the utmost freedom of circulation—as money or bank currency, degraded by no contract or equity between the bank and the holder which shall impair this essential quality. If this capacity be free, it does not matter whether it does circulate or not in point of

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fact. Then if it *be not the favored circulation or currency, when clogged by any such restraint, it may have that quality when issued, and yet lose it (together with the favor and dignity, if the argument I am combatting be sound, which inhere in that quality,) before it reaches the bank counter, where it is redeemable, and before it be redeemed. I will endeavor to explain by illustration, and it is an illustration not founded merely in fancy. Suppose the very bills in question to have been delivered to Johnston upon a stipulation by him to pay them only to one A. B. who had also agreed to pay them only to the bank of Hamburg, his creditor, and that bank to have agreed to retain them, withdrawn from general circulation, for a settlement of balances between itself and the Ocmulgee Bank—and that these several agreements formed the inducement for the issue—is it not plain that the quality of the bills, as a circulating medium, in fact, would be stripped from them as effectually, and that too by agreement, when they reached the strong box of the bank of Hamburg, as if that disability had attached to them the moment they were placed in Johnston's hands? Yet who will say that the bank of Hamburg could not, in the case supposed, have enforced the liability of the stockholders? It is a very insufficient answer to say, that in the case supposed, the bills had paid debts—that they had been received in payment and not as a pledge—for if the various contracts or understandings between the officers of a bank and its customers, looking to the object of keeping out its circulation and postponing redemption, are to enter into question as to the personal liability of stockholders, it will be found that such contracts or understandings have generally consisted in restraints of the utmost liberty to the currency, by directing it into particular and friendly hands; and the final result would teach us, I think, that the security aimed at by the charter, was a futile obligation. Besides, if Johnston had received these bills in payment of his debt, but with a promise not to circulate them, they would no more have been a part of the circulating medium, from hand to hand, in such case, than they were in the case before the Court, or are now. Moreover, in the case I have supposed, they would have become a pledge, a collateral security, for balances, the moment they reached the bank of Hamburg, and would have been effectually withdrawn from the circulation, in the sense in which the majority of

the Court interpret that term. Nor will it do to say that bank bills cannot be held as a pledge so as to attract to them, in that condition, the personal liability of the stockholder. Without resorting to general principles or reasoning, the law of that point is ruled by the Georgia case, as well as others, cited in the circuit decree; and it is agreed, on all hands, that the ruling of Georgia cases,

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when the *true sense of their Courts can be ascertained, is binding upon us, in all that pertains to the interpretation of their statutes. Now what difference can it make, in a practical or theoretical, a broad or a confined, an elevated or an humble view of banking, whether bills are withdrawn from circulation, upon previous contract, when they have reached first, or after they have passed through three hands? Will it be answered, that in the case I have suggested for illustration, the bills would have been returned as "bills in circulation," in the semi-annual statement required for the Governor, and therefore, the case would be clearly distinguishable from that which is before us? The answers are ready to show the contrary: whether they would have been so represented or not, would be wholly independent of any act or power of the bill holder, in the actual or supposed case; that was an affair entirely pertaining to the fidelity of the Ocmulgee Bank; and whether the duty be performed or neglected, is in no wise a matter to affect the rights of the bill holder.—Nevertheless I am inclined to suspect that a consideration of some infidelity on the part of the Ocmulgee Bank, in this respect, and in regard to the bills held by the complainant, has insensibly exercised some potent influence in leading to the judgment pronounced. Let me ask—if these bills had, in fact, been reported by the bank to the Governor, as in circulation, would the decree have been against Johnston? I am apt to conclude it would not; and if I am right, what reason would be adduced? It would probably be said, such an acknowledgment by the bank, would have shown that it regarded the bills in circulation, and the fact could not thereafter be disavowed. The restraint would, in law, have been withdrawn—the bills would have been emancipated—the world would have had the true table of circulation before it; other bill holders would have been advised of the weight resting upon a common security. But I have to reply, that such a return to the Governor would have given no new information to the stockholder sued in this case—the Rail Road Bank well knew the fact that Johnston held the bills, and for what purpose—the bank (the corporate officers) regarded these bills in circulation, except for the moment of time when, at their solicitation, they were returned to the bank, and held in their custody, for the very purpose that they might exclude them from the

item of bills in circulation. I reply, further, that no other bill holder complains here that these bills were not entered in the semi-annual return. At all times, except upon the special occasions referred to, the bills were regarded as in circulation, and such is the language of White, the cashier, (vide page 5 of the printed evidence.) He says, "the notes were brought in whenever the semi-annual statements were made, as notes taken

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*out of circulation." He adds, "when brought in, the packages were never disturbed, and after the statements were made out, were handed to Mr. Johnston again." The rights of no bill holder could be affected, as against a stockholder fully apprised of the facts, by the fair or fraudulent reports made to the Governor by the bank; for the bank might have reported no bills in circulation at all. This is too plain to admit of argument. If the entry of these bills in the semi-annual report, as in circulation, would give Johnston his redress, because he would thereby acquire the legal right to disregard his contract not to circulate them in other hands—while he did, in fact, keep his contract and forbear the exercise of his power, I think a decree for him, on such a ground, would pursue the shadow and not the substance.

The fatal disease of the complainant's case, be it remembered, is, that his bills were to be withdrawn from the current of circulation. What was the practical effect of the agreement, and the object to be obtained by it? It was this; to procure from Johnston, who was willing to indulge, a sum to meet liabilities to those who pressed, upon a delivery to Johnston of notes payable, upon the face on demand, but accompanied by a promise or understanding that the legal liability of the bank to pay on demand, should not be enforced; that the bills should remain in Johnston's hands, an indulgent creditor of the bank, one who had made and was expected to make advances. Suppose each bill holder of the Ocmulgee Bank had in turn presented his bill for redemption, and the directors, instead of redeeming, should have induced him to wait for funds, and procured what specie he had in addition in exchange for other bills, and the bill holder chose to agree to retain his paper 'till it should be more convenient for the bank to redeem; are we to be told that this contract would have absolved the stockholders from all personal liability under the charter? Now this contract, we need not doubt, would have been readily made by every bill holder of this bank, provided he was able to retain so much of his means, if he could not have disposed of his bills without great loss, and was told, or knew, that the stockholders would be personally liable to him. Yet I have supposed a case not essentially differing from Johnston's, in its distinguishing attributes or objects, and which would have

arrested the entire circulation of the bills of the bank as a substituted currency for money.

But it may be said, the bills (in the case put) have been in unrestrained circulation—they have once been set afloat by the bank, as a free currency, with no restraint attached, equitable or legal. Then suppose the Bank had redeemed them, and immediately recovered the specie paid for them, and re-issued them, upon the terms supposed, to the bill

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*holder—wherein should we find the case varied? The stockholder could complain of no fraud, his liabilities would not be increased: a bill holder would call upon him to respond, one who had acted bona fide, who had parted with specie, absolutely his own, for the note; one who would fulfil the character in which the complainant appears, so far as I can discover, in every essential and substantial particular. Would the promise not to circulate the bills, not to part with their possession, be binding? Was such a promise by Johnston binding upon him? We, of the Common Pleas, are constantly announcing that a promise without consideration is not obligatory. Nay, it is not unfamiliar doctrine, that where a creditor promises the principal debtor to forbear action beyond the terms of the contract, if that promise have no consideration to support it, the surety may not avail himself of any defence arising from it—for it is a mere nullity, and does not change the legal relation of the parties. I will not be bold enough to affirm any thing upon a point not argued, in this case, at the Bar, but I am not prepared to assume what has been elsewhere suggested, that Johnston may not have brought action on his bills instantler against the corporation. What was the consideration to him? The benefit was all the bank's. To approach a little closer to the question: More than a year after Johnston obtained the bills, the directors adjusted his account. He obtained the bills either about the middle of the year 1841, or earlier according to Breeze, and his account was adjusted on the 3d October, 1842. On that day (says White, the Cashier) "\$96,951.05, is carried to the credit of Mr. Johnston on the personal ledger as cash, and in the weekly statement of the debit of the bank as deposit bearing interest." On the 30th August 1842, the daily cash Book exhibited an entry, as follows, "Bonds due W. B. Johnston & Co. cancelled and given up \$80,000." "Due bills or memoranda were given to Mr. Johnston (says White) until his account was adjusted by the Board of Directors." "In this investigation (says Breeze) it appeared from the book that W. B. Johnston & Co. were creditors of the Bank to the amount of \$80,000, by bonds issued by the bank to W. B. Johnston & Co." Now after the adjustment of Johnston's demand, after it became a cash deposit, payable instantly to him, if he had demanded the

redemption of the bills he held, and it had been denied, and thereupon he had sued the bank upon them, or announced his resolution to put them in circulation by a sale to those who would buy them, would a Court of Equity have enjoined him? I dare not pronounce upon a subject of Equity jurisprudence, but according to any glimmering light before me, I do not think Johnston would have been restrained. I am persuaded a Chancellor would have reasoned thus: John-

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*ston's demand is most meritorious; he has been forbearing; he has advanced in hard and hazardous times, cash in large amounts, to sustain the very existence of the Ocmulgee Bank, and his money has actually redeemed the circulation and engagements of the bank, so far as it went, (the testimony is so;) the directors have issued to him bonds which have been rendered up; they have deposited bills, understood and intended, on both sides, to impose the charter liability on individual stockholders; his demand has been made to assume the form of a cash deposit, payable presently; payment of the collateral paper has been refused, and is now become an absolute obligation; tho' originally received with a condition annexed, that condition has vanished with the motive on which it was founded; it never could have been designed to be perpetual; it was co-extensive only with the credit; when the debt has become due it is inequitable and unreasonable that such a creditor shall be held motionless, while he sees the substance of his debtor melting away, and his best and only means of resort shall be yet impounded. If such would be the reasoning of a Chancellor, in the case supposed, then the bills of the complainant would be emancipated—and if so, then they were emancipated; for I conceive that I have stated no more than Johnston's case as now made. What Johnston had the lawful right to do is the test of the question, say the majority; for if his power over the bills became unshackled, they were then in circulation, to all intents and purposes, whether he exerted it or not; whether they actually reached one hand or one thousand hands.

I apprehend the idea that leads a majority of the Court would be applicable, if we had different parties before us, and one more fact proved, to wit, the insufficiency of the assets of the corporation, as well as the private means of the stockholders, to respond to the bill holders, in the aggregate. If Johnston and other bill holders who had received their paper in the ordinary course of business were pressing their claims against an insolvent corporation and a set of insolvent stockholders, I could appreciate the application of the argument, now used, in behalf of those who were bill holders, under ordinary circumstances, claiming to push

Johnston behind them in appropriating a fund and a liability insufficient for the whole. They might urge, with a shew of reason, that they had taken their bills with a reference to two items in the semi annual returns of the Ocmulgee Bank, to wit, the names of the stockholders, who owed them a personal liability, and the amount of the bills in circulation, which measured the extent of that liability. They might urge that Johnston, whether with design or not, yet with a knowledge of the effect of his conduct, had lent himself to the purpose of concealing from them the true extent of the stockhold-

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ers's liability. In the absence of any such complaint of any such party, I am at a loss to see upon what recognized principle of jurisprudence, in any of its departments, or what accepted code of moral law, the stockholders shall avail himself of such an equity or such an argument; and thus substantially transmute himself into the semblance of a bona fide bill holder, boldly stalk into Court in his habiliments, in such feigned character raise a clamor against his own wrong and fraud, and finally chase off one victim of his deception, because, perchance, he has deceived some others more.

If we had such parties and such a question before us as I have supposed, Johnston might well dread the case of *Collins v. The Central Bank*, 1 Kelly, as well as the general reasoning, if he was able to shew no more than Collins did. But he has been able to shew much more. In the commentary upon that case, to be found in the circuit decree, aided by the subsequent case adjudged on circuit in Georgia, the copy record of which has been produced before this Court, the distinctions in favor of Johnston as a bill holder are satisfactorily set forth, and to my understanding they are plainly perceptible. I will not reproduce them here, for I wish to regard the patience of hearers and the economy of time. But it ought never to be forgotten, that the parties, in the case of *Collins v. The Central Bank*, were very different from those here—bore very different relations to each other; and fulfilled the conditions, not of the present case, but of that which I described by way of illustration in the paragraph preceeding. There, the Court, in their brief argument, insisted that to place Collins on the footing of other bill holders, (where the claim was to a specific and inadequate fund, and where Collins had taken another and different security, to wit, a mortgage) "would be, in our judgment, to sanction a fraud on the right of those bill holders whose bills are legitimately issued and put in circulation as money, according to the terms and provisions of the charter. On this ground of exception we most cheerfully concur in opinion with the Court below." Now what fraud has been or can be imputed to Johnston upon the Rail Road

Bank? It was the idea of circumventing a fraud by one party on another, before the Court of Georgia, that quickened that tribunal into a cheerful concurrence with the Court below, in construing words in a bank charter equivalent to those in that of the Ocmulgee Bank. They were construing it in reference to the parties and the question before them. The view, however, above cited as furnishing the medium through which the Georgia Court looked at their object, is entirely wanting in the case before this Court, when we turn towards the complainant, but it is not wanting when we direct our vision towards the South Western Rail Road Bank.

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It is conceded that the complainant is *not chargeable with fraud, but that the South Western Rail Road Bank is. It is conceded that the transfer of 1750 shares by that corporation to Collins was fraudulent so far as bill holders were concerned—that is to say, a class of bill holders not before the Court and making no complaint. But we have just heard it decided that the particular bill holder, who furnished the agents of this same fraudulent stockholder (who knew it and made no objection) with the means of silencing the clamors of the favoured class, taking upon his own shoulders the burthen to the extent of \$50,000 of circulation, and who was so unfortunate as to confer another special favor, to wit, to indulge to the bitter end, by way of withholding the bills in his possession from the hand of the enemy—this patient and special friend, who adhered to the fortunes of our stockholder when all besides had abandoned him; who advanced him \$3,800 without even his note for security, he is told that his kindness has been fatal to his claim—that the person and property of the stockholder are sacred from his touch—and he is remitted to a scramble for a share of the assets of the corporation, only—"a beggarly shew of empty boxes." If we had better look to the spirit than the letter of a decision, as of a statute, which I hold to be a true precept, we shall gain nothing from the Georgia case of *Collins v. the Central Rail Road*. I think we are taught by that case, to be astute so to construe a statute as to conform it to sound morals—to borrow from that code a shield to protect the bona fide bill holder of a banking corporation, and not to throw the panoply designed for him over a fraudulent stockholder.

I believe, moreover, that Johnston has well urged the subsequent Georgia case as an authority to support his claim. It does certainly show that bank bills attended upon the issue by an absolute restraint from circulation for a specified time, upon express contract, actually withheld from circulation accordingly, received as a pledge or collateral security for a debt, were nevertheless attended by the personal liability of a stockholder.

Upon these cases from Georgia I forbear to enlarge, for a reason already suggested, and also because they were well treated of in the circuit decree, and I doubt not will be more fully discussed in the dissenting opinion expected from the circuit Chancellor.

I believe the complainant's case is fully sustainable, if we admit all that can be said against him as a bill holder up to a certain time; that is to say, when Johnston's debt was adjusted, when he gave up the bonds he held, or whatever he did hold as evidence of debt to which the bills were collateral, those bills, no longer collateral, were the primary evidences of debt by the bank to Johnston as a bill holder, and one of the

most meritorious, free from all qualification.

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I have al*ready endeavored to shew he would not have been restrained from circulating them, and I presume the only reason he did not was, that they would not bring par value, or else he was still steady to the service of the bank's convenience or necessity, fully relying all the while upon the security of the stockholders, which was intended to be given to him and which he thought he had acquired.

My opinion is, that the complainant deserves to be reputed a bill holder to all intents and purposes, and to have redress accordingly.

APPENDIX

3 Strob. Eq. *371

***JOHN K. HENSON v. MARTIN KINARD**
et al.¹

(Columbia. Nov., 1849.)

[*Husband and Wife* ⇨11.]

A father, in good faith, executed and delivered a voluntary deed of a slave to a trustee, for the use of his married daughter, &c. and the daughter received possession of the slave, being fully apprised of the deed. After her death, the husband claimed the slave as an absolute gift to his wife. The Court *held* that the slave was well conveyed to the trustee, before it was delivered to the cestui que trust, and that the father had no longer any ability to make an absolute gift of the slave, even if he had so intended.

[Ed. Note.—Cited in *Richmond v. Yongue*, 5 Strob. 52; *Lark v. Cunningham*, 7 Rich. 63, 379; *Cloud v. Calhoun*, 10 Rich. Eq. 368, 374.

For other cases, see *Husband and Wife*, Cent. Dig. § 56; Dec. Dig. ⇨11.]

[*Limitation of Actions* ⇨102.]

What constitutes a gift—that is to say, what combination of circumstances will bring a case within the legal definition, is, essentially, a matter of evidence, and not of law; and, therefore, each particular case must depend upon its own circumstances—these must be such as to authorize the belief that a gift was intended.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 494-505; Dec. Dig. ⇨102.]

[*Limitation of Actions* ⇨102.]

The Statute of Limitations does not run against the title of a trustee to property held in trust for a wife, and in favor of her husband's possession of that property, in strict conformity to the trusts of the deed.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 497; Dec. Dig. ⇨102.]

Before Johnston, Ch., at Newberry, July, 1849.

The following circuit decree states the facts necessary to a correct understanding of the case:

Johnston, Ch.—The plaintiff, in this bill, against the defendants, Martin Kinard, Henry H. Kinard, and Henry Oliver Henson, seeks, principally, the delivery of a specific slave, named in the pleadings.

The bill alleges that, on the 16th of August, 1842, the plaintiff, Henson, intermarried with

Huldah, a daughter of the defendant, Martin Kinard, and that his said wife died the 22d of October, 1844, leaving as her only issue the defendant, Henry Oliver Henson, who is an infant of tender years.

That he, the plaintiff, "is the lawful owner of two slaves, named Harriet and Sarah, which he received from the said Martin, by way of advancement to his daughter, your orator's said wife; and which your orator had in possession, as his own property, for a long time before and at the time of the death of his said wife."

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*That shortly after her death, having been informed that her mother, the wife of the defendant, Martin, desired to have the care of her said grand child, he, the plaintiff, carried him, and with him the said slave Sarah, as his nurse, to the house of the said Martin, where he left them—still retaining the actual custody of the other slave, Harriet.

That about the month of January, 1848, he "discovered that a supposed deed, purporting to be executed by the said Martin, and purporting to convey the said slaves to Henry H. Kinard, in trust for the sole and separate use of the said Huldah, during her natural life, and after her death, for the use of her child or children, had been, on the 19th of April, 1845, recorded in the office of Register of Mesne Conveyances, for Newberry district;" a copy of which, marked A, is exhibited.

The bill then charges, "that the said supposed deed was drawn, at Newberry Court House, in the month of January, 1843, and was then dated, a blank being left for the day of the month only; and that the same was signed, sealed, and delivered by the said Martin, at his own home, in Laurens district, many months after the same was drawn; but that the date, originally inserted in the said supposed deed, was suffered to remain."

That "after your orator discovered the record of the said supposed deed," he demanded the said slave, Sarah, from the defendant, Martin, who refused to deliver her up to him.

"And that the said supposed deed, recorded as aforesaid, throws a cloud over your orator's title to the said slaves"—meaning Harriet as well as Sarah—"and your orator is anxious to have his said title cleared up; especially as both of said slaves are females,

¹ NOTE.—This case was omitted in the reports of cases decided November, 1849, not having been marked for report by the Chancellors. But having, while this volume was in press, been referred to in the opinion delivered at May Term, 1850, by Evans, J., in the law case of *Richmond v. Yongue* [5 Strob. 46,] it is now inserted.

and it will be more than sixteen years before his said son," the defendant, Henry Oliver Henson, "will come of age."

The defendants, Martin and Henry H. Kinard, are then called upon to discover—the former to whom he executed and delivered the said deed, and the latter when it was delivered to him; and the bill prays that Martin Kinard be ordered to deliver the slave, Sarah, to the plaintiff; that the deed be declared null and void—delivered up and cancelled; and for general relief, &c.

There is a clear denial in the answers of all the material allegations of the bill. The advancement of the slaves is denied; and it is asserted that they were loaned and not given. It is denied that the deed was executed as stated; but was, in fact, executed on the 2d of January, 1843—the date inserted in it.

The facts are more fully set out in the answer of Martin Kinard, to the following effect: After denying that the plaintiff is the lawful owner of the slaves, or received them

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from *this defendant as an advancement, or in any other way so as to vest the title in him, or ever had the possession of them as his own, either before or after the death of his wife, this answer proceeds to state: that Mrs. Henson, the defendant's daughter, after her marriage, (which took place at the time stated, August 16th, 1842, without this defendant's consent,) resided some twenty miles distant from Lim, with her husband, who was engaged as a schoolmaster, and did not keep house, but boarded out.

That occasionally visiting the defendant, in the close of that year, he learned from her that they intended to begin housekeeping the first of the succeeding year, 1843. The defendant intending to give her two negro girls, but to have them settled on her beyond the control of her husband, and to have the papers executed, and the negroes ready for her by the time she went to her own house, instructed his son, Henry H. Kinard, to get counsel to draw a deed for that purpose. This was in the latter part of December, 1842. On Sunday, the day before sale day, in January, 1843, Henry H. Kinard came up to this defendant's house, bringing the deed with him, and after filling up blanks, which had been left for the day of the month and the names and ages of the negroes, gave directions how the deed should be executed, and for the contemporaneous delivery of the negroes with the deed. On the next day, (which was the 2d day of January, 1843,) the defendant executed the deed, and delivered it with the negroes to his daughter, Catharine, for the trustee, in the presence of the attesting witnesses.

Neither the title nor possession of the slaves had ever been out of this defendant's possession before that time. A few days after, when Mrs. Henson entered upon house-

keeping, or shortly afterwards, she took the negroes home with her. After her death, her child and the slave, Sarah, were brought to the defendant's house by his son, John P. Kinard, from which time forward he has had the care and management of the child and the custody of the negro. The other negro, Harriet, remained in the custody of the plaintiff, who, being the child's father, was supposed, in the absence of a commissioned guardian, to be as proper a person as any other to have charge of his child's property. The defendant had no apprehension or intimation of claim on the part of the plaintiff, until he demanded the slave, Sarah, which was about the first of March, 1848.

The answer of Henry H. Kinard, the trustee, corresponds substantially with that of his father. With respect to the reason of his not being present on the 2d of January, 1843, when the deed was executed, he states that being at the time sheriff of Newberry, he was obliged to be at the Court House on that day, which was sale day, and therefore, aft-

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er filling *up the blanks in the instrument, and giving instructions for its due execution, he was compelled to leave it. In the course of the same week, calling again on his father, who was sick at the time, his sister, Catharine, to whom the deed had been delivered for him, handed it to him duly executed as it stands; and he had it registered afterwards, when Henson entered upon business as a merchant, with a view to avert the claims of persons to whom he might become indebted.

This is the case stated in the pleadings. The facts established by proof, correspond minutely with the statements made in the answers; except that it appears the slaves went to Henson's later in the year 1843 than would be inferred from the defendant's pleadings;—the slave, Harriet, in the spring, and Sarah afterwards, towards summer. It is most satisfactorily proved that the deed was executed on the 2d of January, 1843, and delivered with the slaves, who were then in the donor's possession. This testimony is clear and indisputable, and corroborated by facts appearing on my notes, which confirm the recollection of the witnesses; whose characters were, moreover, upheld by the concurrent testimony of all the other witnesses, on both sides; and besides, there is no testimony whatever to assign any other date to the transactions. I was, therefore, surprised when the counsel for the plaintiff requested an issue on this point.

The slaves were, at the time, in the donor's possession, and so far as appears, belonged to him, and never had been out of his custody. They were his to convey to whomsoever he pleased, and upon whatsoever terms he pleased; and the gift imparted by his deed, must be held valid and effectual, upon the terms of the deed, unless it was

made with intent to defraud some third person. Neither Henson nor his wife had, at the time, any right cognizable by law, to exact the conveyance of any interest in the negroes, but such as the donor chose to create; nor to convert the terms of his transfer to any other than those he chose to impress upon it.

The question is, whether, when the property came to the hands of Henson, it became divested out of the trustee, in whom the title then was, and converted into Henson's own absolute property. If the title still remained in the trustee, it was impossible for Martin Kinard, who no longer had title or control, to bestow the property absolutely upon either his daughter or son-in-law, even if he had sent it to them as an unconditional gift.

But he did not do so. The utmost that can be made of the circumstances, would amount to no more than this: that he permitted his daughter to carry the slaves successively to the residence of her husband, who was not apprized whether they were given or not given; or, if given, upon what

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terms; *but was left to draw his own inferences from the mere fact of the transfer of possession.

We have some old cases in which it is said that such a transaction amounts, ipso facto, in law, to an absolute gift to the husband. I am now passing by the consideration, that the title was, at this time, already vested in the trustee, and beyond the control of Martin Kinard; and I am considering the case as if the title were still in Martin Kinard. But even under these suppositions, I am satisfied that the position to which I have alluded, is too strong to be maintained.

What constitutes a gift—that is to say, what combination of circumstances will bring a case within the legal definition, is, essentially, a matter of evidence, and not of law; and therefore, each particular case must depend upon its own circumstances—these must be such as to authorize the belief that a gift was intended. A jury or a Court deciding upon evidence may presume, from a given state of circumstances, that a gift was intentionally made; but such a presumption is not a legal presumption, but an inference of fact from the evidence—an inference which may or may not be drawn according to the degree of belief which the circumstances are calculated to engender.

If the position be true, that personal property put into the possession of a child, upon or shortly after its setting off in life, amounts in law to a gift, it must be true not only as to slaves, but as to every other species of moveable property. But how contrary is this to universal experience—to the consciousness and belief of all mankind; and how it must uproot all those delightful charities with which parents follow their chil-

dren into the world; hovering over them, upholding them with casual and temporary helps, and encouraging their faltering steps, as timidity or inexperience causes them to hesitate. These kind offices must cease, if it be perilous to exercise them; and the law, if it punishes them with loss, subverts its own end; for the affections which it thus freezes out and extirpates, are the very germs of all social virtue and social happiness, and worth to society incalculably more than all the paltry interests, for the protection of which they are vainly sacrificed.

The transfer of possession (as it is improperly called) of personal property by a parent to his foris familiated child, is not, in itself, a gift; and every man who has been helped by his parents, or has helped his own children knows it and feels it. The act must be judged by its nature and circumstances—by the usages of the community—by those innumerable considerations which no law can define; and from all these sources, conclusions should be drawn conformably to the common sense and common understandings of men.

In many of the older cases, these parol

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gifts, which it was *once the fashion to encourage, were sustained by reasoning founded on the interests of creditors, even where the contest was between parent and child, and no creditor was before the Court. This, it appears to me, was a great mistake. There is a great distinction between the case of a creditor, who may be misled by the appearance of property in the hands of a supposed donee, and who may be unable to prove the exact understanding between the parties to the gift, and the case of the donee himself, who need not be misled, and who should have the evidence of the real facts at his command. The inferences may reasonably be more bold in the case of the creditor; but even there, there is a boundary indescribable by law, but perceptible by the eye of reason and experience, beyond which a jury or a Court should not go.

But the case before us is one in which no creditor is concerned: it is the donee who comes to make the claim. Let us, therefore, look at the circumstances on which the gift, if one exists, depends.

Let us look at the relation of the parties: This is a case in which a son-in-law claims a gift supposed to have been made by the father of his wife. Now, in such a case, the husband's rights are consequential only to the quantum of interest which the father's transfer vested in the wife.

The gift, if any, was not to the son-in-law, but to the daughter; and if she acquired a title, the marital right of the son-in-law attached upon it, and rendered it his own: not otherwise. A husband becomes a purchaser by his marriage; but his right as purchaser is not immediate in all cases. As

to every thing that he may have stipulated for before the marriage—as for instance, in marriage articles and the like—his rights are direct and immediate to himself, and he may insist upon them in that light; but the husband is not a purchaser, in that sense, in this case. What he acquired by the marriage was a vested right in all the property then owned by his wife, and a contingent right to all that she might afterwards acquire—to become vested in him upon its becoming vested in her. The slaves in question did not belong to Mrs. Henson at her marriage; and whether her husband is entitled to the claim he now sets up to them, depends entirely upon the fact whether they afterwards became the property of his wife by absolute gift to her.

Now, the general proof is against the probability of an intention to make such a gift. The marriage was objected to by the father; and it is in evidence that this came to the knowledge of Henson. It must have been known to his wife also. Under these circumstances, it could hardly have been expected by either of them, that whatever property might be advanced to the daughter, would be

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put in the power of her husband—the party objected to. But these probabilities are converted into certainty by the evidence. It appears that Mrs. Henson applied to her father for the negroes, and that he refused to deliver them until he should have secured them, as he did, by the deed. She was fully apprized of the deed when she received them, and must, therefore, be held to have received them upon its terms. These were the express terms upon which Martin Kinard parted from the possession. I hold that, if Henson, the husband, claims under a possession thus conferred on his wife, he must adopt her acts; and that though not strictly his agent, her acts, in relation to rights which must first exist in her, before they can devolve on him, must bind him. It is barely possible that he could have regarded the slaves, when they came home, as having been absolutely given to his wife; but whether he did so or not, I am of opinion that the terms imposed by the donor must prevail, whether known to him or not. This is a subject upon which I have reason to suppose a diversity of opinion exists among my brethren. It was somewhat considered lately in the case of *Watson v. Kennedy*, Ante, p. 1; though that case did not turn on it. Having reflected on the subject, then, it is only necessary to say, as I did on that occasion that in my judgment, if the donor, in annexing terms to the transfer, acts in good faith, and without a disposition to deceive, his terms must be effectual.

I have said, however, that Henson could hardly have accepted the possession under the impression that an absolute gift was made. The circumstances upon which I have remarked, raise the conclusion in my mind;

nor does he say so in his bill, which, in this respect, is guardedly drawn.

He says he received the property as an advancement to his wife. Is this saying that the advancement was by absolute gift; or only for life, with limitation to her issue? And he held them as his own property. Is this an assertion that he so held them in perpetuo, or only in virtue of his wife's life estate? Does he deny a knowledge of the existence of the deed at the time? Is this necessarily implied in what he says about the discovery of its registration?

But all these observations are unnecessary to the case. The title, at the time the slaves came to his wife's hands, was in Henry H. Kinard, and Martin Kinard had no title to confer, even if he undertook to confer one on his daughter. This is conclusive, unless either the deed to the trustee was executed mala fide, or the trustee was privy to Martin Kinard's subsequent delivery of possession, and assented to its being so made as to deceive and defraud the husband. The evidence is clear upon the first point. The deed was executed in good faith, in conformity to

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a long entertained design to protect the property from the husband; and, says the witness, it was openly done, without injunction or request of secrecy. This placed the title in the trustee.

Then, as to his privity with the delivery to the wife, or the terms upon which that was made, there is not a syllable of evidence; and what motive could the trustee have in assisting to impose the property on the husband as his own, which it was not? The trustee's title was already good, and required no art of this sort to secure it; and what other motive he could have had for such an imposition, is more than I can conceive. But if I could conceive a motive, I am not, therefore, at liberty to impute the act, without evidence.

I have considered the case in reference to both the slaves together; and I cannot grant the prayer of the bill, for the delivery of Sarah, nor for confirming the title to Harriet, by ordering the deed to be cancelled.

Nothing was said in the argument as to the re-delivery of Harriet; and I have not considered it necessary to investigate the subject; because clearly the pleadings do not make the point, nor admit of its being decided. It would require a cross bill for such a purpose.

It is adjudged that the title to the slave Sarah is in Henry H. Kinard, as trustee, according to the terms of the deed exhibited with the bill; and it is ordered that the bill be dismissed.

The grounds of appeal from this decree are sufficiently referred to in the opinion of the Court of Appeals.

Pope, for the motion.

Fair, contra.

Curia, per JOHNSTON, Ch.—In affirming the decree in this case it is not to be understood that the Court is committed to any opinion upon the subject of Henson's being concluded by the terms upon which the property was sent home to him, if those terms were not brought to his knowledge. Upon this subject the Chancellor states in his decree there is a diversity of opinion in this Court. But this Court concurs with him in the opinion, that this case does not depend on that point.

The slaves were well conveyed by Martin Kinard to the trustee, before they were delivered to Mrs. Henson, the *cestui que trust*: and Martin Kinard had no longer any ability to make an absolute gift of them, if he had so intended.

As to the statute of limitations, set up in one of the grounds of appeal: it would be extraordinary to regard the possession of Henson during the life of Mrs. Henson, the *cestui que trust*, in strict conformity to the trusts of the deed, as adverse to the title of the trustee; or, if, (as has been argued,)

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every *husband, under similar circumstances, must be regarded as holding for himself, unless notice of the trusts can be fixed upon him. Such a doctrine would speedily extinguish all trust estates.

It is ordered, that the decree be affirmed, and the appeal dismissed.

The whole Court concurred.

Decree affirmed.

3 Strob. Eq. 379

ELIZABETH JAGGERS v. JOHN ESTES.

(Columbia. May, 1849.)

NOTE.—The following is the Circuit Decree, upon the hearing of which an issue was ordered, as appears in the report of the case [ante 34.] When that case was prepared for the press it did not appear to the Reporter that it was necessary to publish this decree—further adjudication of the points involved in the case have, however, convinced him that in all its phases, it should be laid before the profession. Upon the issue ordered, the jury found in accordance with the principles of this decree.

Johnston, Ch.—The Court of Errors having decided that the instrument executed by Thomas G. Jaggars, on the 12th of April, 1820, may, if duly delivered, operate as a deed, has directed a further inquiry as to its delivery. I feel no difficulty in adjudicating that point, having no interest in that question.

The only inquiry now, is whether the instrument was delivered; and I think the evidence before me (which will appear from my notes,) is sufficient to establish that it was.

A question somewhat preliminary was raised, whether a delivery of the property was not essential to the operation of the deed. If I had any doubt on this point, it

seems to be resolved in the judgment of the Court of Errors. But I have none.

I take it that personal property can, in no case, pass without a delivery. But this does not mean that there must, in all cases, be an actual tradition of the property. Whenever an effectual means of controlling such property is conferred by its owner on another person, that is a valid delivery of the property.

In some of the cases, (*Pitts v. Mangum*, 2 Bail. 588, is perhaps, one of them,) it has been held, that if a transfer be attempted by parol, and the owner interpolate conditions, or uses expressions signifying that he does not intend a present possession of the property to pass, the transfer of property is ineffectual.

This is upon the ground, that parol carries

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no proprietary *right of control, without a delivery; and where an intention to deliver is negated by the owner, the right of property does not pass, but remains in him. In such a case, the control of the property can be transferred only by its delivery. It is different, I apprehend, where writing is the medium of conveyance. The delivery of a deed, imparting a right of property, is a legal delivery of the property itself. It has been sometimes called a symbolical delivery of it; but this is not my view. The deed does not operate on the property in virtue of its being a symbol of it; but because it carries on its face an acknowledged right in the grantee to control it. I do not mean a present right to enjoy it; but a present right to dispose of it according to the grantee's interest in it. That is universally a delivery of personalty, which confers the means of coming at the possession of it. A symbolical delivery of one thing in the name of another is no delivery of the latter. The argument of Lord Chancellor Hardwicke, in *Ward v. Turner*, 2 Ves. Sr. 431, is conclusive upon this point. But if the key be delivered of a desk, in which a paper or a jewel is contained, the paper or jewel is thereby delivered; because he who has the key has the dominion of it. A deed stands upon analogous grounds, and whenever the deed is effectually executed and delivered, it draws to the grantee the thing conveyed in it, according to its terms.

The true question in the case, is that which the Court of Errors sent down to this Court. Was the deed delivered? The testimony (to be found on my notes) does not materially differ from that which was offered before Chancellor Caldwell.

The delivery is proved by John P. Roden, one of the attesting witnesses, under a commission issuing to Alabama, where he now resides. The other witness, Caleb Davis, is dead.

On the other hand, Mr. Rosborough, the Registrar of Mesne Conveyances, says that

when this deed, with four others, contemporaneously executed, was produced for registration, (which appears to have been the 6th of Sept. 1820,) he drew an affidavit on one of the deeds, in the usual form, to be sworn to by Roden, who was present; but Roden declined to swear to it. The affidavit, as drawn at first, was to the effect, that the affiant saw the deed signed, sealed and delivered. Roden objected, that he could not swear to the delivery. Upon which Mr. Rosborough struck out the word "delivered," and substituted the word "acknowledged." Which of the deeds it was to which this objection was specifically made, the witness does not remember. But whichever of them it was, it appears that it was the first that was produced: for Mr. Rosborough says, that upon Roden's objection being made, he inferred that it ap-

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plied equally to all the deeds, and *accordingly adopted the same form of affidavit for the remaining deeds.

In addition to this testimony of Mr. Rosborough, Nancy Ward was produced and examined for the defendant. Her testimony, with that of the other witnesses, will appear on my notes. I cannot place the least reliance upon her evidence. She was utterly discredited; and she discredited herself by her manner, her inconsistencies, and the inherent improbability of some of the facts to which she most confidently deposed. Indeed, she was obliged to admit, "that ever since the affair of the forged note, many persons had undertaken to undervalue her character."

Discarding this witness, the issue of fact depends mainly upon the testimony of Roden and Rosborough. There is no doubt, whatever, of the veracity of these witnesses.

Every witness on both sides, including Mr. Rosborough himself, attributes the highest character to Roden; and from a very considerable personal acquaintance with him, I am persuaded he is justly entitled to it.

I am still better acquainted with Mr. Rosborough, whom I have known from my childhood; and I know him to be incapable of the least intentional perversion of truth. If there is any conflict in the testimony of these witnesses, it certainly results from infirmity of memory; and the question in that case would be, which of them possesses the clearer recollection; which of them is most likely to have the more accurate recollection, and which of them is best borne out in his impressions by collateral circumstances, and facts testified to by other witnesses.

But there is no conflict between the two, unless Roden, in the Registrar's Office, professed to be unacquainted with the delivery of this particular deed, or in terms extended his objection to the whole batch of deeds then produced. Mr. Rosborough does not recollect that he did either. He speaks with much hesitation. He does not remember

that this was the deed which drew forth Roden's objection; and although now satisfied in his mind that Roden intended his specific objection to apply to all the deeds, he cannot remember that he stated it in words of that extensive import. The evidence is substantially this. One of the deeds was produced, and Roden refused to prove its delivery.

Mr. Rosborough, seeing that all of them were contemporaneous and imported to have been executed before the same attesting witnesses, inferred that they all stood upon the same footing; and that if Roden was unable or unwilling to prove the delivery of one, he must be equally unable and unwilling to prove the delivery of the others. Having this impression of the operation (not the meaning) of Roden's objection, he applied it to the whole of the deeds, by a silent change

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of the *form of the following affidavits. Nothing appears to have been said to Roden, calculated to apprise him of Rosborough's opinion, or to draw from him any disclaimer of the correctness of that opinion. How then can it be said that Roden, on that occasion, disputed the delivery of any other deed than the one first produced? Or that this is that deed? Or that his present recollection of the delivery of the deed before us, is at variance with his statements in the Registrar's Office?

Mr. Rosborough's testimony not only fell very far short of convicting Roden of inconsistency, but to the extent he did go, he spoke with much distrust of his own memory. On several collateral points, relating to the transaction in his office, upon which his memory was tried, it was found to have failed—and no wonder. There was nothing so important in the matter, as to have made an indelible impression on him at the time.

He is now a very old man; and this was but one of the thousands of probates made before him in a long official career, now extending to 48 or 49 years. It has been argued, however, that Mr. Rosborough's memory was fixed by an occurrence which took place sometime afterwards. This argument proceeds upon a mere confusion of ideas.

Mr. Rosborough heard a rumor sometime after the occurrence in his office, that the deeds, or some of them, had been surreptitiously obtained. This, by its coincidence with the inference he had drawn from Roden's objecting to a particular deed, confirmed him in that inference, and perpetuated the recollection of it. He was now sure that Roden had good reason for declining to prove the particular deed to which he objected, and not doubting that all the deeds stood upon the same footing, he was confirmed in the impression that he could not have proved the delivery of any of them.

On the other hand, there are strong circumstances in favor of Roden's testimony.

He says he saw the deed in question, in this case, delivered to Elizabeth Jagers, the grantee; and so lively is his recollection of the facts, that in his testimony he deposes to the provisions of the instrument, the property conveyed, and the words in which the delivery was couched. His relation to the whole transaction renders it probable that he should have retained an accurate remembrance of it.—He drew the paper, and was one of the attesting witnesses. He lived then, and for nearly 20 years afterwards, in the immediate neighborhood, where the transaction was often referred to by the parties and others. If his attention had been drawn to it, he might possibly have shown that one of the deeds was not delivered, and that that was the one to which he objected: for one of them (not this one) was subsequently delivered up by the party interested in it, and the ground of redelivery may have been that it was surreptitiously obtained. This would have reconciled the whole of the testimony.

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*Mr. Roden is borne out, also, by other circumstances. His statements, when he must have had a full recollection of the facts, were consistent with his present memory of them. In a conversation with Anderson, he told him, many years ago, that Thomas G. Jagers (the grantor) had offered to purchase his lands, and to pay for them in the deeded negroes; and that he had declined the offer; adding, that if he took the negroes, he must necessarily run them off, for they would belong to others at Thomas's death. Anderson says Roden often told him the deeds were correctly executed.

The circumstances testified by Phillips, go to show that whatever objections Thomas may have had to the claims of his sisters, the non-delivery of the deeds was not one of them. And finally, the probability of the delivery of the deeds, in general, is strengthened by the fact, that several of the other grantees were shown to have been in possession of their deeds, and no credible proof was produced (for, as I have said, I cannot rely on Nancy Ward) that any of them got them unfairly.

But suppose I am mistaken, both as to the drift and the weight of the testimony I have been considering. Suppose Mr. Rosborough had said, and said it with confidence in his memory, that Roden declared expressly that he did not see this specific deed delivered. And suppose that Roden, when examined as to its delivery, had forgotten it. Or suppose, which is certainly strong enough, that on his examination, he had proved that he witnessed all the formalities of executing the deed, except its delivery, and that it was not delivered at that time, but, on the contrary, retained by the grantor. Would it follow from all this, that a post delivery might not be inferred from the subsequent

possession of the deed by the party interested in it? It certainly would be inferred at this distance of time, unless the possession was shown to have arisen in fraud. It may be assumed, in general, that whenever a deed, duly signed and sealed, is in the possession of the party to be benefitted by it, he obtained the possession by formal delivery, unless the contrary is made to appear; especially where the evidence of delivery must, from the nature of the case, be obscure; as where the deed is of ancient date, or the witnesses are dead, or out of the jurisdiction. In this case, we have the fact from the defendant's own witness, Mr. Rosborough, that the deed under which the plaintiff claims, was in her possession on the 6th of September, 1820, (five months after its execution.) Now, if we had no other testimony than that on which the defendant relies, to wit: that the deed was, at its date, signed, sealed, and acknowledged, but not then delivered, are we thence to conclude against the delivery, without considering whether a post delivery may not be inferred

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after such a lapse of time, *from the fact of possession alone? Few deeds of 28 years old, could be better proved than this one.¹

To sum up this view, in connexion with others already taken: A deed is effectually delivered, whenever the circumstances warrant the presumption, that the grantor has divested himself of his control over the instrument; as if he place it in the hands of the grantee, or in the hands of a third person for the grantee's benefit; or if he transfer to them the means of coming at the possession, such as the key of a desk, in which the deed is locked up. All these are but different methods of passing the control of the instrument from himself to another; and whenever, and by whatever means this is done, there is a delivery; which, in principle, and in all cases, is neither more nor less, than the transfer of control over the thing intended to be delivered. The fact of being in possession of the deed, in this case, is evidence that the control which the possession imports, was conferred by the grantor, unless the contrary was shown. The delivery and control of the deed being thus established, the deed is perfected, and a deed duly perfected carries the right to control the property mentioned in it: which right of control operates as a delivery of the property itself.

It is ordered and decreed, that the defendant do deliver up to the plaintiff, the slaves described in the bill, as passing under the deed of Thomas G. Jagers, to the plaintiff, with their issue born after the date of said deed; and that he come to an account with her, before the Commissioner, for the profits of their labor since the death of said Thomas G. Jagers.

¹ 3 Phillips, notes 1261-4, and note 888.

RULES FOR THE COURT OF ERRORS.

3 Strob. Eq. *385

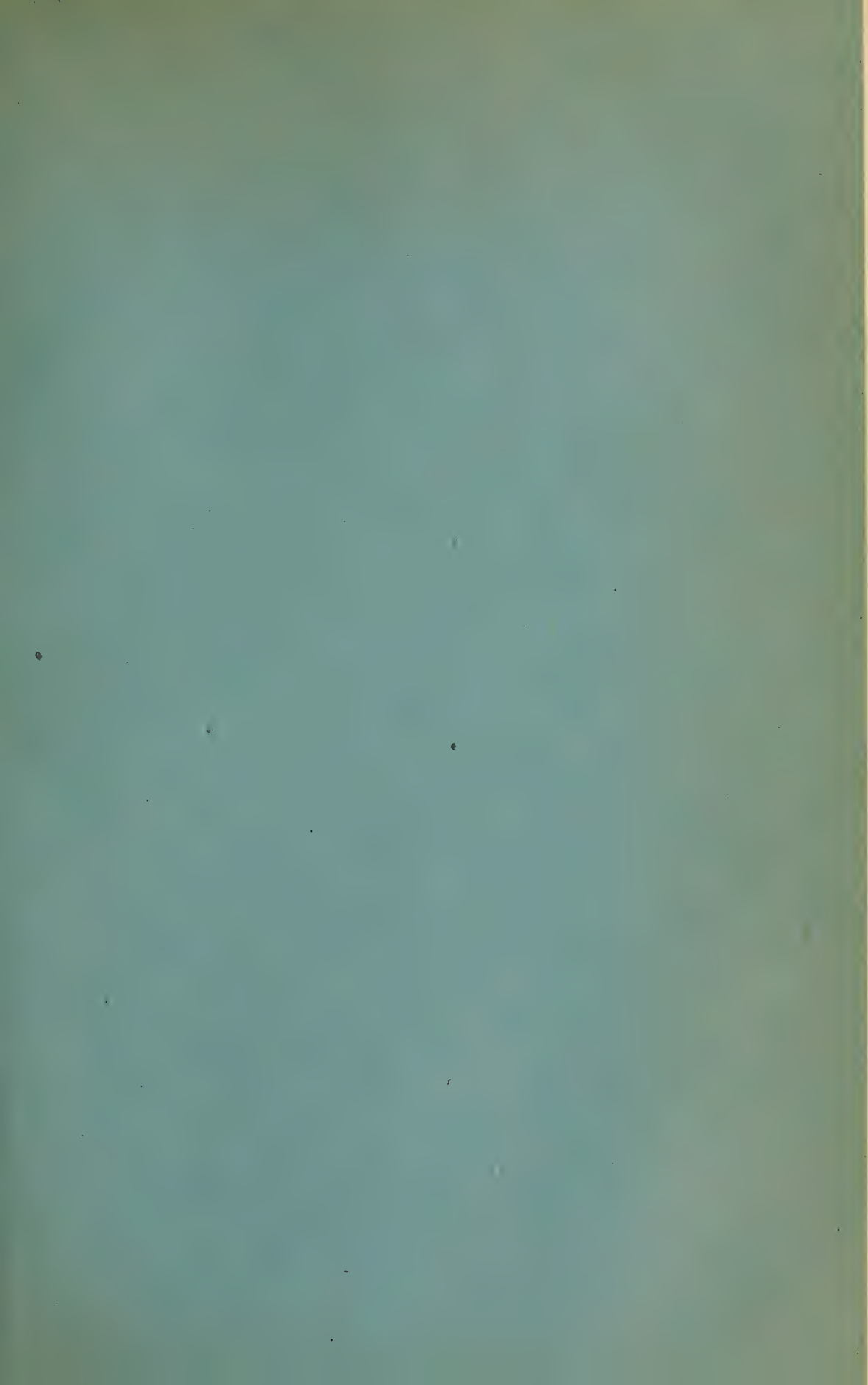
*Rules settled in *Pell v. Ball*, 1st. Rich. Eq. 418.

1st. In no case whatever will an appeal lie directly from any Circuit Court of Law or Equity, to all the Judges assembled as a Court of Errors.

2nd. No cause shall be placed on the docket of the Court of Errors, unless by the order of the Appeal Court in which the cause was heard or opened.

3rd. No application will be entertained by either Court, by petition or otherwise, nor will argument be heard on any motion for sending a cause to the Court of Errors, after judgment rendered.

4th. In every case, the Court requiring the assembling of a Court of Errors, shall, so far as practicable, (unless all questions and matters involved in the cause be referred to the said Court,) specify the particular questions and points of law on which it may desire the judgment of that Court.



REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE
COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON, JANUARY TERM, 1850
AND
AT COLUMBIA, MAY TERM, 1850

By JAMES A. STROBHART
STATE REPORTER

VOLUME IV

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON
1851

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1917

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CHANCELLORS OF SOUTH CAROLINA¹

DURING THE PERIOD COMPRISED IN THIS
VOLUME

HON. JOB JOHNSTON,

“ B. F. DUNKIN,

“ G. W. DARGAN.

HON. J. J. CALDWELL, died in March of this year.

¹ The Chancellors sitting together form the Court of Appeals in Equity—sitting together with the Law Judges, they form the Court of Errors.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA—JANUARY AND
FEBRUARY TERM, 1850.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
“ B. F. DENKIN,
“ J. J. CALDWELL,
“ G. W. DARGAN.

4 Strob. Eq *1

*WM. M. LAWTON, Ex'r. of Wm. Mathews,
Deceased, v. BENJ. F. HUNT,
S. B. HUNT et al.

S. B. HUNT et al. v. WM. M. LAWTON,
Ex'r. of Wm. Mathews, Dec'd.

(Charleston. Jan. and Feb. Term, 1850.)

[*Executors and Administrators* ⇨130.]

By the laws and usages of this country, an executor is entitled to the controul and possession of the real estate, so far as it is necessary to enable him to carry into effect the will of his testator, by making crops, collecting rents, and deriving income, as the testator had himself done; and any interference with the executor in this lawful discharge of his duty, will entitle him to the aid of the Court against the devisees and their agents; but as between the executor and those claiming under the will, it is quite

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consistent with the *duty of the executor and his necessary controul over the estate, that the objects of the testator's affection and bounty should occupy the estates devised and bequeathed, so far as this may be done without diminishing the income, and without interfering with the temporary controul which the testator has conferred upon the executor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 537; Dec. Dig. ⇨130.]

[*Wills* ⇨733.]

Testator devised and bequeathed to his daughter, A. (who was a married woman, and was living with him at the time of his death, and had previously done so for many years,) for the term of her natural life, his house and lot, in which he then resided, and his servants and furniture used in said house. Notwithstanding the testator had, in the first clause of his will, directed his whole estate to “be kept together until, from the net produce of the crops, rents, and all other sources of income,” his debts and pecuniary legacies should be paid, the Court held, that the house and lot, servants and fur-

niture, were intended for the immediate possession and enjoyment of the testator's daughter, and, therefore, to be exempted from the operation of the general clause of the will, directing the estate to be kept together, &c.

[Ed. Note.—Cited in *Drayton v. Rose*, 7 Rich. Eq. 336, 340, 64 Am. Dec. 731.

For other cases, see *Wills*, Cent. Dig. § 1823; Dec. Dig. ⇨733.]

[*Wills* ⇨733.]

The fourth clause of testator's will is as follows, “I give and bequeath to the children of my daughter, S. who may be living at the time of my death, to be equally divided between them, all bonds, notes, judgments, mortgages, or other securities or evidences of debt, which I hold against their father, B.” Held, that to effect the purposes of the testator, the gift should take effect immediately and entirely, notwithstanding a previous clause of the will directing the whole estate “to be kept together, until, from the net produce of the crops, rents, and all other sources of income,” the debts and pecuniary legacies should be paid.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1819–1846; Dec. Dig. ⇨733.]

[*Wills* ⇨781, 802.]

Testator, in his lifetime, purchased from his son-in-law, a plantation and negroes, and took a conveyance to himself, in trust, for the separate use of his daughter, A. (the wife of the vendor,) during her natural life, and afterwards, for the joint use of her husband and the issue of the marriage during his life, and after his decease, to the children of the marriage. In the event of the daughter's survivorship, without issue, the estate vested absolutely in her; and in the event of her husband's survivorship, under the same circumstances, he had a life estate in the whole, and a moiety vested absolutely in him, and the other moiety in the next of kin of his wife. The testator, in his will, required that this property should be held “not to the uses, trusts, and limitations declared in the deed, but to the uses and purposes declared in his will concerning the property devised and bequeathed to” his “said daughter, A.” &c. These trusts and purposes

were, first, to the payment of his debts and legacies—then to his daughter, A. for life, “and after her death,” then to his granddaughter, M. “her heirs, executors, administrators and assigns forever.” But should his said granddaughter, M. die before attaining the age of twenty-one years or day of marriage, then to the children of his daughter, S. to be equally divided among them. *Held*, that testator’s daughter A’s, present interest under the deed, was different from that which she took under the will, and that her contingent interest under the deed rendered it a case of election.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2016, 2096; Dec. Dig. Ⓒ781, 802.]

[Wills Ⓒ630.]

The express restriction by the testator, of his daughter’s interest in a certain slave, to the use during her natural life, with remainder to her children lawfully begotten of her body, “to them, their heirs and assigns forever,” and the subsequent bequest of the use of the proportion of his said daughter of his personal estate during her life, and “at her decease, to her children lawfully begotten,” *held*, to manifest very clearly the intention of the testator to give the usufruct to his daughter, and to create a

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new stock in her children, and, *therefore, that all the children, as they came in esse, took vested, transmissible, interests.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480, 1486, 1487; Dec. Dig. Ⓒ630.]

[Wills Ⓒ547.]

The fifth clause of testator’s will was as follows, “I give to the four children of my deceased daughter, Mary, three thousand dollars each, to be paid as hereinbefore directed, out of the income of my whole estate, and should either of the said children die before arriving at the age of twenty-one years or day of marriage, then I give the share of such child or children so dying, to be equally divided among the survivors of them, and if only one survives, then the whole of the sum of twelve thousand dollars to that one.” One of the children, an infant, had died, unknown to the testator, before the date of his will. *Held*, that the three surviving children were entitled to have divided among them the twelve thousand dollars, bearing interest one year from the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1179–1181, 1185; Dec. Dig. Ⓒ547.]

[Wills Ⓒ802.]

Husband and wife (who, on their marriage, had entered into a settlement containing a covenant to settle any after acquired property on the wife,) claimed in behalf of the wife, a moiety of certain property which they alleged that testator, (her father,) had disposed of by his will, as a part of his estate, in a manner contrary to the provisions of the will of the wife’s grand-father, under which testator held it in right of her mother. The wife was co-legatee with her sister, under testator’s will. It was *held*, that this claim, being inconsistent with the claim of the wife’s co-legatee, her interest under testator’s will must be sequestered until compensation be made to her disappointed co-legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2091–2098; Dec. Dig. Ⓒ802.]

[Wills Ⓒ788.]

An infant being *held* bound to take under or against the will, a reference to the Master was ordered to inquire which was for his benefit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2012; Dec. Dig. Ⓒ788.]

[Wills Ⓒ788.]

At the death of testator, the children (infants,) of his deceased daughter, had an immediate interest under his will, but they had, at the same time, an interest in other property which testator had undertaken to give to other persons. This presenting a case of election, it was referred to the Master to inquire which alternative would be for the interest of the children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2012; Dec. Dig. Ⓒ788.]

[Executors and Administrators Ⓒ325.]

Where the testator had neither contemplated nor authorized a sale of any portion of the corpus of his estate by the executor, but had directed it to be kept together, until, from the income, the debts and legacies should be paid; the authority of the Court, in such case, being necessary to confer a good title on the purchaser, and a sale having become indispensable to pay the debts of the estate, to anticipate and prevent a multiplicity of suits and a variety of litigation, and to prevent injustice and inequality by the arbitrary sale of property of either devisee, under execution, and to protect the legatees and tenants for life, from the indefinite postponement of the benefits intended for them by the testator, the Court restrained the creditors at law; and to provide a fund for the payment of such debts as should be established before the Master, ordered a sale to be made by him of sufficient property to raise the necessary sum; this sum to be contributed in equal parts by the devisees, it appearing on the face of the will, that the testator intended to equalize their shares.

[Ed. Note.—Cited in *Ex parte Boyd*, 8 Rich. Eq. 183.]

For other cases, see Executors and Administrators, Cent. Dig. § 1341; Dec. Dig. Ⓒ325.]

[Appeal and Error Ⓒ949.]

The refusing or granting an interlocutory order, the subject of which is purely ministerial, is entirely within the discretion of the Chancellor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3835; Dec. Dig. Ⓒ949.]

[Executors and Administrators Ⓒ91.]

An executor is regarded as merely a trustee for preserving and securing the rights of those interested under the will. In the discharge of these fiduciary duties, he will be maintained by the Court, and the law has fixed his compensation for the performance of such duties. But the Court looks first to the interest of those for whom the executor is trustee, to wit, the creditors, and then the legatees, &c.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 397, 398, 400–402; Dec. Dig. Ⓒ91.]

[For subsequent opinion, see 4 Rich. Eq. 233.]

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*Before Dunkin, Ch., at Charleston, February Sittings, 1849.

Dunkin, Ch. The object of the principal suit was to obtain the instructions of the Court in carrying into effect the will of William Mathews deceased, and to restrain the defendants, or some of them, from interfering with or obstructing the complainant in the discharge of his trust. The cross bill seeks, among other things, an account from the executor—prays that he may be removed, and that the Master may take charge of the

estate; or rather, that he should be "directed to take an account of all the testator's debts and legacies, and report a provisional division thereof; and that upon the complainants (in the cross bill) making such provision for the payment of that portion that shall be assigned to them, with consent of the creditors, they may be quieted in the possession of the lands and negroes and planting estates devised to them, subject only to be divested on failure to comply with their undertaking; and that the remaining portion of the debts and legacies be provisionally charged upon the portions of the estate devised to the other parties, subject to the final order of this Court."

The testator died on the 22d July, 1848. A few days afterwards, the will was proved and the executor qualified; but, difficulties having soon arisen, the original bill was filed on the 6th December, 1848, and the cross bill, in January, 1849.

The first clause of the will is as follows, viz:—"I direct that the whole of my estate shall be kept together, until, from the net produce of the crops, rents, and all other sources of income, all my debts and the pecuniary legacies hereinafter bequeathed to the children of my deceased daughter, Mary Boyd, are fully paid and satisfied."

By the next clause, the testator devised and bequeathed a portion of his real estate and slaves to his daughter, Mrs. Hunt, and her children, in the manner therein specified; and, by the succeeding clause, a portion of his real estate and slaves, to his daughter, Mrs. Colburn during her natural life, and, after her death, then to her daughter, Mary Ann Mathews Colburn, absolutely. After some other bequests, the residue of his estate is bequeathed to daughters, Susan B. Hunt and Ann A. Colburn, to be equally divided between them, subject, however, to the trusts and limitations declared in relation to the property specifically devised and bequeathed to them. William M. Lawton, Mary Ann Mathews Colburn and Charles Macbeth were appointed to execute the will, the first of whom alone qualified, Mary Ann Mathews Colburn being an infant of tender years, and Charles Macbeth having declined to act.

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*The first question presented by the pleadings involves an inquiry into the powers and duties of the executor under this will. No interest is given to him, and he has no rights but such as are incident or necessary to the discharge of his trust. But the testator's will is the law of his property, unless it violates some principle of policy—his will may determine the mode in which his debts shall be paid, and the line in which his estate shall pass—he may charge his devise with the payment of his debts, in exoneration of the personal estate, which would be otherwise primarily liable; or he

may direct his lands to be sold by his executors for that purpose; or he may require a fund to be raised, with that view, from his real and personal estate. Neither of these is the mode which the law prescribes, but it is an indulgence which the law allows to a testator, and which those who partake his bounty are not permitted to gainsay.

The debts of the testator already ascertained, and the legacies to the children of Mrs. Boyd, amount to between fifty and sixty thousand dollars. The primary direction of the will is, that the whole of the testator's estate shall be kept together until these charges shall be fully paid and satisfied from the net produce of the crops, rents, and all other sources of income.

The estate consisted, principally, of a plantation in Prince George, Winyaw, three plantations in St. James, Santee, a plantation and ferry in Christ Church, and some three hundred and fifty slaves, besides two houses in the City of Charleston. All this was subsequently devised and bequeathed, in equal or unequal, proportions, to his daughters and their families. The injunction seems as explicit as it is imperative, that this distribution shall not be carried into effect immediately, but that his whole estate shall be kept together, until, from the income, his debts and legacies shall be fully paid and satisfied. It is not questioned that it is the appropriate duty of the executor to ascertain and pay the debts, and to satisfy the legacies. The legal estate in the personality vests in him by virtue of his appointment, and his assent to the bequests of these three hundred and fifty slaves, until after the debts were paid, would be a violation of his duty, and a manifest *devastavit*. But it is said, the law gives him no authority over the realty. In this country, even this proposition must be received with some qualifications. It cannot be questioned, however, that it is competent for the testator to vest in his executor the same power over his real estate that the law gives him in the personality. The power to sell and convey his real estate, which is sometimes given to the executor, which is familiarly exercised, and which is recognized by the statute of 1712, includes every

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less authority. *The only inquiry is whether the intention of the testator has been sufficiently expressed. It is not too much to say that a testator's language must be construed in reference to the general understanding and usages of the country.

The condition of real estate in this country has been somewhat changed, both by statutory regulation and custom. Lands are liable for all debts to the same extent as personal chattels, and may even be sold by the sheriff, under an execution against the executor. In *Gregory v. Forrester*, 1 McC. Eq. R. 328, the Court, after adverting to these modifications of the English law,

remarks (Nott, J.) "How far executors or administrators have the management of, or may exercise any control over the lands of their testator or intestate in this State, remains, as far as I am informed, still to be settled." And again, "From the nature of a part of the property of this estate, the executor must necessarily exercise some control over the real estate. Slaves cannot, in most instances, be well employed, except in the cultivation of the land, where the testator dies possessed of lands—they must, therefore, be employed under the superintendence of the executor—that would seem to impose upon him the necessity of employing overseers, paying taxes, receiving the profits, and generally superintending the whole economy of the plantation. But it gives no power to sell," &c. I am not aware that the soundness of these observations has ever been called in question; on the contrary, the control of the executor over the real estate, so far as it was necessary for the discharge of his trust, has been repeatedly recognized, as in *Haigood v. Wells*, 1 Hill's Eq. R. 59, and in *Pell v. Ball*, Speer's Eq. R. 518, and in *Walton v. Wooten*.

In this state of the law, the testator directs all his estate to be kept together until from the income thereof his debts and legacies should be fully paid and satisfied. It must be kept together under the control of the executor, in order to enable him to discharge the trust which has been confided to him, of paying the debts and legacies out of the income of the estate. In the exercise of this control, as Judge Nott remarks, "the necessity is imposed upon him of employing overseers, paying taxes, receiving the profits," &c. But this power is conferred upon the executor by the testator, for the purpose of enabling him to realize the income as applicable to debts and legacies; and this leads to the consideration of the manner in which the power of the executor has been exercised. As between the executor and those claiming under the will, that instrument is the rule. Creditors not interfering, it is the duty of all to carry out the intentions of the testator, so far as they can be understood. The testator was a planter of large means, and comparatively unencumbered estate. He owned several plantations, a ferry which had been very profitable, a

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house in Charleston, which he *rented out, besides a city residence which his family occupied during the whole or the greater part of the year. The sources of his income were his crops of rice and cotton, his ferry and his rents. It was not suggested that he was in the habit of deriving income as such, from any other quarter, and it may well be inferred from this as well as from the language of the will, that the testator looked to those as the sources of income from which his debts and legacies were to

be paid, and for which purpose his estate was to be kept together. The family of the testator, like the family of every other planter in his condition, were in the habit of deriving large supplies from his plantations, which interfered in no manner with what is usually considered the income, and which would probably be otherwise lost to the proprietor. The estate was to be kept together until, from the income, the debts, &c., should be paid. It was to be kept together as he had kept it, and the income derived, as he had derived it. As between himself and those claiming under the will, it seems quite consistent with the duty of the executor and his present necessary control over the estate, that the objects of the testator's affection and bounty should occupy the estates devised and bequeathed, so far as this may be done without diminishing the income, and without interfering with the temporary control which the testator has conferred upon his executor.

There is some embarrassment in the question relative to the Charlotte-street property. The testator, by the third disposing clause of his will, devises to his daughter Mrs. Colburn, during her natural life, "my house and lot in Charlotte-street, where I now reside, and my house servants and furniture used in the said house." It is submitted, on the part of the executor, that this house must be put to rent, the servants hired out, and the furniture sold, in order to derive an income, as provided by the first clause of the will. The other house in Charleston, which was rented out by the testator, was devised to Mrs. Hunt, and it is believed that no question was made that these rents were applicable to the payment of debts. I have remarked that it is entirely a question of intention; and the Court may be aided by considering the situation of the testator, and of those to whom he was looking as the objects of his care or kindness. If the testator had left under his roof a widow and children, to whom he had devised the homestead, it would be difficult to affirm that it was the scheme of this will to remove his family from the premises, or put them to rent. This might become necessary to satisfy the rigorous demand of the creditor, but it could not be assumed as the voluntary arrangement or intention of the parent. But the testator left no widow. His wife had been dead four or five years, and he left

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no unmarried children. Mrs. Colburn had been married some fourteen years, she had but one child, a daughter, to whom the testator seems to have been tenderly attached, and whom, though a child, he named as an executrix of his will. I think it was stated, that Mr. and Mrs. Colburn had never resided elsewhere than with the testator. They certainly constituted a part of his family for many years prior to his death,

and since the decease of testator's wife in 1844, they alone resided with him. Some few years since, Mr. Colburn was unfortunate in business, and from that time had been entirely dependent on the testator. Although the language of the first clause is very general, I think there is enough in the terms of this devise to Mrs. Colburn, taken in connection with her situation and relation to the testator, which warrants the conclusion that he did not intend this as a source of income for the payment of his debts. The devise includes not only the house in which the testator resided, and in which Mrs. Colburn and her family were living with him, but "the house servants and furniture used in the said house." The testator could not have been ignorant of Mr. Colburn's inability to pay a proper rent for such an establishment, and the result must necessarily be that he and his family must quit the house. But to what purpose did he give his daughter a life estate in furniture, and postpone the enjoyment until it would probably be destroyed or valueless? I am of opinion that the testator did not intend that the family mansion should pass into other hands, nor that it should constitute a source of income for the payment of his debts. *Drayton v. Grimke*, 1 Hill Eq. R. 224, is somewhat analogous: The first clause of testator's will was as follows: "I will, order and direct, that my estate be kept together until my just debts are fully paid and satisfied." Notwithstanding the comprehensiveness of this provision, the Court held that certain specific devises and bequests were exempted from the operation of the general clause directing the estate to be kept together. Various reasons are assigned, arising as well from the terms of the will, as the situation of the property, and of the parties. Among other things, the Court say, "The view is strengthened by the fact, that William Henry Drayton, the first taker, had but a life estate, and as he had no other estate than this, and the mass of property intended for him constituted the fund for the payment of debts, it is most likely that the special provision in this clause was intended for his immediate use." The application of these remarks to the provision of this will is sufficiently obvious, and leads to the conclusion already stated, that the house, house servants, and furniture used in it, were intended for the immediate possession and enjoyment of the devisee.

The next clause is as follows: "Item—I

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give and bequeath *to the children of my daughter, Susan B. Hunt, who may be living at the time of my death, to be equally divided between them—all bonds, notes, judgments, mortgages, or other securities, or evidences of debt, which I hold against their father Benjamin F. Hunt."

The executor submits, whether the interest

accruing on this debt, since the testator's death, must be regarded as part of the income of his estate, which was to be kept together for the payment of his debts; and, if so, whether the interest should be calculated on the original principal, or on the aggregate amount due at his death.

It was stated, at the hearing, that painful differences had existed, at one time, between the testator and Col. Hunt, in relation to their pecuniary transactions. I think that a careful analysis of the language of this clause will well warrant the inference that the testator did not speak of an ascertained debt, or interest-bearing fund, as due by Col. Hunt, but that he referred to all the evidences of demands, adjusted or unadjusted, which the testator held, or which might be found in his possession; these he transferred to the children of his debtor, for as much as they were worth. It was thus rendered an account easy of adjustment; it was a peace offering which the Court would be solicitous to respect, and which any other construction might very easily convert into a fire-brand of litigation and discord. To effect the purposes of the testator, the gift should take effect immediately and entirely.

It seems that the testator, some time before the execution of his will, sold to his grandson, Benjamin F. Hunt, junr., a slave named Diana. This slave was included in the marriage settlement of B. P. Colburn and wife, executed in February, 1834. The testator requires that the parties interested under the settlement should confirm the title in the slave to his vendee.

The testator purchased from Benjamin P. Colburn a plantation on Wambaw and twenty-three slaves, and, on the 25th August, 1847, B. P. Colburn conveyed the premises to the testator, in trust for the separate use of his wife during her natural life, and, afterwards, for the joint use of Benj. P. Colburn and the issue of the marriage during his life, and, after his decease, to the children of the marriage. In the event of Mrs. Colburn's survivorship, without issue, the estate vested absolutely in her; and, in the event of his survivorship, under the same circumstances, he had a life estate in the whole, and a moiety vested absolutely in him, and the other moiety in the next of kin of his wife. The trusts of the marriage settlement are the same. The testator requires that the Wambaw property shall be held to

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the uses and *purposes of his will, and not to the uses declared in the deed of August, 1847.

All parties are willing to perfect the title of Benjamin F. Hunt, junr., in the slave Diana, but the surviving trustee under the marriage settlement, in whom is the legal estate, is not before the Court, and a reference must be directed as to the interests of the infant. In *Gretton v. Howard*, 1 Swanst.

413. it was held that an infant was bound to elect to take under, or against, a will, and a reference to the master was ordered, to inquire which was for his benefit.

So, in regard to the Wambaw plantation and slaves, B. P. Colburn expresses his readiness to release his contingent interest in such manner as the Court may direct. Mrs. Colburn submits that she takes the same interest in possession under the deed and the will, and that as any other interest she may have is future and contingent, no case of election is presented. Her interests under the deed have been already stated. In the ninth clause of testator's will, after reciting that B. P. Colburn had, in consideration of a debt released by the testator, conveyed the said plantation and slaves to him, to the trusts and purposes set forth in said deed; "and whereas," (continues the recital,) "the said plantation and negroes were purchased and paid for by me; now I do direct, as a condition precedent to the bequests and devises by me herein made to my daughter, Ann A. Colburn, and my grand-daughter, Mary Anna M. Colburn, that the said plantation and negroes mentioned in the said deed, so far as shall be in the power of the parties interested therein, shall be held, not to the uses, trusts, and limitations declared in the said deed, but to the trusts and purposes declared in this my will of and concerning the property devised and bequeathed to my said daughter Ann and her child; and on failure of the parties interested complying with my will in this particular, I revoke and annul all of the devises and bequests made to them, and devise and bequeath the property, above devised and bequeathed to them, to my daughter Susan B. Hunt and her children, subject to the same trusts, and for the same estates, as the property herein devised and bequeathed to them is subject to."

Clearly, this is the language of a man expressing his intention to dispose of property as his own, because he had purchased and paid for it, although he admitted the equitable interests to be in others. It is the assertion of a proprietor's will, and acquiescence is secured by a strong sanction.

The Wambaw plantation and twenty-three slaves are to be held, "not to the uses, trusts, and limitations declared in the deed, but to the uses and purposes declared in the will concerning the property devised to his daugh-

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ter," &c. "The *trusts and purposes," to which that property was, by his will, devoted, was, in the first place, to the payment of his debts and legacies—then to his daughter, Mrs. Colburn, for life, "and, after her death, then to her daughter, Mary Ann Matthews Colburn, her heirs, executors, administrators and assigns forever;" "but, should the said Mary Ann Matthews Colburn die before she attains the age of twenty-one years, or day of marriage, then I give the

said property, so given to her, to the children of my daughter Susan, to be equally divided among them."

It is obvious that the testator was not satisfied with the provisions of the deed of August, 1847; and the interest secured to Benjamin P. Colburn may have been, and probably was, the leading cause of discontent, but he seems not to have entirely approved the other limitations—at least, he liked better the scheme of his own will. In this view, as if he had the power under the deed to revoke the former uses and declare new ones, he annuls the uses, trusts, and limitations, and devotes the property, not merely to the limitations declared in his will, but to the purposes to which he had directed the property, devised and bequeathed to Mrs. Colburn, to be applied. It is impossible always to avoid ambiguity, but when the testator changed the expression, he probably intended a different meaning. "Purposes" was intended to indicate more than the "limitations" of the estate, and pointed to the other objects to which the testator's estate was appropriated. I think, therefore, that Mrs. Colburn's present interest under the deed is different from that which she takes under the will. But I am further of opinion that her contingent interest under the deed renders it a case of election. Mr. Justice Story, § 1095, adverts to the opinion which once existed, that the doctrine of election was inapplicable to persons claiming a remote interest in property. He says, "it has been well remarked that the doctrine of election is applied to interests, not in respect of their amount, but of their inconsistency with the testator's intention; and to assume their remoteness or their value as a criterion of the existence or absence of that intention, would introduce that uncertainty which, in questions of property, is perhaps the worst defect of the law." He concludes by stating that "the principle is now well established, that the doctrine of election is equally applicable to all interests, whether they are immediate or remote, vested or contingent, of value, or of no value; and as well in regard to real as to personal estate." I think, therefore that Mrs. Colburn must be put to her election. But, in regard to this property also, a reference must be directed as to the interests of the infant, Mary Ann M. Colburn.

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*The question next to be considered, relates to the provision in favor of the children of Mrs. Boyd. The fifth clause of the will is as follows, viz: "Item—I give to the four children of my deceased daughter, Mary Boyd, three thousand dollars, each, to be paid as hereinbefore directed, out of the income of my whole estate, and should either of the said children die before arriving at the age of twenty-one years and day of marriage, then I give the share of such child or children so dying, to be equally divided

among the survivors of them; and if only one survives, then the whole of the sum of twelve thousand dollars to that one."

Mrs. Boyd, the testator's daughter, had had four children, but one of them, an infant of tender years, had died before the date of the testator's will. The three surviving children (all of whom are under twenty-one years of age) resided, at the date of the will, and still reside with their father, the Rev. Charles LeRoy Boyd, in the State of Alabama. It is submitted, whether the three surviving children are to take three thousand dollars each, or to divide the sum of twelve thousand dollars among them.

Mr. Roper states the general rule to be, that "where distinct legacies are given to individuals, or an aggregate fund is directed to be divided among them, nominatim, in equal shares, their interests are several; and, if any of them die before the testator, what was intended for those legatees will lapse into the residuum. But to this rule there are various exceptions, which he proceeds to consider and to illustrate by the authorities. "A distinction must be noticed between cases where a legacy is given to a class of persons, in general terms, as tenants in common, as to the children of B. and those instances in which it appears upon the face of the will that particular objects, at the date of it, were intended to take the property. In the latter, the death of one of the legatees before the testator, will occasion a lapse, but it is not so in the other, since it is presumed that those persons of the described class who should survive the testator, were the only objects of his bounty."¹ I think the case may fall within this distinction. The legatees were the objects of the testator's bounty, because they were the children of his deceased daughter, Mary Boyd; and it is presumed, says Mr. Roper, that those persons of the described class, who should survive the testator, were the only objects of his bounty. The children are not designated by name in the will, nor is there any thing on the face of the instrument from which to infer that they were personally known to the testator. So in the first clause of the will, these legatees have no other description than as "the children of my deceased daughter, Mary Boyd." The attempt

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to enumerate them, and to fix their *proportions, is, in itself, of little importance. "It often happens, (says Mr. Jarman,) that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases, it is highly probable that the testator has mistaken the actual number of the children, and that the real intention is, that all the children, whatever may be their number, shall be included." And so

e converso, in *Lord Lesley v. Lord Lake*, 1 Beavan, 151, a trust to five daughters of testator's niece, E. was held to apply to a daughter of E. (and who was the only daughter at the date of the will.) There is enough on the face of this instrument to justify the inference, that the testator intended a legacy of twelve thousand dollars to the children of his deceased daughter, Mary Boyd; and his mistake in the number of the children, and, consequently, in their proportions of the bequest, ought not to be permitted to defeat the intention. "But," says Mr. Roper, "another exception to the rule of lapsing in consequence of one of the legatees dying before the testator, occurs when there is a limitation over of the legacy to the survivors generally, or upon the death of any of them under the age of twenty-one. In such instances, it is settled that the limitation to survivors shall have effect during the continuance of the testator's life; so that, in the first case, if a legatee tenant in common die before the testator, or if, in the end, the legatee die in the testator's lifetime before attaining twenty-one, or the happening of the event upon which the limitation over is made to depend, the legacy will not lapse, but go to the survivors under the express provision of the will. Among other cases cited, is *Ledsome v. Hickman*, 2 Vernon, 611, where testator gave £300 apiece to A, B and C, at twenty-one or marriage, and if any died before, then to the survivor. B died in the testator's lifetime. It was held that the £300 did not lapse, but went over to A and C. The principle is founded on the presumed intention of the testator to give the aggregate sum to those individuals, and the limitation to survivors warrants this presumption, although the previous language had created a tenancy in common, and had fixed the proportions." In this case, the testator gives to the four children of his daughter, Mary Boyd, three thousand dollars each, "and should either of the said children die before arriving at the age of twenty-one years and day of marriage, then I give the share of such child or children so dying, to be equally divided among the survivors of them; and if only one survive, then the whole of the sum of twelve thousand dollars to that one." If Mrs. Boyd's four children had been alive at the date of the testator's will, but one had died before the testator, the case would be concluded by *Ledsome v. Hickman*, and on

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much stronger *evidence of intention. Does it make any difference in this view, that the child was dead before the date of the testator's will? Ordinarily, the will, as to the personalty, speaks at the death of the testator. But in order to ascertain the intention, evidence is admitted as to the existing state of things at the making of his will, but to explain the ambiguity, in this case, it is necessary to go further back,

¹ 1 Rop. Leg. 331.

Having thus ascertained the origin of the testator's mistake, the inquiry recurs, whether the limitation of twelve thousand dollars "to the surviving child," does not demonstrate the intention of the testator, that this sum should be paid to the surviving children or child of Mary Boyd, if there were any such to demand it. Such seems to me his obvious purpose, which it is difficult to express in more explicit terms. With respect to interest, nothing is perceived to withdraw this from the principle that general legacies bear interest one year from the death of the testator, whether payable out of income or otherwise, or whether the fund from which they are to be paid be productive or not.²

The testator had married Mary Barksdale. The will of her father, George Barksdale, bears date 2d December, 1793, and was proved 14th March, 1794. By one of the clauses he gives to his "daughter, Mary Barksdale, during her life, the use of a negro woman, Charlotte, with her increase, and at her decease, to her children lawfully begotten of her body, to them, their heirs and assigns forever." After several intermediate bequests to his other daughters, as well as to Mary, the testator declares as follows, viz: "the remaining part of all my personal estate, I do give and bequeath unto all my children, viz: Mary Barksdale, my son Thomas Jones Barksdale, my daughter, Elizabeth Barksdale, my son George Barksdale, and my daughter Abigail Barksdale, in the following manner, that is to say—I do give the use of my daughters' proportion or parts of my personal estate to them, with the increase of the negroes they shall have during their lives, and at their decease, to their children lawfully begotten of their bodies, and they to receive their shares or parts, at the day of marriage, or at the age of twenty-one years, and my son, Thomas Jones Barksdale, and my son George Barksdale, to receive their proportion undivided, until my youngest daughter arrives at the age of twenty-one years, or marries."

Mrs. Mathews, the wife of the testator, died on the 30th November, 1843. Charles L. Boyd, the husband of Mary Boyd, on behalf of himself and his children, insists that the testator received in his lifetime, and had at the time of his death, slaves and other personal property, which his wife held under her father's will, and which, on her decease,

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devolved, by the limitations of the will, on her children living at her death, and the representatives of such as were then dead. Mr. and Mrs. Colburn also insist that they are entitled to a moiety of these slaves, which they allege to be sixty-two in number, on the ground, that by the true construction of the will of George Barksdale, the limitation is to such of the children of Mary

Barksdale as were living at the time of her death.

It is stated in some part of the pleadings, that Mrs. Mathews had seven children, four of whom died in infancy. Mrs. Boyd also died in the lifetime of her mother, leaving Mrs. Hunt and Mrs. Colburn the only surviving children. No evidence was adduced on this subject, and it will necessarily form matter of inquiry, but these facts are assumed as sufficiently accurate to warrant the judgment of the Court.

No question was made at the hearing, that the interest of Mrs. Mathews, under her father's will, was a life estate, and that the limitation over was valid: the will must be taken together, and the express restriction of her interest in Charlotte, to the use during her natural life, with remainder to her children lawfully begotten of her body, "to them, their heirs and assigns forever," and the subsequent bequest of the use of the proportion of his daughters of his personal estate during their lives, and "at their decease, to their children lawfully begotten," manifest at once, and very clearly, the intention of the testator to give the usufruct to his daughters, and to create a new stock in their children.³ "But the question which has been chiefly agitated," says Mr. Jarman, "in bequests to children, is as to the point of time at which the class is to be ascertained, or in other words, as to the period within which the objects must be born and existent."

In enumerating the rules of construction which have been established, regulating the class of objects entitled in respect of periods of birth under general gifts to children, the second is as follows: "Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. Thus, in a bequest to A. for life, and after his decease to his children, the children of A., (if any,) living at the death of the testator, together with those who happen to be born during the life of A., the tenant for life, are entitled."⁴ Among the authorities cited is *Odell v. Crone*, 3 Dow. 61, in which Lord Eldon says: "The principle of the law is that, that where persons are to take, under this general description, the object of the Court should be, to comprehend as many as, by fair construction, could fall within it; and unless it was necessary, under the

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words, to *shut out all except such as were born at the time of the testator's death, the rule is, to include all such as may have come into existence before the time when the fund is to be distributed." Mr. Jarman aff-

² 1 Rep. Leg. 189; *Pearson v. Pearson*, 1 Sch. & Lef. 10; *Gillon v. Turnbull*, 1 McC. Eq. R. 148.

³ *Lemaacks v. Glover*, 1 Rich. Eq. R. 141.

⁴ 2 Jarman on Wills, 74-75.

erwards explains that, by objects at the period of distribution, is not meant children existing at that time, "for," says he, "it has been already shown, that all who have existed in the interval between the death of the testator and the period of distribution, whether living or dead at the latter period, are objects of the gift, and may, therefore, not improperly, be termed objects at that period; their decease before the period of distribution having no other effect than to substitute their respective representatives, supposing, of course, their interest to be transmissible." The principle is recognized and explained in *Naylor v. Wetherell*, 4 Sim. 114; and by our own Courts, in *Rutledge v. Rutledge*, Dudl. Eq. R. 201, all the children of Mrs. Mathews, as they came in esse, took vested, transmissible interests. The shares of those who died in infancy passed to the father and the then living brothers and sisters, in the manner provided by the statute, as no administration could be deemed necessary. But I think there must be administration on Mrs. Boyd's estate, and leave is granted so to amend the pleadings.

There was no proof that the testator had received any property which his wife took under the will of her father; much less was there any proof that he had undertaken, by his will, to dispose of such property as his own. But the cause was argued on the assumption that the slaves, which had been received from the estate of George Barksdale, were among those "usually used, attached and belonging to" the several plantations described in the will, which plantations he had devised to his daughters, "and all the slaves, &c., and every other thing usually used, attached and belonging to said plantations" respectively.

This leads to the inquiry, whether a case of election is not presented. It is immaterial in this inquiry whether, in disposing of this property, the testator did so knowing it not to be his own, or whether he did so under the erroneous supposition that it was his own. Either is sufficient to raise a case of election.⁵ The principle of election is, that he who accepts a benefit under a deed or will, must adopt the whole instrument, so far as to renounce every right inconsistent with it. The modern doctrine is, that a legatee, claiming against the will, does not thereby forfeit the whole benefit proposed for him, but only so much as is necessary to compensate the legatee, whose claims he has disappointed.⁶ In *Lady Cavan v. Pulteney*, 2 Ves. Jr. 544, Lord Rosslyn refers, with approbation, to the judgment of Chief Justice De Grey, expressed on the hearing of a former branch of the case before the Lord

not a case of express condition; it is no forfeiture of interest; but the Court lays hold of what is devised, and makes compensation out of that to the disappointed party. "It had been argued on that occasion," continues Lord Rosslyn, "that the devise, being on no express condition, it could not be implied; then, that Mrs. Pulteney could not be put to her election, because she had no alternative; being a married woman, it was contended she could not defeat her husband's right." In answer to that, Chief Justice De Grey distinguished the equity of this Court from an express condition, "which," he says, "must be performed as framed; and, if it is not, that will induce a forfeiture—but the equity of this Court is," (as he very well expresses it,) "to sequester the devised interest quousque, till satisfaction is made to the disappointed devisee." Then in respect to her supposed disability to do that which, in case of submitting to the will, she must do, he says, "her being a femme couverte has no effect. The election is her's and her husband's; a married woman may forfeit a conditional gift; the estate is in her; he takes in her right. If they disagree, it must be considered by the Court what is most for her interest." Mr. Baron Eyre said, "the husband's interest is only an emanation from the wife's estate."

Much of this is applicable to the claim of Benjamin P. Colburn and wife, who insist that they are entitled to a moiety of the sixty-two negroes, which are said to be held under George Barksdale's will. The marriage contract of February, 1834, contains a covenant to settle any after-acquired property of the wife, and in this Court would estop him from insisting on his marital rights; nor does he interpose any such exclusive claim, but "submits to the Court that he and his wife are entitled to one-half of the said negroes, in right of his said wife." If, then, the assertion of this right is inconsistent with the claim of her co-legatee, under the will of her father, I think her interests under the latter instrument must be sequestered, until compensation has been made to the disappointed legatee. In *Wilson v. Lord John Townsend*, 2 Ves. Jr. 697, it is said that, when the Court directs an election to be made, "if the party is under restraint, and cannot accomplish that, it is the misfortune of the party; but the consequence is, that while he continues in that situation, his claim must be barred; for it is directly contrary to the intention and distribution of the property—that is, in point of law, implied. As to this bequest to Mrs. Wilson, for her separate use, the Court cannot execute a will by parcels; it must be totally, or with regard to the party by whose means it fails; the Court can do nothing for that party; the Court must execute the will."

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Chancellor, Chief Justice De Grey, and Baron Eyre. He had held that election was

⁵ Story's Eq. § 1493.

⁶ Story, § 1085.

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*I have arrived at a different conclusion

in respect to the claim of the husband of Mrs. Boyd. His wife died before the life-tenant—supposing an administration to have been made, he would be entitled to one-third of his deceased wife's interest, under the will of her maternal grandfather. Mr. Boyd is not a beneficiary under the will of Mr. Mathews; nor does he claim under any one who has a benefit from that will. He cannot, therefore, be required to conform to the provisions of that instrument, by renouncing a right inconsistent with it.

The case of the children of Mrs. Boyd is more perplexing, rather in consequence of an expression in some of the books, than from any reason that I can perceive. It is stated, by Mr. Jarman, that the doctrine of election does not apply to derivative claims—and, in the case put, that may very well be:—"A legatee is not precluded from claiming derivatively, through another, property which such other person has taken, in opposition to the will." A daughter, having taken a legacy to her separate use, under her father's will, is not thereby precluded, on a subsequent day, from claiming her dower in land which her husband held in opposition to the will. This is the extent of the qualification. But, says Mr. Jarman, (and he is fully sustained by the authorities,) "the doctrine of election clearly applies as well to reversionary and remote, as to immediate interests." At the death of the testator the children of Mrs. Boyd had an immediate interest under his will in the legacy of twelve thousand dollars, but they had, at the same time, an interest (not quite so immediate and well ascertained) in other property which the testator had undertaken to give to other persons. Is it of any consequence in what way, or by what title, or through what source, they acquired this latter interest, or whether it was legal or equitable? If Mrs. Boyd had been alive at the death of the testator, and had renounced a legacy given her by the will, in order that she might hold the property acquired from George Barksdale, and had afterwards died, leaving these children her distributees, it would be analogous to the case stated by Mr. Jarman. An election had been already made, and the penalty of holding the property in opposition to the will had been exacted, long before these children had acquired any interest whatever in the Barksdale negroes. But that is not the case before the Court; and I think it must be referred to the Master to inquire which alternative would be for the interest of the children of Mrs. Boyd. Something was said about the Statute of Limitations; but it seems quite clear that the statute cannot run until there is a legal representative of Mrs. Boyd.

It would seem premature to make any ob-

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servations in re*gard to the rights of Col. Hunt, as growing out of the limitations in George Barksdale's will, until his plea to

the original bill has been disposed of, he not being a party to the cross-bill. His plea is, for want of any specific charge or demand against him, and for want of equity, as well as for want of privity between the executor (complainant) and himself. The conflicting claim under George Barksdale's will, which is set forth in the bill, would be a sufficient reason for making Col. Hunt a party, although it is not stated in the bill that either he or Mr. Colburn, or any other persons than Mr. Boyd and his children, have interposed any claim under that will. It is proper that Col. Hunt should have an opportunity of being heard by his answer, before the Court pronounces any decree involving his rights.

But the correspondence, which was introduced in evidence, evinces, in very unambiguous terms, the views which the devisees have taken of the executor's rights and of their own. The letter of February, 1849, is a distinct notice to the executor that "any attempt, on his part, to plant the plantations, Pleasant Meadow or Springfield, except with the consent, and in subordination to the devisee, acting by her male friends, would be resisted, and the executor and his agent expelled"—that "any further attempt, on the part of the executor, to interfere with the real estate, would be met with direct opposition, and that the executor and his agents would be treated as trespassers."

In the view which the Court has taken, the executor was authorized, under the provisions of the will, to plant the land with the negroes, in order to raise crops for the payment of the debts and legacies. Any interference with the executor, in the lawful discharge of this duty, would entitle him to the aid of this Court, against the devisee and the agents of the devisee. In this respect, therefore, the Court cannot say that Col. Hunt was an improper party under the prayer of the bill.

It is ordered and decreed, That the cross-bill be dismissed.

It is further ordered and decreed, That leave be granted to amend the original proceedings, by making parties thereto the surviving trustee, under the marriage settlement of Benjamin P. Colburn and wife. That it be referred to one of the Masters of this Court to take an account of the debts, legacies and assets of the testator, William Mathews, deceased; and also of the complainant's administration of the same, with leave to report any special matter. That he further inquire and report whether it would be for the interest of the infant, Mary Ann Mathews Colburn, to conform to the provisions of the testator's will.

It is further ordered and decreed, That the

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Master inquire *whether any, and what part, of the property held by the testator, was subject to the provisions of George Barksdale's will; and whether any, and what part of the

same, was specifically or otherwise disposed of by the testator, William Mathews, and to whom. And that he take an account of the said property since the death of the life-tenant—with liberty, also, to the Master to report any special matter in relation to this subject of inquiry; and that he also inquire and report whether it would be for the interest of the children of Mrs. Boyd to conform to the will of the testator, by renouncing any claim they may have on the Barksdale property which is inconsistent with said will.

Each party to be at liberty to apply at the foot of this decree for such further or other order as may be necessary to carry into effect the provisions of the same.

The various grounds of appeal taken by the several parties are sufficiently noticed in the following decree of the Court of Appeals:

DUNKIN, Ch. The several grounds of appeal in this case were submitted without argument, except on the appeal taken by the executor. The Court has considered the grounds taken by the children of Charles Le Roy Boyd, and those taken by Mrs. Colburn. Without the aid which the argument of counsel might afford, the Court is unable to perceive any error in the adjudication of the Circuit Court, and the same is affirmed.

The Chancellor held that the Charlotte Street house, house servants and furniture used in it, were intended for the immediate possession and enjoyment of the devisee. This Court has examined the will, and is entirely satisfied with the decree.

The remaining grounds of appeal taken by the executor and devisees may be disposed of by a few general observations. The devisees, or some of them, insist that the executor, having no legal "interest in the lands, he has no right to enter, hold and plant the real estate of the testator, against the consent of the devisee." On the other hand, the executor has appealed, because the Chancellor did not declare that the executor was entitled to the exclusive possession and control of the real estate until the debts and legacies were fully paid, and because he held the devisees entitled to plantation supplies while the debts and legacies were unpaid. The executor has also appealed from a subsequent decretal order of the Chancellor, directing an inquiry into certain facts, and the effects of them, instead of forthwith ordering an attachment for contempt and injunction, as moved by the executor. The executor also appeals, because the Chancellor refused leave to file certain letters and ad-

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ditional affidavits. The subject *of these latter interlocutory orders was purely ministerial, and was addressed to the discretion of the Chancellor; and this Court is of opinion that the discretion was properly exercised.

The first clause of the testator's will directs the whole of his estate to be kept together, until, from the net produce of his crops, rents, and all other sources of income, his debts and legacies were paid. A few months after the testator's death some of the devisees resisted the executor's control of the real estate.

The Court ruled that, by the laws and usages of this country, the executor was entitled to the control and possession of the real estate, so far as it was necessary to enable him to carry into effect the will of the testator, by making crops, collecting rents, and deriving income, as the testator had himself done, and that "any interference with the executor, in this lawful discharge of his duty, would entitle him to the aid of this Court, against the devisees and the agents of the devisees." The Chancellor further held that, "as between the executor, and those claiming under the will as volunteers, it seemed quite consistent with the duty of the executor, and his present necessary control over the estate, that the objects of the testator's affection and bounty should occupy the estates devised and bequeathed, so far as this might be done without diminishing the income, and without interfering with the temporary control which the testator has conferred upon the executor." For the purpose of disposing of this appeal, the Court deems it necessary only to say that they perceive no ground for revising the judgment of the Chancellor.

But subsequent to the decree of the Chancellor, to wit, in May, 1849, an order was obtained, at the instance of the executor, directing the Master to call in the creditors of the estate, and to inquire and report whether it was practicable to pay the debts and legacies from income, &c., and whether any and what portion of the estate should be sold for the payment of the debts. The creditors were, by the same order, enjoined from prosecuting their rights at law. The Master has submitted a report, which was referred to in argument, but which is not before us. It seems that the debts and legacies amount to about seventy thousand dollars, and the income to six or seven thousand dollars. It is therefore manifest that a sale of a portion of the estate is indispensable, unless the debts are discharged by the devisees.

All parties concur that the testator's project of paying his debts and legacies from the income must be abandoned as impracticable. In discussing the course proper to be adopted by the Court, much was said about the necessity of protecting and preserving the

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rights of the executor. It seems necessary only to say that both the testator and this Court regard the executor as merely a trustee for preserving and securing the rights of

those interested under the will. In the discharge of these fiduciary duties he will be maintained by the Court, and the law has fixed the compensation to be allowed for the performance of such duties. But the Court looks first to the interest of those for whom the executor is trustee, to wit, the creditors, and then the legatees, &c. The testator devised and bequeathed his entire estate, real and personal, on various trusts and limitations. He contemplated no sale of the corpus by the executor, and he authorized none. If the creditors were permitted to proceed at law, they have the right to levy on any part of their debtor's estate, without regard to the provisions of his will. This would necessarily provoke proceedings in this Court, requiring payment to be made by the devisees and legatees, on the well established principles of this Court. To anticipate and prevent this multiplicity of suits, and variety of litigation, the decretal order of May 1849 was granted. The authority of the Court to grant such order, and the practice under it, is considered and affirmed by Chancellor Kent, in *Thompson v. Brown*, 4 John. C. R. 638. The Court, restraining the creditors at law, is bound to provide a fund for their payment. By the provisions of the testator's will, his real and personal estate are inseparably connected in the several devises and bequests. A sale has become indispensable. But the executor has no legal estate in the realty, and he has no authority to dispose of the personality. A sale by the authority of this Court would alone confer a good title on the purchaser. This Court has already directed the debts to be established before the Master. The sales should therefore be made by the Master, and the fund disbursed by him, under the direction of the Court. To carry into effect these principles, the following decretal order has been adopted by the Court—to wit:

It is declared that the debts of the testator are to be borne by his devisees, Mrs. Hunt and Mrs. Colburn, in equal proportions; the intention of the testator to equalize their shares being sufficiently apparent on the face of the will. And it is further declared that the waiter Harry is a part of the house servants bequeathed to Mrs. Colburn, and that the washerwoman Myra is a part of the negroes belonging to Snee farm, bequeathed to Mrs. Hunt. As to the disputed point, whether the carpenters, Ben, Hector, Maurice, Paul, Little Ben, and John, and the sloop hands and boatmen, Nat, Jim, Phil, Joe, Steward and Jack, are part of the negroes devised to Mrs. Colburn, or of the residuary estate, the same is referred back to the Master, to take further testimony. As to the extent and quantity of land devised to Mrs. Colburn, un-

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der the devise of Tibwin, the same is also referred back to the Master for further information, and it is ordered that a survey

and plat of all the lands claimed as belonging to Tibwin be made, for the information of the Court. That the sloop, traveling horses and pony, the gold watch and spectacles, are a part of the residuary estate. That the creditors who have proved their claims before Mr. Laurens, under the decree of Chancellor Dunkin, and against whose claims no exceptions are filed, have a right to immediate payment by a sale, and that the legatees have a right to be paid out of the income, with interest from one year after the decease of the testator. That it is necessary that a sum sufficient to pay off the debts and legacies be raised by a sale, under the order of this Court, to prevent injustice and inequality by the arbitrary sale of property of either devisee under execution, and to protect the legatees and tenants for life from the indefinite postponement of the benefits intended for them by the testator. That the plantation and negroes called Thompson's are to be considered part of Mrs. Colburn's portion under the will, and liable to contribution for debts, equally with the rest—and that the money owing for the purchase of said property is to be considered the proper debt of testator, so far as the creditors are concerned. But it is referred to the Master to ascertain and report whether, as between Mrs. Hunt and Mrs. Colburn, said debt is chargeable specifically upon said land and negroes, or upon testator's whole estate. And as it is represented to the Court that Mrs. Colburn desires her contributory part of the debts and legacies to be raised by an immediate sale, and that Mrs. Hunt desires time to make arrangements with the creditors for her part: It is ordered and decreed, that all the residue of the estate, not specifically devised, be sold by the Master of this Court, and the money, and any balance in the hands of the executor, applied to the satisfaction of testator's debts. That the Master proceed forthwith to raise, by a sale of real or personal estate devised and bequeathed to Mrs. Colburn, to be selected, if she thinks fit, by her, such a sum as, with what she has already contributed, will be equal to her portion of the amount that may remain due for the testator's debts and legacies, after such application of the residuary estate, and that the money so raised be applied towards the payment of her part of the debts and legacies; and so much as may remain of the estate, real and personal, so devised and bequeathed to Mrs. Colburn, be delivered to her, to have and to hold the same to her sole and separate use during her natural life, and to her daughter, Mary Ann Matthews Colburn, after her decease, according to the terms of the will, freed and discharged from any interference on the part of any of the parties to this suit, other than creditors of the testator.

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*And it is further ordered that Mrs. Hunt and her children have time till the first day

of March ensuing to make arrangements for paying off her proportion of the debts and legacies aforesaid, and have leave to substitute, in place of any of the creditors or legatees who may be paid off, such person or persons as may advance the money for paying off such creditors or legatees, to the extent of the sums so advanced and actually applied. And the real and personal estate devised and bequeathed to Mrs. Hunt and children shall stand as a security in their hands for the moneys so advanced, in the same manner as the same was liable in the hands of the testator or his executor to the original demand. But no person so substituted to the rights of the testator's creditors or legatees shall have any lien, claim, or demand whatsoever, on the real or personal estate devised or bequeathed to Mrs. Colburn. And in case the creditors be not fully paid and satisfied by the said first day of March, then the Master shall raise, by a sale of the real and personal estate devised and bequeathed to Mrs. Hunt, to be selected, if she thinks fit, by her, a sum sufficient to pay off the residue of the testator's debts and legacies aforesaid; and that upon payment, on the part of Mrs. Hunt, of her proportion of the said debts and legacies, the real and personal estate devised and bequeathed to her, or so much thereof as may remain, be delivered to her, to have and to hold the same to her sole and separate use during her natural life, and to her children after her decease, according to the terms of the testator's will, freed and discharged from any of the parties to this suit. And in case any of the claims against which exceptions have been filed shall be ultimately established against the estate, the same shall be satisfied in the same manner as the other debts of the testator are by this decree provided for; and the Master of this Court in such case shall proceed to raise the amount out of the estates devised to the testator's daughters and their families, in equal proportions, by a sale, as hereinbefore directed. And it is further ordered that, upon the executor's (Mr. Lawton) accounting for the money in his hands, and complying with this decree, he be forever exonerated and discharged of and from all other and further claims and demands of all and singular the devisees, legatees and creditors of the testator who are parties to this suit. And it is further ordered that all sales, made in pursuance of this decree, be on the following terms, that is to say: Real Estate, half cash, residue in one and two years. Negroes, half cash, half in twelve months, to be secured in all instances by bond and mortgage and personal security.

And it is ordered that the costs of this suit be paid out of the estate.

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*And as to the right of the Rev. Charles Le Roy Boyd, it is further ordered that the

amount of his claim be considered a charge upon the estate, and paid as other debts.

CALDWELL and DARGAN, CC., concurred.

JOHNSTON, C., absent at the hearing.

Decree affirmed.

4 Strob. Eq. 25

KER BOYCE et al. v. THE EX'RS OF J. G. COSTER.

(Charleston, Jan. and Feb. Term, 1850.)

[Partnership \hookrightarrow 227.]

A purchaser of the share of one who, subsequent to its formation, had been let into a copartnership formed for the purchase and improvement of City lots, was held to have had sufficient notice of the partnership and its objects to subject his share, on a settlement, to all the equities of the other partners, from the fact of its having been provided in the deed of indenture by which his vendor had been admitted into the firm, that he was "to hold" with the other partners as "joint tenant," and "to conform in all respects to the articles of agreement executed between them, bearing date," &c., "for the improvement and sale of said property."

[Ed. Note.—Cited in *Maybin v. Kirby*, 4 Rich. Eq. 115.]

For other cases, see Partnership, Cent. Dig. § 474; Dec. Dig. \hookrightarrow 227.]

[Partnership \hookrightarrow 68.]

[Where an estate is conveyed to the grantees in such form as to make them tenants in common, if it be paid for out of the partnership funds, it must be treated in equity as vesting in them in their partnership capacity, in trust for the use of the firm.]

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 104; Dec. Dig. \hookrightarrow 68.]

[Partnership \hookrightarrow 68.]

[Real estate, bought with the partnership funds or for partnership purposes, as a general rule, is regarded in a court of equity as personal estate, and is administered and disposed of as if such was its character.]

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 108; Dec. Dig. \hookrightarrow 68.]

[Partnership \hookrightarrow 76.]

[Partner's in trade are, at law, joint tenants of the partnership stock and effects, with the rights of survivorship and its incidents; but in equity the joint estate of partners is subject to the maxim, "Jus accrescendi in mercatores locum non habet," and also to the jurisdiction of the court to enforce an account between the parties, based on the equities growing out of the business in which they have been engaged.]

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 124; Dec. Dig. \hookrightarrow 76.]

[Partnership \hookrightarrow 182.]

[The share of each member in a partnership is subject to a lien in favor of the others for any indebtedness arising out of the partnership operation which exists on a final settlement of the accounts.]

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 318; Dec. Dig. \hookrightarrow 182.]

[Tenancy in Common \hookrightarrow 44.]

[One who is tenant in common in real estate, and possessed of a legal title which does not upon its face exhibit any incumbrance by equities, may, by a valid assignment, convey his share to a stranger; and such assignment

is good against the equities of co-tenants, if made bona fide, and for valuable consideration, without notice of such equities, or of circumstances to put him on his guard concerning them.]

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 133; Dec. Dig. 44.]

Before Dargan, Ch., at Charleston, June Sittings, 1848.

The facts of the case are stated in the following decree:

Dargan, Ch. On the trial of this case, a vast mass of facts was brought to view in the evidence, embracing nearly the entire history of the City Land Company from its formation to the present day. There are, however, but two questions presented for the judgment of the Court: one of fact, and one of law. I shall not complicate or encumber this opinion with the voluminous history of the Company, which has been offered in evidence, but advert only to those facts and circumstances that appear to me to be necessary or material to a clear comprehension and adjudication of the questions at issue.

In the year A. D. 1836, an association was formed by Ker Boyce, Leroy M. Wiley, Henry W. Conner and Geo. H. Kelsey, for the purchase and improvement of certain vacant lots in the city of Charleston, known then as "the Burnt District." This Company was formed as early as the 18th day of March of that year; and the objects in view were the purchase of vacant lots, and the erection of buildings and enclosures thereon, with a view to profits from their rent and resale. A negotiation was entered into with the City Council of Charleston for the purchase of the lots; and the City Council, for the consideration of \$246,000, by deed of indenture, dated 4th April, 1836, conveyed the said

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lots to the four persons above named, "to them and the survivors or survivor of them, and to the heirs and assigns of such survivor." And a mortgage, bearing the same date, was duly executed by the said vendees to the City Council, to secure the payment of the purchase money, in four equal instalments; to be paid on the 1st of April, in the years 1849, 1851, 1853 and 1855, with interest at 5 per cent. On the 16th May, 1836, articles, containing the rules and regulations by which the association was to be governed, were severally subscribed by the members, and entered in their journal. These articles contain a positive inhibition against the alienation, by any member, of his share, or any part thereof, without the unanimous assent of the Company, under the penalty of a forfeiture of his interest in the land, &c. alienated. They also contained a provision that no money should be withdrawn from the concern until its affairs were brought to a close, except by unanimous consent; and provided for the addition of further rules and regulations that might afterwards be deemed necessary.

On the 16th June, 1836, by the unanimous resolution of the association, James Hamilton "was admitted as a copartner to the City Land Company, to the extent of one-fifth, on the same terms and conditions that they purchased 'the burnt lands' from the City Council; the copartnership to take effect from the first day of April last." And, on the same day, the said James Hamilton signed an instrument in the journal, of the following tenor and effect: "Having been admitted a copartner in the City Land Company, I do hereby ratify and confirm all that the proprietors have done to this date." As the consideration of being admitted a partner, the said James Hamilton agreed to pay the other members of the Company the one-fifth of the purchase money due the City Land Company, to wit, \$49,300; and on the 10th day of June, of the same year, executed his bond to the other members, for the said sum of money, to be paid on the same terms and conditions that the purchase money was to be paid to the City Council. And, on the same day, the four original members of the Company executed a deed of indenture, in which, after reciting the purchase and conveyance from the City Council, and the consideration to be paid them by the said James Hamilton, they convey to him "one undivided fifth part of all that lot, piece or parcel of land, commonly called the Burnt Square, bounded," &c., "together with all the undivided fifth part of all and singular the rights, members," &c., habendum, to the said James Hamilton, his heirs, executors and administrators," with a general warranty. This instrument then proceeds to declare "that it is the true intent and meaning that the said James Hamilton should be let into the purchase of the said Burnt Square, in joint own-

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ership with the *parties, to the extent of one-fifth of the same, and to hold as joint tenant in all the uses, benefits, rents and profits of the same. It is understood that the mortgage which the said Ker Boyce, Henry W. Conner, Leroy M. Wiley and George H. Kelsey have made and executed for the security of the City Council of Charleston, by reason of their purchase of said Burnt Square, shall stand in full force and effect, without prejudice by this indenture, until the said James Hamilton shall have paid his fifth part of the aforesaid purchase money, of the aforesaid Burnt Square, according to the terms of his bond, as above recited. And I, the said James Hamilton, do bind myself, and each and every of my heirs, executors, administrators and assigns, to pay one-fifth part of all the instalments, principal and interest, according to the tenor and effect of the aforesaid bond," &c. "And I, the said James Hamilton, do moreover covenant and agree with the aforesaid parties, to conform in all respects to the articles of agreement executed between them, bearing date the — day of —, in the year of our Lord

one thousand eight hundred and thirty-six, for the improvement and sale of the said property." This indenture concludes with a covenant for further assurances to the said James Hamilton, but the foregoing is the only title he ever has had. It is signed and sealed by all the parties, and was registered on the 5th June, 1836, but the rules and regulations of the Company were not registered until the 11th day of June, 1842.

On the 21st July, 1837, James Hamilton, for and in consideration of \$12,500, paid him by John G. Coster, of New York, conveyed to him one-fourth part of said James Hamilton's fifth part of the said land. On the 15th January, 1839, in consideration of the said John G. Coster's bond for \$30,900, the said James Hamilton conveyed to him another fourth part of his fifth of the said tract of land, making the one-half of his entire share. These deeds were conveyances in fee, with the usual warranties, and were recorded on the 31st January, 1842. On the 5th May, 1840, James Hamilton mortgaged to John G. Coster the remaining moiety of his share in the land of the Company, on an agreement between them respecting the bond for \$30,900, last mentioned; which, by a stipulation at the time of its execution, was to have been assigned to the Charleston Insurance and Trust Company, and was to have been paid by the said James Hamilton. Having failed in the performance of these covenants, John G. Coster instituted a suit for, and obtained a decree of foreclosure of, the said mortgage. And the said John G. Coster having afterwards departed this life, George W. Coster, Henry A. Coster, and Gerard H. Coster, as the executors of his last will and testament, by virtue of the aforesaid decree,

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and the sale authorized *thereby, became the purchasers of the said James Hamilton's remaining half of one-fifth in the said land, and the Master has conveyed to them accordingly. Subsequently, Gerard H. Coster assigned all his interest in the premises to his co-executors, George W. Coster and Henry A. Coster, the defendants in this bill; who, by virtue of the said several deeds, with the dates as above stated, became thus entitled to the rights and interests of the said James Hamilton in the said premises. They, however, claim more than the rights of James Hamilton as they would stand if he were at present a party in interest, as will be seen in the denouement.

I have thus traced the title of the defendants in the chronological order of the different transactions on which it depends. I must now go back, in point of time, for the purpose of bringing to view another class of facts. The quintuple alliance, or association, having been formed, in the manner as before stated, they proceeded to form and execute their plans for carrying on their contemplated speculative improvements. Messrs. Wiley

and Conner were authorized (in Aug. 1837,) "to contract, in New York or elsewhere, for materials, and for building the ten stores agreed upon on the 28th September," &c. A contract was accordingly made with N. & J. Potter, of Providence, to build the ten stores complete, for the sum of \$80,000. At a meeting of the Company, called 25th March, 1838, for the purpose of devising the ways and means of meeting the payments, agreeably to the contract for building, it was then resolved, "that in order to raise the funds to meet the contract, that each of the Company will give his note, or notes, for the sum of ten thousand dollars, to the treasurer, to be discounted by him, for the use of the Company." At a subsequent meeting, (17th January, 1839,) it was resolved, "that the notes that had been drawn by each of the members individually, in favor of the treasurer, for \$10,000 each, for the use of the Company, should now become the debt of each of the parties individually, but the treasurer be authorized to endorse the renewals, 25 per cent. being taken off the notes every sixty days," the notes being all discounted in the Bank of Charleston. On the 3d January, 1839, a note of James Hamilton, bearing that date, and payable to H. W. Conner, treasurer of the City Land Company, (and endorsed by him,) for the sum of \$10,000, was discounted by the Bank of Charleston. At the first renewal thereof, on the 1st to 4th March, 1839, 25 per cent. was paid, and the note was renewed for \$7,500. It was regularly renewed until 29th June, 1841, when it was renewed for the last time, and made payable 28th to 31st January, 1842, at which time it was paid by H. W. Conner, and is now held and claimed by the City Land Company as the endorser thereof, through their treasurer, H. W. Conner.

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*On the Journal Folio of the Company, (of the date of 27th April, 1839,) James Hamilton stands charged, "Dr. To sundries, \$10,000," and, on the same date and page, he is credited with two notes to the Company, each of the sum of \$5,000. Here arises the first question, which, I have before said, was a question of fact. From the discrepancy in the date at which the credit was given, as well as on account of the fact that the note of the 3d January, 1839, was for \$10,000, and the credit given was for two several notes, each for \$5,000, it was contended that the note now produced was not a note of James Hamilton, or a renewal thereof, given by him, under the resolutions of the Company, and endorsed by the treasurer by the authority of those resolutions. The books of the Company were very irregularly kept, and this confusion of dates and irregularity of entries has given rise to a strenuous effort on the question, as to the identity of the note. But I have no difficulty whatever on the subject. The fact that the note was discounted in

near conformity with the date of the credit, and was for the sum of \$10,000, the precise amount authorized by the resolution, and was made payable to and was endorsed by the treasurer of the Company, is satisfactory evidence to my mind, notwithstanding the discrepancy of the dates of the book entries, that this is a renewal of the note, or notes, of James Hamilton, authorized to be given for the use of the Company, under the aforesaid resolutions. But, to make the matter irresistibly clear, by going back to page 38 on the journal, we find, under date of May 22, 1838, the following entries:

Sundries, Dr. To Bills payable—	
Cash, proceeds of General Hamilton's Note.....	\$4,814 17
Interest, discount on ditto.....	185 83
	<hr/>
	\$5,000 00
Note due 1st to 4th Jan. 1839, discount for 7 mos. 13 days, is.....	185 83

Under date of July 21, 1838, journal, page 41, we find the following entries:

Sundries, Dr. To Bills payable—	
Cash, proceeds of General Hamilton's Note.....	\$4,863 33
Interest, discount on ditto.....	136 67
	<hr/>
	\$5,000 00
Note due 1st to 4th Jan. 1839, discount for 5 mos. 14 days.....	136 67

From these entries it appears that the notes of James Hamilton were drawn at an earlier period than was supposed by defendants' counsel; that the entries that gave him credit for two several notes for \$5,000 each, were correct, except as to the time at which

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the credit should have been given; and *that these two notes were both due at the same time, to wit, 1st to 4th January, 1839, at which time, I have not a doubt, they were consolidated into one; and that the note of 3d January, 1839, for \$10,000, was itself a renewal of the two notes for \$5,000 each.

This note, then, and the interest thereon, is due by the said James Hamilton to the Company, as a member thereof, being money due by him on account of the improvements that have been constructed. And the original four members of the Company have filed their bill against the defendants, who represent James Hamilton's share, for the purpose of setting up this debt against the share of Hamilton in the rents, profits, and income of the said property. It would be as well to remark here, that the defendants have been regularly recognized, by an agreement in writing, as the representatives of the Hamilton share in the enterprise, under mutual covenants and conditions; each party reserving their rights, as they stood, ab initio, in regard to this claim of the Company on the Hamilton share, for the protested note before mentioned.

This claim is resisted by the defendants, on the question of fact, which I have just disposed of; and also on the ground that the complainants have not, in law, from the character of their joint undertaking, and the subject matter of their speculative operations, a lien on the share of James Hamilton, for their debt against their rights; they occupying the position of bona fide purchasers, for a valuable consideration, without notice. And this brings up the second question in this controversy.

Partners in trade are, at law, joint tenants of the partnership stock and effects, with the rights of survivorship and its incidents. But in equity the joint estate of partners is subject to the maxim or exception, *jus accrescendi in mercatores locum non habet*; and subject also to the jurisdiction of this Court, to enforce an account between the parties, based upon the equities growing out of the business in which they have been engaged. As a general rule, real estate, bought with the partnership funds, or for partnership purposes, is regarded in this Court as personal estate, and is administered and disposed of as if such was its character.¹ Another rule is, that the share of each member in the joint stock and effects is subject to a lien in favor of the others for any indebtedness arising out of the partnership operations, which may exist on a final settlement of the accounts. Under this rule, the alienation by one of his interest, would be subject to the equities of the other partners on a settlement. This unquestionably may be said to be a general rule in equity. But whether, in reference to real estate, it will be applied in this Court, under all circumstances, and without regard to the rights of

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third persons, has been a much controverted question, and the authorities are discordant upon the subject. It would seem that there are cases where the decisions are the other way. If two or more, being tenants in common of an estate, by an agreement among themselves, not registered, contract to improve the estate at a joint expense, with a view to speculation, which is accordingly done, and one of the tenants were, under these circumstances, to alienate his share to a stranger, for a valuable consideration, and without notice of the latent equity, would not the equity of the stranger be superior to that of the copartners? The case would not be different if the agreement of copartnership was made first, and afterwards the parties purchased the real estate, and took a deed to them as tenants in common, which did not contain the terms of copartnership or any allusion thereto.

The deed of the City Council to Ker Boyce and his associates is to them and the survivors or survivor, and the heirs of the sur-

¹ Winslow v. Chiffelle, Harper's Eq. 25,

vivor. The indenture of these joint tenants to Jas. Hamilton, conveys to him one-fifth of the land, to him, his heirs, executors, administrators and assigns. The instrument, after conveying one undivided fifth to James Hamilton, his heirs and assigns, proceeds very inconsistently to declare that it is the true intent and meaning to let him into the purchase of the Burnt Square, in joint ownership with them, (the original vendees,) to the extent of one-fifth of the same, and to hold, as joint tenant, in all the uses and profits of the same. Whether the subsequent provisions may not be considered repugnant to the previous grant, might very well create a doubt; but the estate conveyed to James Hamilton wants two of the unities of a joint tenancy—that of title and that of time. He neither holds by the same act or instrument with all the other tenants, or under a title commencing at the same time. The estate which James Hamilton held in “the Burnt District,” under the deed of Ker Boyce and his associates, must, in my view, be regarded as a tenancy in common. Indeed there are many cases where joint tenancies (at law) in real estate, purchased with partnership capital, have been held in equity as tenancies in common, and as constituting only a portion of the partnership fund. And there is both reason and authority for the proposition, that one who is tenant in common in real estate, and possessed of a legal title, which bears upon its face no evidence of its being encumbered with equities, may convey, by valid assignment, his share to a stranger, and that such an assignment would prevail against the equities of the co-tenants, provided it was bona fide, and for valuable consideration. This is harmonious with the principle, that the alienation, by a trustee, of the trust estate, involving a breach of the trust, is valid

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*to a purchaser for valuable consideration, without notice. And, in regard to real estate, partners are considered in equity as trustees, and as seized in trust for the whole firm, and for him or them who may be entitled on a final settlement. But if partners, dealing in real estate, and taking title deeds, which make them tenants in common, and which contain on their face no evidence of the trust, are not bound by the assignments of each other, for valuable consideration, and without notice, they put it in the power of each other to circumvent innocent persons, by the exhibition of titles, clear upon their face, but encumbered with secret equities.²

But it is not necessary for me to express a positive opinion whether the joint tenancies of partners in real estate are, in equity, to be regarded as tenancies in common, and as only a portion of the partnership fund. And whether the deed of Ker Boyce and his as-

sociates, of the 10th of June, 1834, (to which James Hamilton was also a party,) conveyed to the said James Hamilton an estate in common, or in joint tenancy, it is unnecessary for me to decide, under the governing view which I take of the case. For regarding him in the position most favorable to the case of the defendant, to wit, as a tenant in common, and conceding that the principle of law is well established, that a bona fide purchaser from him, of his share and interest, would have a good title against the equities of his copartners in the enterprise, still there are circumstances which, in my opinion, upon the most reasonable and admitted distinctions, make the rights of the copartners paramount in equity, and their claim upon the protection of this Court irresistible. A purchaser, occupying the attitude of the defendants against the complainants, asserting their claim in the title of (we will say) a tenant in common, against the equities of the copartners, must, by universal consent, be a bona fide purchaser, and one who has laid out his money in the purchase, without notice of those equities. And I will go further and say, he must be without notice of such circumstances as would have put him upon his guard, and the possession of which, by a reasonably diligent research, would have enabled him to discover the subsisting and just incumbrances in behalf of other persons. If he has a knowledge of the pre-existent equities of other persons, or of facts upon which, by a reasonable degree of diligence, he may have acquired such knowledge, and still lays out his money, (though he may have done it with purity of purpose, in a moral point of view,) he is not a bona fide purchaser, either in law or equity. It is not in behalf of such a purchaser as this, that this Court will supersede the high and prior equities of copartners. Were there any circumstances in the case amounting to notice, on the part of

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John G. Coster, when he *made the purchase of a part, and advanced his money on a mortgage of the remaining part, of General Hamilton's interest in this land? In my opinion, there are; and the evidence is to be found in the fact, that in the indenture of 6th June, 1836, (which is the only title he ever possessed,) there are the most abundant indications of his partnership relations with his associates. The condition expressed therein, that he was to hold with them, as a joint tenant, (though perhaps repugnant to the grant, and to the nature of the estate which he took,) contains pretty clear indications that he was a partner with Boyce and his associates. The provisions of the indenture expressly recognize the mortgage to the City Council, and General Hamilton covenants and agrees with the parties to that instrument (who were previously partners,) “to conform in all respects to the articles of agreement executed between them, bearing date,” &c., “for the

² Ford v. Herron, 4 Mum. 316; M'Dermot v. Lawrence, 7 Serg. & Rawle, 438.

improvement of said property;" that is to say, of the property therein conveyed to him. Here, then, there was, upon the face of the only title he held, and by which alone he could sell, an explicit declaration of the existence of a partnership, and that he was a member thereof; that there were written articles of agreement, constituting the terms and conditions of their association, and that the partnership was for the improvement and sale of the land, one-fifth of which was sold to James Hamilton. When he applied to the defendant's testator, to become the purchaser, he exhibited his title, with the foregoing information spread upon the face of it. If Coster did not call for the title, it was his own reckless imprudence, against the consequences of which this Court is in no wise bound to protect him. If he had bought on a legal title, clear on the face of it, the case might have been different. But here was clear and explicit notice of the partnership and its objects, and that they related to the improvement and sale of the very land—and, consequently, that the share of James Hamilton was subject to the equities of the other partners on a settlement. They assert, in their answer, that their testator was positively assured, by the vendor, that there was no lien or incumbrance upon his title, and that, upon this assurance, their testator advanced his money. However this may be, he had the means of finding out the truth, which, having omitted to do, those who represent him have no right to complain.

It is ordered and decreed, that the complainants, as copartners of James Hamilton, have a lien on the share of the said James Hamilton, in the stock, rents and profits of the City Land Company, for the amount of his note for \$7,500, (and interest thereon,) discounted in the Bank of Charleston, on the 3d January, 1839, and endorsed by the Treasurer of the Company in behalf of the

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Company; and that the share of *the said James Hamilton, in the hands of the defendants, as assignees, is subject to said lien.

And it is further ordered and decreed, that it be referred to the Master (Laurens) to report the amount due on said note.

Copy of Indenture.

The State of South Carolina.

This indenture, made and executed this tenth day of June, in the year of our Lord one thousand eight hundred and thirty-six, between Ker Boyce, Henry W. Conner, Leroy M. Wiley, and George H. Kelsey, of the one part, and James Hamilton, of the other, all of the City of Charleston, and State aforesaid, witnesseth—

That whereas we, the said Ker Boyce, Henry W. Conner, Leroy M. Wiley, and George H. Kelsey, did, on the first day of April, in the year of our Lord one thousand eight hundred and thirty-six, purchase and

buy, of the Corporation of the City Council of Charleston, certain lots or parcels of land, commonly known as the Burnt Square, which will more fully appear by reference to certain deeds of conveyance executed by the City Council of Charleston to the aforesaid Ker Boyce, Henry W. Conner, Leroy M. Wiley, and George H. Kelsey, and which have been made of record in the office of the Register of Mesne Conveyances for Charleston, in Book —, page —.

Now, know ye, That for and in consideration of the sum of five dollars, to us in hand paid before the sealing and delivery of these presents, and a certain bond or obligation of the said James Hamilton, bearing even date with this indenture, in which he binds himself, and each and every of his heirs, executors, administrators and assigns, to pay us the sum of ninety-eight thousand six hundred dollars, conditioned for the payment of forty-nine thousand three hundred dollars, in the like instalments of principal, and at the same rate of interest, as we are jointly and respectively bound in our bond and obligation to the City Council of Charleston—have granted, bargained, sold and released, and by these presents we, the said Ker Boyce, Henry W. Conner, Leroy M. Wiley, and George H. Kelsey, do grant, bargain, sell and release unto the said James Hamilton one undivided fifth part of all that lot, piece or parcel of land, commonly called the Burnt Square, bounded on the west on Meeting street, on the south on north Market street, on the east on Anson street, on the north on Pinckney street, having such dimensions, divisions in lots, and such buttings from the intersections of the new streets

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proposed to be laid out, as will more *fully appear by reference to the survey hereunto annexed, marked A, which call for
feet front on Meeting street, hundred
feet on Pinckney street, hundred feet
on Anson street, and feet on north
Market street.

Together with all the undivided fifth part of all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in any wise incident or appertaining: to have and to hold all and singular the one undivided fifth part of the said premises unto the said Jas. Hamilton, his heirs, executors and administrators, to warrant and forever defend the said James Hamilton, and his heirs and assigns, against us and our heirs, or all persons whatsoever lawfully claiming or to claim the same or any part thereof.

Now, know ye, That it is the true intent and meaning that the said James Hamilton should be let into the purchase of the said Burnt Square in joint ownership with the parties, to the extent of one-fifth of the same, and to hold as joint tenant in all the uses, benefits, rents and profits of the same.

It is understood that the mortgage which the said Ker Boyce, H. W. Conner, Leroy M. Wiley and George H. Kelsey have made and executed, for the security of the City Council of Charleston, by reason of their purchase of the said Burnt Square, shall stand in full force and effect, without prejudice by this indenture, until the said James Hamilton shall have paid his fifth part of the aforesaid purchase money of the aforesaid Burnt Square, according to the terms of his bond, as above recited.

And I, the said James Hamilton, do bind myself, and each and every of my heirs, executors, administrators and assigns, to pay one-fifth part of all the instalments, principal and interest, according to the tenor and effect of my aforesaid bond, which, in its covenants and stipulations, correspond with the bond and obligations given to the City Council by the said Ker Boyce, Henry W. Conner, Leroy M. Wiley and George H. Kelsey. And I, the said James Hamilton, do moreover covenant and agree, with the aforesaid parties, to conform in all respects to the articles of agreement executed between them, bearing date the day of , in the year of our Lord one thousand eight hundred and thirty-six, for the improvement and sale of said property.

And the parties to this indenture mutually covenant and agree with each other to make such further titles and assurances as they may be advised to execute by their counsel learned in the law, not only for the security of this title of the said James Hamilton, but the perfecting the retrospective rights, interests and benefits of all and each of the parties to this indenture.

Witness our hands and seals at Charles-

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ton, on this tenth *day of June, in the year of our Lord one thousand eight hundred and thirty-six, and in the year of the Independence of the United States of America.

Ker Boyce, (Seal.)

H. W. Conner, (Seal.)

L. M. Wiley, (Seal.)

Geo. H. Kelsey, (Seal.)

James Hamilton, (Seal.)

From this decree the defendants appealed, on the following grounds:

1. Because the complainants were, with James Hamilton, tenants in common, and not copartners.

2. That this tenancy in common was not intended as a copartnership in lands, inasmuch as the share of each of the individuals was ascertained, and became a charge on him, exclusively, and not on those who were connected with him; and this was particularly the case with James Hamilton, who gave his separate bond for the one-fifth conveyed to him.

3. That the same principle was applied to contracts for improvements. Each became bound for his proportion, and the contracts

for the buildings and other improvements were made with a direct reference to the individual liability of each of the parties for his proportion, and all liability for the non-payment of this proportion was excluded by the others.

4. That advances thus made between those who were tenants in common of land, cannot be held as advances made by one copartner to another, but merely constitute an indebtedness from one individual to another.

5. That the articles of association were not recorded until after James Hamilton had conveyed to J. G. Coster, and therefore were no notice to the purchaser. And if J. G. Coster is affected with notice of such articles from what appeared on the title deeds to James Hamilton, nevertheless it is submitted that he is entitled to the protection of that portion of the agreement between the parties which provides that each shall be held exclusively liable for his share of the debt.

6. That the title of the said John G. Coster became perfect, as to a portion of the property, by the title deeds of James Hamilton to him—and to the other portion, the said J. G. Coster had acquired a lien by virtue of the mortgage to him, from the said James Hamilton. And these having been executed prior to the date of the note claimed to be set up against the property, did vest in the said J. G. Coster an absolute title as to one portion, and a valid lien as to the

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residue, which *could not be divested by any transactions between the said James Hamilton and the complainants.

7. Because the note was barred by lapse of time, and could not be set up against third persons, without proof of a promise to pay it: and inasmuch as the said J. G. Coster was a fair and bona fide purchaser without notice, no decree should have been made against his estate in the hands of his representatives, in proceedings for an account of an alleged copartnership, until James Hamilton had been made a party to the proceedings.

8. Because the original consideration, for which the note was given, was not a debt of any copartnership, but a debt of James Hamilton to the contractors for the buildings on the lands owned by him and his cotenants; that the contractors could have no equity to divest the title which J. G. Coster had acquired, nor can the complainants, who, having paid a private debt, are not entitled to claim against a bona fide purchaser without notice, any higher equity than attached to the original debt.

9. Because there was no evidence to show that the note claimed to be set up as a charge on the share in the hands of the representatives, was in any manner connected with the business of the City Land Company,

or that the proceeds thereof were either required or intended for the payment of improvements made on the land.

A. G. & E. Magrath, for the motion.
Petigru & Lesesne, contra.

PER CURIAM. This Court concur in the judgment of the Circuit Court, and the appeal is dismissed.

JOHNSTON, Ch., absent at the hearing.
Decree affirmed.

4 Strob. Eq. 37

GEORGE BUIST, Adm'r of James D. Sommers, and in His Own Right, v. HUGH P. DAWES and JOSEPH IOOR WARING, Ex'rs. of John W. Sommers, et al.

(Charleston. Jan. and Feb. Term, 1850.)

[Descent and Distribution \hookrightarrow 8.]

Testator, by his last will and testament, devised and bequeathed his real and personal estate to his wife, during widowhood, with remainder, in case of her death or marriage, to his mother for life, remainder to James B. P. for life, i. e., "the use thereof for life, and at his decease the said land, slaves and premises shall be, and is hereby vested in the male issue of said James; and, in default of such, in the issue female surviving him; and if a general failure shall be at the death of the said James, I give said land and slaves to my cousin J. W. S. on the same terms, conditions, limitations

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and reservations as this is made *liable to, in respect to James's interest therein, in pursuance of this my will; and should there be a total failure of issue (immediate) on the decease of the said J. W. S., I give the said lands and slaves, and the issue and the increase of the female slaves, to his (the said J. W. S.'s) brother, J. S., his heirs and assigns forever." The widow married; and James B. P. having died without issue, in the lifetime of testator's mother, at her death the estate passed into the possession of J. W. S. His brother J. S. died in his lifetime, intestate. The Court held that the ulterior limitations in the will were valid as to the personal estate;¹ that J. S. took a contingent interest in the same that was transmissible to his personal representatives; that at the death of J. W. S., without issue living, the said personal estate was distributable among them, and that those persons (parties to the bill) were to be regarded as the distributees of J. S., who would fall within that description at the period of his death, and his or her legal representatives.

[Ed. Note.—Cited in *Badger v. Harden*, 6 Rich. Eq. 148.

For other cases, see *Descent and Distribution*, Cent. Dig. §§ 33-39; Dec. Dig. \hookrightarrow 8.]

[Perpetuities \hookrightarrow 4.]

[Testator, after the decease of his mother, gave "the use" of the estate to A. "for life," and after his decease declared the same to be vested in the male issue of A., and, in default of such, in the issue female surviving him, and, if a general failure at the death of A., then over. Held, that the limitations over in the event of A.'s leaving no issue were inoperative

and void, whether regarded as contingent remainders or executory devises.]

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 23; Dec. Dig. \hookrightarrow 4.]

[Remainders \hookrightarrow 3.]

[A remainder cannot be limited on a fee, whether simple, qualified, or conditional.]

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 2; Dec. Dig. \hookrightarrow 3.]

[Wills \hookrightarrow 7.]

[All contingent estates, whether of real or personal property, and all springing and executory uses and possibilities coupled with an interest, where the person who is to take is known and ascertained, are devisable and transmissible. If they be of personal property, and there is an intestacy, they will be transmitted to the legal representatives, according to the rules of personal succession.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 11; Dec. Dig. \hookrightarrow 7.]

[Wills \hookrightarrow 614.]

[Cited in *Evans v. Godbold*, 6 Rich. Eq. 37; *Moore v. Paul*, 7. Rich. Eq. 364, to the point that a testator, after the decease of his mother, gave "the use" of the estate to A. "for life," and after his decease declared the same to be vested in the male issue of the said A., and in default of such, in the issue female surviving him, and if a general failure at the death of the said A., then over. Held, that the estate devised was a fee conditional at common law, that the will gave A. an estate for life, and at his death to his issue male, in their default, to his issue female, the issue taking by way of limitation.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1393; Dec. Dig. \hookrightarrow 614.]

[Wills \hookrightarrow 625.]

[Cited in *Selman v. Robertson*, 46 S. C. 268, 271, 24 S. E. 187, to the point that limitations that are utterly void as contingent remainders are often held to be valid as executory devises under certain circumstances. So a fee may be limited on a fee simple absolute, by way of executory devise, provided the contingency upon which it is to take effect or vest must necessarily occur within the period prescribed by the rule to prevent perpetuities; but an executory devise cannot be created after a fee conditional.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1447; Dec. Dig. \hookrightarrow 625.]

Before Dargan, Ch., at Charleston, Feb'y. Sittings, 1849.

Edward Perry, the maternal grandfather of Edward Tonge, the testator, left the following children, viz: Edward Perry; Martha, who intermarried with John Sommers; Susannah, who intermarried with Edward Tonge, the elder, and Sarah, who intermarried with ——— McPherson.

Edward Perry, son of Edward, died before Edward Tonge, the testator, and left four children, viz: Edward Perry, who died, without issue, before the said Edward Tonge; Mary Perry, who intermarried with John L. Frazer, survived him and died without issue, before the said Edward Tonge; James Boone Perry, deceased; and Ann Perry, yet living.

Martha Sommers died before Edward Tonge, the testator, leaving the following children, viz: Henrietta, who intermarried with Charles E. Rowand, the elder; Mary

¹ NOTE.—The questions as to the real estate were referred to the Court of Errors.

who intermarried with the Rev. Geo. Buist; John W. Sommers, and James D. Sommers.

Susannah Tonge, wife and widow of Edward Tonge, the elder, had one child, viz: Edward Tonge, the testator, and survived him.

Sarah McPherson died before Edward Tonge, the testator, and left one child, who intermarried with—— Alston, and died before the said Edward Tonge, leaving her husband, and one child, her daughter, Sarah or Sally, surviving her, who has intermarried with John Izard Middleton.

Henrietta Rowand died a widow and intestate, on or about April 1st, 1838, leaving the following children, viz: Charles E. Rowand, the younger; Robert Rowand; Thos. E. Rowand, who died intestate, without issue and unmarried, in June following; Martha S. wife of Alfred R. Drayton; and Mary

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*E., wife of Dr. Thos. A. Simons. Robert Rowand has administered on the estates of Henrietta Rowand and Thomas E. Rowand.

Charles E. Rowand, the younger, (son of Charles E. and Henrietta Rowand,) intermarried with Helen R. Robertson, and died January 6, 1839, without issue, leaving a will, (of which George Buist is executor,) making the following residuary bequest or disposition of his estate, and no other, viz: "All the rest of monies coming to me from the estate of my father, or from any quarter, I give and bequeath to my brother, Robert Rowand and family, for their ease and support"—and leaving, as his heirs and distributees, his widow, Helen R. Rowand, his brother, Robt. Rowand, and his sisters, Martha S. Drayton, and Mary E. Simons. Mrs. Helen R. Rowand, by deed, in his life-time, debarred herself of all claim on her said husband's estate, after his death.

Mary Buist died, on or about April 1st, 1845, leaving a will, (of which Geo. Buist is qualified executor,) which directs her residuary estate, in possession, expectancy or remainder, to be sold by her executor, and distributed as therein directed, and which, of course, includes her interest, if any, real and personal, derivable from or under the will of Edward Tonge, the testator.

Mrs. Mary Buist left surviving her, at her death, her daughters, Mary S. Lamb, wife of James Lamb, and Martha Buist; and her sons, George and the Rev. Edward T. Buist, and the children of her deceased son, the Rev. Arthur Buist—all of whom are legatees and devisees under her will.

James D. Sommers intermarried with Susan B. Farr, and died, on or about the day of , 1817, intestate and without issue, leaving, as his heirs and distributees, his widow, Susan B. Sommers, his brother John W. Sommers, and his sisters Henrietta Rowand and Mary Buist. Wm. McDow, who intermarried with the widow, administered

on the estate of James D. Sommers, and, since the death of Wm. McDow, Geo. Buist has administered, de bonis non, on the estate of James D. Sommers.

Susan B. Sommers, widow of James D. Sommers, intermarried with William McDow, and died, intestate, and without issue, on or about the day of , 18 , leaving, as her heirs and distributees, her second husband, William McDow, and her sister, Jane L. Waring, widow of Richard Waring. Thomas R. Waring (son of Richard and Jane L. Waring,) has administered on the estate of Susan B. McDow.

William McDow died, without issue and a widower, on or about the day of , 1839, leaving a will, of which Thos. R. Waring is qualified executor, devising one

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*moiety of his estate, real and personal, to Jane L. Waring, for life or widowhood, and, after her death or marriage, to be equally divided between Sarah F. Perry [wife of the Hon. Benjamin Perry, of St. Paul's] and Thos. R. Waring; the other half to the children of his brother James McDow, and Martha, his wife, of Lancaster district; and all the rest and residue of his estate, both real and personal, to be equally divided between the children of his said brother, James McDow, and Martha, his wife, share and share alike.

John W. Sommers died, unmarried and intestate, on the 5th day of January, 1848, leaving a will, devising and bequeathing his property (including the Tongeville plantations and negroes,) to various legatees and devisees, and appointing Geo. Buist, Hugh P. Dawes, and Joseph Ioor Waring, executors, all of whom have qualified as such.

Edward Tonge, the testator, intermarried with Ann and died, without issue, on or about the day of , 1809, leaving a will, (the same set forth in the pleadings,) and leaving as his only heirs or distributees, at the time of his death, his widow, Ann, and his mother Susannah Tonge. His widow intermarried with Gist, and died intestate, without issue, before Susannah Tonge and before James Boone Perry, her second husband surviving her.

James Boone Perry died, unmarried and intestate, on or about the day of , 1821 or 1822, before Susannah Tonge, and before the date of her will, leaving his sister, Ann Perry, his sole heir and distributee.

At the death of James Boone Perry, the only heir or distributee of Edward Tonge, the testator, then living, under the Act of 1791, was his mother, Susannah Tonge, (his widow being then dead)—his heir, at common law, at that time, is doubtful. His nearest of kin, at that time, ex parte materna, were his first cousins, Ann Perry, daughter of his uncle Edward Perry, and John W. Sommers, Henrietta Rowand, and

Mary Buist, son and daughters of his aunt, Martha Sommers. The kindred of Edward Tonge, *ex parte paterna*, are unknown.

At the death of John W. Sommers, the only heir or distributee of Edward Tonge, the testator, then living, was his first cousin, Ann Perry; and the only heirs and distributees of James D. Sommers, then living, were his seven nieces and nephews, the children of Henrietta Rowand and Mary Buist.

Susannah Tonge (mother of Edward Tonge, the testator,) died, a widow and without living issue, on or about the day of _____, 1828, leaving a will, dated September 25, 1822, and proved August 29, 1828, of which Charles E. Rowand, the elder, and John W. Sommers, both deceased, were qualified executors, among other things, be-

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queathing and devising the rest, residue and remainder of her estate, real and personal, to her nieces, Henrietta Rowand, Mary Buist and Ann Perry, and her nephew, John W. Sommers, who, at her death, were the only surviving heirs and distributees of her son, Edward Tonge.

On the death of Edward Tonge, the testator, in 1809, his widow, Ann, went into possession of the Tongeville lands and negroes, as tenant, for life or widowhood, under his will; on her intermarriage with _____ Gist, Mrs. Susannah Tonge succeeded her, as life tenant, under said will; and, on the death of Mrs. Susannah Tonge, in or before August, 1828, John W. Sommers went into possession, as tenant in remainder of both the said lands and negroes, and continued in possession until he died.

John W. Sommers, in his life time, used and disposed of the Tongeville lands and negroes, as if they were his own, not for life only, but absolutely and in fee simple, selling and giving away negroes, in his life-time, and, by his last will and testament, disposing of both lands and negroes, as if they were absolutely his own—he having had quiet and undisturbed possession of the same, from or before August _____, 1828, the time of the death of Mrs. Susannah Tonge, to the 5th day of January, 1848, the day of his own death, a period of near 20 years.

At the death of James D. Sommers, who died, as it was then believed, insolvent, (and, as was the fact, irrespective of his contingent interest, under the will of Edward Tonge,) he was seized and possessed, in fee simple, of a plantation or tract of land, called Golden Grove, in St. Paul's Parish, Colleton district, and of a few negroes and some other personalty.

After the death of James D. Sommers, and after the intermarriage of his widow with William McDow, she claimed and was allotted her dower in the real estate of her deceased husband, by assessment of a sum of money, in lieu thereof, as appears by certain

proceedings, in dower and judgment thereon, in the case of Wm. McDow and Susan B., his wife, demandants, against John W. Sommers, and others, defendants, duly entered of record, in the Court of Common Pleas for Colleton district, May 13, 1820.

On this judgment in dower, execution was duly sued out, and lodged in the office of the sheriff of Colleton district, and the plantation or tract of land, called Golden Grove, containing 1000 acres, more or less, was levied on and sold, by sheriff Oswald, of said district, to satisfy said execution, to the said William McDow, at and for the sum or price of \$400; and he received the said sheriff's title deed for the said plantation or tract of land, (dated Dec. 4, 1820, and recorded in the Clerk's office of Colleton district, book E, p.

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463,) and *the said plantation or tract of land still belongs to the undivided estate of the said Wm. McDow, or to the devisees thereof under his will.

The facts, in relation to Mrs. McDow's claim and assignment of dower, in the real estate of her first husband, were discovered, after the Chancellor's decree; and are now relied on to shew that Mrs. McDow having, in her life-time, elected to take, and having actually taken her dower, in the real estate of James D. Sommers, her first husband, deceased, was thereby debarred of all claim to any distributive or other share of his estate, real or personal, and could not therefore transmit the same to her heirs or distributees, or the persons answering that description, at the time of her death, viz: her second husband, William McDow, and her sister, Mrs. Jane L. Waring.

The will of Edward Tonge, dated March 10, 1805, with two codicils, dated respectively March 17, 1805, and February 24, 1809, among other things, devised and bequeathed as follows:

"I give and devise to my dearly beloved wife, Ann, for and during the term of widowhood, (and no longer,) the use of the plantation on which I reside, situate on Cane Acres aforesaid, containing, by a resurvey thereof, made in June, 1776, 1897 acres, having such form as is represented by a certain plan thereof, in Register's office, in the city of Charleston, book B, No. 7, p. 185. Also for the same time, the use of my plantation on Godfrey's Savannah, in Saint Bartholomew's Parish, and State aforesaid, containing 707 acres, (or thereabouts,) and having such form as appears in the aforesaid office, in book No. 6, p. 365. Also, for said term, the use of my following named negroes and slaves, (viz.) [a number of negroes by name,] being 73 in number, and [the] whole of my slave property. Also, my said wife shall have the use, for the aforesaid term, of all the future issue and increase of the females; also, the use of all the plantation carriages, tools and implements, and of all the planta-

tion horses, cattle, sheep and hogs, that may be on my Cane Acres plantation, at the time of my death, and thereto belonging, subject to the proviso and condition hereafter mentioned, (that is to say,) that she, my dearly beloved wife, shall, during her widowhood, or natural life, pay all taxes and public assessments, that shall be assessed, become due, or levied on or for the said plantations, slaves and premises, and well and sufficiently clothe and maintain such slaves, and keep up and maintain on the said plantations, respectively, the buildings thereon, and an equal number of cattle, horses, sheep, hogs, of equal value with those that shall be on and belonging to my Cane Acres plantation,

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at the time of my death, for the benefit of and to the intent that such number, with the said plantations, slaves and premises, and the future issue of the female slaves, may go, be delivered over and disposed of, after her marriage or death, to or for the benefit of my residuary legatees, or the persons hereinafter for that purpose mentioned."

"It is my will, notwithstanding any thing hereinbefore to the contrary, that if my new mansion house now building should be occupied by me, at the time of my death, all the household furniture that may be therein, or thereto belonging, at such event, shall be considered, and is declared by me, to be an inseparable member of the said mansion."

"I give and devise to my said mother, Susannah Tonge, for and during her natural life, after the marriage or death of my said dearly beloved wife, the use of all the lands and slaves, (excepting the negro man slave called Sago,) and of the future issue and offspring of the females, cattle, horses, sheep and hogs, plantation tools and implements, the use of which I have hereinbefore given to my said wife, during her widowhood only, and after the decease of the said Susannah, I give the said lands, slaves and premises, to my cousin, James Boone Perry, (the only surviving son of my uncle, Edward Perry, deceased,) the use thereof for life; and, at his decease, the said lands, slaves and premises, shall be, and is hereby declared to be, vested in the male issue of the said James, and in default of such, in the issue female surviving him; and, if a general failure should be, at the decease of the said James, I give said lands and slaves to my cousin, the said John Withingham Sommers, on the same terms, conditions, limitations and reservations, as this is made liable to, in respect to the said James' interest therein, in pursuance of this my will; and should there be a total failure of issue, (immediate) on the decease of the said John Withingham, I give the said lands and slaves and the future issue and increase of the female slaves, to his, the said John Withingham's brother, James Sommers, his heirs and assigns forever."

"And, further, it is my will, if the said James Boone Perry shall live to become possessed of the aforesaid lands, slaves and premises, and the future issue and offspring of the female slaves, in pursuance of this my will, that one-half income of the whole income, arising out of the profits of the said lands and slaves (that is to say, rents and productions of the labour of such slaves,) annually, shall be equally divided between the said James Sommers and John Withingham Sommers, until each of them shall have received seventeen hundred dollars, the respective payments to be made to each of them (in propria persona) and not otherwise."

The will annuls these, and makes other

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provisions, in the event of the testator's leaving issue, of course providing for such issue.

The codicil of February 24, 1809 directs as follows.

"It is my will and desire that if my new dwelling house, on the plantation I reside, should not be finished at the time of my decease, that any one of my named executors in the said will, who are executors thereof, and of this and the preceding codicil, who shall qualify and act, shall apply so much money belonging to my estate, either from crops or other sources, as shall be requisite to complete and finish the same, which sum so applied shall not exceed one thousand dollars. But, in my humble opinion, it will not require near that sum, provided frugality and economy is observed; and such executor shall be entitled to, out of my estate, for his trouble and attention, the sum of one hundred dollars."

"And, lastly, in the construction of my before recited will and these codicils, it will readily be perceived that no professional character has been consulted, or has had any agency in the draughts, and that although it has occupied many of my leisure hours to digest and to throw them in their present form, the said will, this and the preceding codicil, may, notwithstanding, appear crude and incorrect; but, having endeavoured in them to be plain and explicit as possible, even at the expense of prolixity, perhaps of tautology,—I hope and trust that no disputes will arise between the persons who are interested in them; but if, contrary to expectation, the case should be otherwise, from the want of legal expression or the usual technical terms, or because too much or too little has been said in the devises in them, to be consonant with law, my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial, disinterested and intelligent men, known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two; which three men, thus chosen, shall, unfettered by law or le-

gal construction, declare the sense of the testator's intentions, and such decision is, to all intents and purposes, to be as binding on the parties, as if it had been given in the Courts of Equity and Appeals, established in this State."

The bill is filed by George Buist, as administrator, *de bonis non*, of James D. Sommers, and in his own right, (he being also executor of John W. Sommers, of his mother, Mary Buist, and of Charles E. Rowand, the younger,) against Hugh P. Dawes and Joseph Ioor Waring, co-executors with him of John W. Sommers; Thomas R. Waring, as administrator of Susan B. McDow, and executor of William McDow, and in his own

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right as legatee and devisee of Wm. McDow; Benjamin Perry, and Sarah F. his wife, as legatees and devisees in remainder of William McDow; Jane L. Waring, as distributee of Susan B. McDow, and legatee and devisee of William McDow; Martha A. Gamble, wife of William J. Gamble, Margaret J. Curry, wife of Samuel Curry, Thomas McDow, John J. McDow, James H. McDow, Agnes H. McDow, and Martha L. Gettys, children and grandchild of James McDow, as legatees and devisees of William McDow, James Lamb and Mary S. his wife, Martha Buist, and the Rev. Edward T. Buist, devisees of Henrietta Buist, and distributees of James D. Sommers, at the death of John W. Sommers; Robert Rowand, Alfred R. Drayton, and Martha S. his wife, Dr. Thomas Y. Simons, and Mary E. his wife, as distributees of Henrietta Rowand, and of James D. Sommers, at the death of John W. Sommers, and Robert Rowand, as administrator also of Henrietta Rowand; Helen R. Rowand, widow of Charles E. Rowand, the younger; and Ann Perry, as sole heir and distributee of Edward Tonge, at the death of John W. Sommers, and sole heir and distributee of James Boone Perry.

The objects of the bill were to obtain constructions of the wills of Edward Tonge and John W. Sommers, and of the rights and interests of the several parties entitled or interested under the same, and an account and settlement of the estates of James D. Sommers and John W. Sommers, and of the other estates concerned; and it especially claims that, on the death of John W. Sommers, without living issue, the negroes held by him devolved, under the limitations of Edward Tonge's will, on the complainant, as administrator, *de bonis non*, of James D. Sommers, deceased, and prays that Hugh P. Dawes and Joseph Ioor Waring, co-executors with him of John W. Sommers, should be decreed to deliver up the said negroes to him, in his capacity of administrator as aforesaid.

The answer of Hugh P. Dawes and Joseph Ioor Waring, co-executors with complainant of John W. Sommers, claims that his executors are entitled to retain the whole

Tongeville lands and negroes as the absolute property of John W. Sommers, or at least a portion of them, in right of their testator, as an heir and distributee of James D. Sommers, and they must submit the question, in the latter case, whether the legacies of their testator, charged on the Tongeville property, are to be regarded as revoked, or how and in what order and proportion they are to be paid.

The answer of James Lamb and Mary S. his wife, Martha Buist, the Rev. Edward T. Buist, Robert Rowand, Dr. Thos. Y. Simons and Mary E. his wife, and Alfred R. Drayton and Martha S. his wife, claims that John W. Sommers took but a life estate in the real

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and personal estate, held by him, *under the will of Edward Tonge, with remainder in fee, on his death without issue living at his death, to his brother, James D. Sommers, who died in 1817, without issue and unmarried; and that these defendants, being the nieces and nephews (the children of the deceased sisters,) of the remainderman, and the only persons answering the description of his heirs and distributees, at the time of the happening of the contingency contemplated by the testator, viz:—the death of the life tenant, John W. Sommers, without issue, at his decease, are entitled, among them, to the whole landed and personal estate.

The answer of Thomas R. Waring, administrator of Susan B. McDow, claims that John W. Sommers was but life-tenant, under the will of Edward Tonge, and James D. Sommers, the remainderman in fee; and that, on the death of John W. Sommers, without living issue, the estate, real and personal under the will, devolved on James D. Sommers, who died in 1817; and that the same became distributable, under our statute of distributions, between and among the persons who were heirs or distributees of James D. Sommers, at the time of his death, and not among those who answered that description at the death of John W. Sommers; and that, in this view of the case, the whole estate, real and personal, devolved, one-half on Susan B. Sommers, (afterwards McDow,) the widow of James D. Sommers, and the other half on his sisters, Henrietta Rowand and Mary Buist, and his brother, John W. Sommers—and this defendant claims, as her administrator, the share of the personalty devolving on his intestate.

The answer of Jane Ladson Waring, Benjamin Perry and Sarah F. his wife, and the children and grandchild of James McDow, sets up the same claim, the first named claiming as sister and distributee of Susan B. McDow (who died intestate and without issue,) and the others as legatees and devisees of William McDow, the second husband, and one of the distributees of Susan B. McDow.

The answer of Ann Perry claims the whole estate, real and personal, under Edward

Tonge's will, by reverter, as sole heir and distributee of testator, at the death of John W. Sommers, or as sole heir and distributee of her brother, James Boone Perry.

Helen R. Rowand, widow of Charles E. Rowand, the younger, files a disclaimer of all interest or estate in the Tongeville property, real or personal.

[For subsequent opinions, see 3 Rich. Eq. 281; 4 Rich. Eq. 421.]

The following is the Circuit decree:

Dargan, Ch. The first question that arises, in the natural order of this discussion, is,

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what estate was devised to *James Boone Perry by the testator's will. After the decease of the testator's mother he gives James Boone Perry "the use" of the estate "for life, and after his decease the said lands, slaves and premises shall be, and is hereby declared to be vested in the male issue of the said James, and in default of such, in the issue female surviving him; and if a general failure should be at the decease of the said James," then over. This clause in regard to the real estate would create an estate tail male, remainder an estate tail female in James B. Perry, under the statute de donis, and in South Carolina it creates a fee conditional. I do not think that the testator's having given "the use" of the estate to the first taker, can vary the construction. In *Hinson v. Pickett*, 1 Hill's Eq. R. 38, the word 'lend' was construed to be synonymous with 'give,' and in *Waller v. Ward*, 2 Speer's R. 793, it is said that "the term use might sometimes afford argument for an intention to give only a life estate, but it is of no avail in the inquiry whether the generality of the phrase, 'lawful issue of the body,' has been tied up by the subsequent clause." It is moreover obvious that, under the Statute of Uses, the legal estate must follow the use, under the magical operation of that statute. I read the clause, therefore, as giving the estate to James Boone Perry for his life, and declaring that, at his death, it shall be vested in his male issue, and in default of such, in his female issue. The issue, if there had been any, under the rule in *Shelly's case*, would have taken by way of limitation and not as purchasers. The fact that the testator gave only a life estate to James B. Perry, will not affect the interpretation. It may be conceded that he intended to create a life estate merely in the first taker. The rule is beyond the control of intention when a proper case arises for its application. It is of absolute and peremptory obligation, and enlarges the life estate (notwithstanding the intention) into an estate of inheritance, and clothes the tenant for life with the power of defeating the rights of those to whom the estate is limited, by fine and recovery, and by feoffment. It is thus in estates tail. In a fee conditional, after the birth of issue capable of in-

heriting, the issue may be barred by any deed of the tenant for life which would operate as a conveyance.

Though this celebrated rule had its origin in feudal ages, and was doubtless based, in part, on feudal usages and principles, the inexorable operation which has been given to it by modern judges, may be vindicated not only by the necessity of adhering to a rule of property, which has been so long established, but of adhering to the manifest "distinctions between descent and purchase, and to prevent title by descent from being stripped of its proper incidents and disguised with the qualities and properties of a purchase."²

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In the language *of Lord Thurlow, in *Jones v. Morgan*, "Whoever takes in the name of an heir, must take in the quality of an heir." I take it then as indisputable, that the estate devised (I am of course still speaking of the real estate,) to James Boone Perry was a fee conditional at common law.

The next question to be considered is, whether the estate limited after the failure of the issue of James B. Perry, first to John Withingham Sommers, and then over to James Sommers, can be sustained, either as a contingent remainder or executory devise; or, in other words, whether a contingent remainder or an executory devise can be limited after a fee conditional. In regard to the first branch of the proposition, I need only to say, that innumerable decisions and authorities, both in England and the United States, without any respectable opinion to the contrary, concur in the establishment of the doctrine, beyond the shadow of a doubt, that a remainder cannot be limited on a fee, whether simple, qualified, or conditional. Limitations that are utterly void as contingent remainders, are often held to be valid as executory devises under certain conditions and circumstances. And a fee may be limited upon a fee simple absolute, by way of executory devise, provided the contingency upon which it is to take effect, or vest, must necessarily occur within the period prescribed by the rule for the prevention of perpetuities.³ And were the question a new one, or were I at liberty to speculate, I might inquire if there were any valid reason why an executory devise may not be created after a fee conditional as after a fee simple, and under the same modifications and restrictions. But the contrary doctrine is established by a series of decisions in this State, and the question, it appears, is not open for discussion. In the case of *Bedon v. Bedon*, 2 Bail L. 231, (where the estate to Stobo Bedon was construed to be a fee simple defeasible,) it is said "if the estate to Stobo Bedon is construed to be a fee conditional, the estate in remainder to Richard B. Bedon

² Har. Law Tracts, 489.

³ 1 Bro. 206.

cannot take effect as a contingent remainder; for it would be a fee mounted on a fee, and therefore void. It could not operate as an executory devise, for if the devisee takes an estate in fee conditional, the limitation would be after an indefinite failure of issue capable of taking per formam doni."

In the case of *Mazyck v. Vanderhorst*, Bail Eq. 48, the devise was of real and personal estate to the testator's daughter, and to the heirs of her body forever; but if she should depart this life leaving no lawful heirs of her body, then over to his other daughter Mary Woodberry's eldest son, &c. The opinion of the Court was delivered by that able and learned jurist, Judge Nott. And the Court, observing the distinction made by Lord Macclesfield in *Forth v. Chapman*,

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held the limitation valid as to the personal estate, and too remote and void as to the real estate. The devise in this will was held to create in the first taker a fee conditional in this State, and what would have been a fee tail under the statute de donis. It was decided that the limitations over could not be supported as a contingent remainder, and in accordance with the decision in *Forth v. Chapman*, and *Dainty v. Dainty*, 6 T. R. 307, it was solemnly adjudged, that the limitation over, as to the real estate, was after an indefinite failure of issue, and could not be sustained as an executory devise.

In the case of *Adams v. Chaplin*, 1 Hill's Eq. R. 268, it was held that the devise of Chaplin, the elder, to John Chaplin, the younger, constituted a fee simple at common law. And Chancellor Harper says, "it is clear that the limitation over to the testator's brother, William Chaplin, was too remote and void, and could not be sustained as an executory devise. In the case of *Bailey v. Seabrook*," [Rich. Eq. Cas. 419,] he observes, "decided by me at Charleston, I considered the question whether a remainder could be limited after a fee conditional, and decided that it could not."

Deas v. Horry, 2 Hill's Eq. 244, though an authority directly to the effect that a contingent remainder cannot be limited after a fee conditional, does not bear upon the question whether an executory devise may not be so limited; for there was no feature in the limitations of that will which gave them the semblance of an executory devise.

In *Whitworth v. Stuckey*, 1 Rich. Eq. 404, the testator, John Baxter Fraser, devised the land to his son for and during the term of his natural life, and at his death to the lawful issue of his body; and if he should die without lawful issue living at the time of his death, then over to his other sons. The defendant had sold the land to the complainant, who filed his bill against the defendant for a rescission of the contract, on the ground

that the title was defective in consequence of the limitations of John Baxter Fraser's will, and of fraud in the concealment of those defects of title by the vendor. The case was heard by Chancellor Harper, at Sumter, June, 1843, who dismissed the bill. The decree was affirmed by the Court of Appeals, on two grounds; one of which was, that the will of John B. Fraser as to the land in question created a fee conditional, that the rule in *Shelly's case* applied, that the issue took nothing as purchasers, and that the title was good. It is true that there were other important questions discussed in the case. It was adjudged that, where a purchaser remains in the undisturbed possession of the land, he cannot maintain a bill in this Court for a rescission of the contract on account of an outstanding title, unless on the ground of fraud. Fraud was charged in the bill, and the Chancellor, in the appeal decree, admitting the sufficiency of fraud to entitle the

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complainant to relief, observes, "it may not be necessary to conclude any thing on this subject. The case would be remanded, perhaps, for the purpose of hearing evidence on the subject of fraud, but that we are with the defendants on the limitations in the will of John Baxter Fraser." The questions involved in the case, therefore, turned, in the judgment of the Court of Appeals more especially, on the construction of the will, and this was in truth the only issue decided. For upon the fraud as a question of fact, the Court expressed no opinion and concluded nothing. *Whitworth v. Stuckey* is, therefore, an authoritative case, and is in harmony with the series already cited and remarked upon.

I will now proceed to consider the case of *Williams v. Caston*, 1 Strob. L. R. 130, so confidently quoted and relied on in the argument against the claim of Ann Perry. The testator Samuel Caston devised the land in dispute to his daughter Elizabeth Caston, (who afterwards intermarried with one Williams,) during her natural life, and then to descend to her issue; and if she should die without any living issue, her share to return back to the testator's living heirs, share and share alike. There is an analogy between the foregoing provision of Samuel Caston's will, and the clauses of Edward Tonge's will, which we are considering. But there is none whatever in regard to the questions submitted to the Court in the two cases. An issue as to the validity of the executory devise over to the living heirs of the testator, on the event of his daughter Elizabeth dying without leaving issue, was not made, and could not have been made, for Elizabeth had issue who were living, and who were the plaintiffs in the case, asserting their claim (their mother being dead without having aliened) to the land against a mere stranger and trespasser. The result of the case could not have been

otherwise than reported. For it is clear that the plaintiffs would have been entitled to recover, whether they were considered as purchasers under the will of Samuel Caston, or whether their mother took a fee simple or a fee conditional under that will. If they were purchasers, they could have claimed in their own right. If their mother took a fee simple, as her heirs at law, they were entitled to maintain their action; and, if she took a fee conditional, her children were of course entitled to claim *per formam doni*. Thus the two cases present no analogy in the questions before the Court; and, in *Williams v. Caston*, the construction of the will of Samuel Caston was not considered, because unnecessary to be considered. Wardlaw, J., concurring in the result, observes, "In the case, the questions concerning the construction of the devise to Elizabeth Caston, have not been at all argued. I do not assent to some of the observations made about them, and doubt as to the conclusion." Indeed, there appears to

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my mind a confusion and inconsistency in the opinion of the Appeal Court. In the first part, there appears to be an expression of opinion in harmony with the cases which I have cited, and a reference to some of the same cases. I quote the language of the Court in delivering that opinion: "The devise presents three objects of testator's benefaction: first, his daughter; next, her issue; and then his living heirs, if she died without any living issue. If effect were given to the devise in its popular sense, the daughter would take an estate for life; her issue, that is, her children and grand-children, would take an estate in fee, in remainder; and, if she left no such issue living, the land would revert to the living heirs of the testator, living at her death, as tenants in common." Proceeding to show that the popular sense was not the true construction, the Judge remarks: "But, in giving effect to devises, the Courts are guided by artificial rules of construction, which to some extent control the particular intention. Thus, under the devise to Elizabeth Caston for life, and then to descend to her issue, the life estate and remainder are merged in an estate of inheritance, in the first taker, by the rule of *Shelly's case*. Issue and heirs of the body, when construed as words of limitation, have the same meaning, and the terms of the devise would vest a fee conditional in Elizabeth Caston. After a fee conditional, no remainder or executory devise can be limited." Such is the language of the Judge who delivers the opinion of the Court. And the opinions, expressed in the passages quoted, are consonant with what may be considered firmly established principles of the law of this State, and I cannot conceive how that opinion is to be reconciled with the subsequent adoption of what had previously been considered the popular and

erroneous sense, or construction.⁴ The point decided, however, was that the plaintiffs were entitled to recover the land on the strength and solidity of their title. Beyond the question immediately at issue, the opinion was speculative in its character, and the weight, that such an opinion is entitled to, is diminished by the fact that the questions arising on the construction of the devise were not argued, and, probably, not considered by the Court.

In the construction of Samuel Caston's will, the limitation over might possibly have been supported as an executory devise, on the force of the words that the estate was to return back to the testator's living heirs, "share and share alike," as importing a tenancy in common. The case of *Doe ex Dem. Gilman v. Elvey*, 4 East, 313, would afford some countenance to such construction.

But the very fact that the decision in that case is placed upon the effect of the words "equally to be divided among them," with a limitation "to his, her or their heirs," without reverting to the limitation over, in the event

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of the first taker *not leaving issue living at the time of his death, amounts to the strongest confirmation of the rule so well established in the English Courts.

Adhering to what I conceive to be the well-settled principles of law upon the subject, which I have no authority to question, and against what I conceive should have been the rule governing cases like the present, I am of the opinion that the devise of Edward Tonge gave the real estate in question to his wife, during widowhood, with remainder on her marriage, to his mother for life, remainder in fee conditional to James Boone Perry: that the limitations over, on the event of his leaving no issue, are inoperative and void, whether regarded as contingent remainders or executory devises: that James Boone Perry having died without leaving any issue to take *per formam doni*, there is a reverter to the right heirs of the testator: and that Ann Perry, being the sole surviving heir at law of Edward Tonge, is entitled to the whole real estate, described in the pleadings, and it is so adjudged and decreed.⁵

In regard to the disposition of the personal estate, my interpretation of the will is different. Words which, in reference to lands, would create a fee conditional, would, without qualification, give the first taker an absolute estate. But words constituting a fee tail, or fee conditional, as to the real estate, oftentimes admit of a construction that gives personal property to the issue as purchasers, creating limitations over by way of executory devise; as in *Forth v. Chapman*, *Mazyck v.*

⁴ *Adams v. Chaplin*, 1 Hill, 267. *Mazyck v. Vanderhorst*, Bail. Eq. 48; *Deas v. Horry*, 2 Hill Eq. R. 248.

⁵ *Forth v. Chapman*, *Shaw v. Weigh*, Stra. 798; *Richards v. Bergavenny*, Vent. 524.

Vanderhort, and other cases that may be cited. In these cases a rule of construction prevailed, which, on the same words, sent the real and personal estate in two directions. The limitations in Edward Tonge's will, as to the personal estate, are not prescribed to take effect after an indefinite failure of issue; but there are qualifications, which bring them within the rules of law, which are directed against perpetuities. Thus, James Boone Perry takes an estate for life, and, at his decease, it is to be vested in his male issue. The period of his death, then, is the time at which the estate of his male issue is to vest; a period within the rule certainly; and, in default of such issue, (a default which, of course, must take place at his death) it is to vest in his issue female. What issue female? The issue female surviving him. (James Boone Perry.) The words, surviving him, still more strongly fix the period at which the limitation to James Boone Perry's issue is to take effect. "And, if a general failure shall be at the death of the said James," then over to John Withingham Sommers, "on the same terms, conditions, limitations and reservations." And, if there should be a total failure of issue immediately on the decease of the said John Withingham Sommers," then

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over "to James Sommers, *his heirs and assigns, forever." I think the words here employed as expressive of time and contingencies, on which these several limitations are to take effect, must receive the same construction, and have the same operation, as if the words had been "if the said James B. Perry," or "if the said John W. Sommers, should die without leaving any issue living at the time of his death." In which case, according to innumerable authorities and decisions, the previous direct bequests to the issue would be qualified, so as to make them take as purchasers, while the ulterior limitation over is so circumscribed and defined, as plainly to show that it must take effect, if at all, within a life or lives in being, or twenty-one years after.

My opinion, therefore, is, that the ulterior limitations in the will of Edward Tonge are valid as to the personal property. And it remains to be seen who are the persons entitled to a distribution thereof. James B. Perry, as we have seen, died in the lifetime of the tenant for life, without issue and without having had possession of the estate. At the death of the testator's mother, the estate, real and personal, passed into the possession of the next in the order of limitation, John W. Sommers, who died in 1848, without issue. His brother, James Sommers, had died some years before. On the death of John Sommers, "immediately," "if there should be a total failure of issue at his decease," the estate was to go to "his brother, James Sommers, his heirs and assigns forever." James Sommers, then, if

now living, would be the person who would be entitled to take the personal estate. My opinion is, that James Sommers took a contingent interest that was transmissible to his personal representatives. It was a possibility coupled with an interest. The rule is, that all contingent estates, whether of real or personal property, and all springing and executory uses and possibilities coupled with an interest, where the person who is to take is known and ascertained, are assignable, descendible, devisable and transmissible. If they be of personal property, and there is an intestacy, they will be transmitted to the legal representatives, according to the rules of personal succession. As James Sommers died intestate, this personal estate must go into the hands of his administrator.

The next question that comes up is, how is the estate to be distributed, and who are to take as the distributees of James Sommers? Are those persons to be regarded as his distributees, who could make themselves such at the happening of the contingency on which his estate depended, or those only who would fall within that description at the period of his death? Which class of persons would take, if it were a case of partition of real estate, (from the view which I have taken as to the disposition of the land) I

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am not under the *necessity of deciding. Whether the phraseology of our statute of distributions should be considered as having modified the English canon of descent, *seisina facit stipitem*, so as to entitle those who were heirs at law of the contingent remainderman, at his death, to take, rather than those who would represent that character on the vesting of the estate, is a question which has not yet been settled, and one which, to my mind, wears a somewhat embarrassing aspect. Upon that question I express no opinion. But, in regard to the personal estate, as affected by this question, there appears to be no difficulty. In the argument, there was a pretty general agreement of opinion among the counsel that those only are entitled to the personal property who were distributees at the death of the intestate, James Sommers. And this is my opinion.⁶ It is therefore ordered and decreed, that distribution be made of the personal property, which is hereby adjudged to be the estate of the said James Sommers, among those persons, parties to this bill, who represent the character of distributees at the time of his death, or his or her legal representatives. It is further ordered and decreed that orders may be applied for from time to time to carry into effect this decree. It is also ordered that each party pay his own costs.

The only other question that I am to consider is one which arises out of the will of

⁶ 1 Williams on Ex'ors. 238, 936.

John Withingham Sommers, the person last possessed of the estate. He, believing that he was a rightful owner in fee of the Tongeville property, real and personal, disposed of the whole of it by his will. He has bequeathed several pecuniary legacies, to wit: To Hugh P. Dawes, \$5000; to Ann B. Perry, \$1000; and to

\$1000; all to be paid out of the Tongeville property. And it is contended that, inasmuch as those legacies are charged upon the Tongeville property, all of which the testator believed to be his own absolutely, when, in fact, he was entitled to it for life, and only to one-sixth of the personal estate in fee as one of the distributees of James Sommers, these legacies, under the circumstances, ought to be considered as revoked. I have not sufficient data by which to decree upon this question: I incline to the opinion that there should be an abatement. But I have not had before me the will, nor do I know what are the dispositions which he has made of the corpus of the property, nor whether he had other property besides the Tongeville estate. I should be infinitely perplexed were I to attempt to decide this question without being illuminated as to the facts. This question is, therefore, reserved, and it is ordered that the master (Laurens) do inquire and report the provisions of John W. Sommers' will, what estate he died possessed of, other than the Tongeville property, and any special matter.

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*The parties, defendants named in the bill, as claiming under Susan B. Sommers, one of the heirs of James D. Sommers, at the time of his death, appealed from the decree of his Honor, upon the grounds following, and asked that the same might be modified accordingly, to wit:

Because his Honor erred in decreeing that the real estate, devised by Edward Tonge, in 1805, reverted to Ann Perry, upon the death of Susannah Tonge, and insist that the true construction of said will gave, after the determination of the estates of the wife and mother of Edward Tonge, only a life estate to James Boone Perry, in the real as well as personal estate, with a contingent remainder in said real estate, to such issue male as he might leave surviving him, intended to vest absolutely in such male issue surviving at the period of his death; and, in default of such male issue surviving, to any issue female surviving, to vest absolutely at his death, and, in default of these, to John Withingham Sommers for life, and then over, immediately at his death, to any issue male whom he might leave surviving, absolutely, as above—in default of such, to the issue female as above, and, in default of these, then over absolutely to James D. Sommers in fee. The effect of this, they insisted, was to give to James D. Sommers, on the death of Edward Tonge, a contingent remainder in said realty, constituting a present interest in the realty, though to be en-

joyed in future, which interest was transmitted, the one half to his widow; that this transmissible interest, at her death, descended, under the statutes, to her heirs, to wit: one moiety to her sister, Mrs. Waring, and the other moiety to her husband, William McDow; that this latter moiety passed, under McDow's will, to the devisees therein named, and that Mrs. Waring and said devisees are now entitled to a moiety of the realty, under the will of the said Edward Tonge.

Peronneaus & Hayne.

Solicitors for Said Defendants.

The administrator of James D. Sommers appealed from the Chancellor's decree, on the following grounds:

1. That the real estate of Edward Tonge is, by his will, well devised over, on the deaths of James B. Perry and John W. Sommers, without leaving issue, to James D. Sommers in fee.

2. That Ann Perry is not entitled, as the decree supposes, to the real estate, because the limitations over to John W. Sommers and James D. Sommers are good—and, if those limitations are not good, she is not entitled, because, at the death of James B. Perry, she was not the next heir of the testator—and, if she had been the next heir

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of the testator, *at the death of James B. Perry, she is not entitled now, because the adverse possession of John W. Sommers, for upwards of ten years, has barred her right—and also the right of any other person claiming as such heir.

3. That both the real and personal estate of testator, on the death of John W. Sommers, without issue, passed, under testator's will, to James D. Sommers, and are distributable among the persons answering the description of heirs or distributees of James, at the death of John, and not among those answering that description at the death of James, as decreed by the Chancellor in relation to the personalty.

4. That the decree as to each party paying his own costs should be modified, several of the defendants being minors, one having filed a disclaimer, and several others having been made parties only to quiet the title to the property.

R. Yeadon & J. L. Petigru.

Appellant's Solicitors.

The executors of John W. Sommers appealed, on the grounds:

1. That their testator, having gone into possession of the real and personal estate in litigation, in August, 1828, and having held and enjoyed quiet and peaceable possession of the same, as his own in fee simple and otherwise absolutely, from that time until his death, in January, 1848, a period of nearly twenty years, and having disposed of the same as his own, by his last will and testament, his title to the same, by possession and otherwise, was complete and infeasible, and cannot now be disturbed.

2. That his Honor, the Chancellor, erred in supposing that the will of John W. Sommers was not before him, and should have decided the questions raised under the said will, viz: 1. Whether, if the whole Tongeville plantation and negroes were not the property of John W. Sommers, the legacies bequeathed by him, in the belief that the whole estate was his, are void, or are only to abate? 2. Whether the legacies payable out of the Tongeville plantation and negroes, if not void, are to be paid out of testator's estate generally, or only out of the portion of the Tongeville negroes (one-sixth) adjudged to him by the Chancellor? 3. Whether the legacy bequeathed to Hugh P. Dawes is to be paid in preference to the other legacies, or any and which of the other legacies.

Macbeth,

Solicitor for Appellant.

DARGAN, Chancellor, delivered the opinion of the Court.

The circuit decree adjudged the ulterior limitations in Edward Tonge's will to be valid as to the personal estate, and that, on the death of John Withingham Sommers,

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without issue living at his death, the next in succession, James D. Sommers, was entitled to take the said personal property, by way of executory devise. On the question as to how the personal estate was to be distributed, and who were to take as the distributees of James D. Sommers, the Circuit decree adjudged that those persons were to be regarded as his distributees who would fall within that description at the period of his death. And, accordingly, it was ordered and decreed, that distribution of the said personal estate should be made among his distributees (parties to the bill), who would represent that character at the time of his death, and his or her legal representatives.

This Court fully concur with the Chancellor in the views he has taken of that branch of the case, and for the reasons which he has given. It is, therefore, ordered and decreed that, in these respects, the decree of the Circuit Court be affirmed.

Subsequently to the hearing of the cause, and the filing of the decree, the complainant, by the consent of parties, has amended his bill. In the amended bill, the complainant has raised the question whether those parties, who now represent the interests of the late Mrs. McDow, (who was the widow of James D. Sommers) are entitled to any part of the estate devised, under the will of Edward Tonge, and now decided to belong to, and ordered to be distributed as a part of, the estate of the said James D. Sommers. It is urged by the complainant, and by some of the defendants, who are adverse in interest to the representatives of Mrs. McDow, that the representatives of Mrs. McDow are not entitled to a distributive share of said

estate, because, on the death of her husband, James D. Sommers, she took her dower in his real estate. It is contended that she has elected, or, at all events, her having taken her dower must be regarded as a satisfaction of any claim on her part under the Statute of distributions. It is scarcely necessary to remark that this Court does not possess original, but only appellate jurisdiction. And, in the amended bill, new questions of law and fact are raised, which have never been heard or decided by the Circuit Court. How can this Court entertain a question which is not brought before it as an appeal? To do so would be utterly to confound and obscure all the distinctions between the original and appellate jurisdiction of this Court. Yet, as the parties have consented to an amendment of the bill, in which these new issues of law and fact are made, there is no indisposition, on the part of the Court, that those issues should be fairly tried in the proper forum. It is therefore ordered that this part of the case be remanded to the Circuit Court for a hearing. In regard to the construction of the will of Edward Tonge, as to the real

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estate, and as to what estate James *Boone Perry took in said estate under said will, whether he took a fee conditional therein, and, if so, whether there could be a limitation thereon, by way of executory devise, to John Withingham Sommers—and, if he died without issue, to James W. Sommers—it is thought advisable that the case be referred to the Court of Errors, and it is so ordered and directed.

In all other respects, the Circuit decree is affirmed, and the appeal is dismissed.

DUNKIN, CALDWELL and JOHNSTON, CC., concurred.

Decree modified.

4 Strob. Eq. 58

DAVID L. THOMSON et al. v. JOSEPH J. PORTER, Administrator of Mary Porter.

(Charleston. Jan. and Feb. Term, 1850.)

[Evidence \hookrightarrow 354, 376.]

When a merchant or shop-keeper relies upon his books as evidence of his sale and delivery of goods, he must produce his original entries, which must be such as are usually made in the course of business and trade, and he is competent to prove his own entries, and the delivery of the goods. This rule, however, does not apply to the case where the goods are taken up on an order, or where they are entered in a pass book, and in either case delivered to a third person, and not to the purchaser; there the plaintiff must furnish other proof of the sale and delivery of the goods, than his original entries, which cannot supply the production of the order, or the pass book, which would be the best evidence to establish the contract. If these be lost, or destroyed, then the common law rule of proving their existence, contents and loss, must, if required, be enforced. So in the case of a

merchant or shop-keeper making the entries himself from the statement of his clerk, the latter must prove the delivery of the goods, and the former is incompetent to establish it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1438, 1449, 1632; Dec. Dig. ☞ 354, 376.]

[Witnesses ☞ 268.]

The law which grants the extraordinary privilege to a merchant or shop-keeper to prove his account when he makes the sale, entry and delivery of the goods, does not prohibit or restrict a defendant from ascertaining, by a cross examination, the circumstances under which the entries are made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. ☞ 268.]

[Evidence ☞ 383.]

Proof of entries in the books of a firm being in the handwriting of a deceased copartner, and of their being made in the regular and usual course of business, is sufficient to raise the presumption that the goods were sold and delivered to the alleged purchaser, and must prevail pro tanto, unless it be rebutted by proof on the part of the defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1476, 1660-1677; Dec. Dig. ☞ 383.]

Before Johnston, Ch., at Gillisonville, Feb. Sittings, 1849.

Mary Porter, of St. Helena Parish, widow, died in October, 1840, intestate, leaving surviving her six children, two of mature age, one of whom had married the defendant David L. Thomson some years previously, and the other four infants. Shortly after her death, Thomas Talbird, Sr. administered

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on *her estate, and continued in the administration until his death in September, 1843, leaving his son, Thomas Talbird, Jr. his executor. Joseph J. Porter then became administrator de bonis non of her estate.

In the lifetime of Mrs. Porter, Thomson, her son-in-law, was said to have received and disbursed as her agent, considerable sums of money. He was at the same time a merchant in Beaufort, in business with one James Thomson, under the firm of D. L. & J. Thomson. With this firm, Mrs. Porter contracted, as it was alleged, sundry store accounts. Neither Thomson's transactions as her agent, nor Mrs. Porter's accounts with the firm of D. L. & J. Thomson, were settled at the death of Thomas Talbird, Sr. It also appears that Thomas Talbird, Sr. had on one occasion in his lifetime, put the four infant children of his intestate to board and lodge with Thomson, under a contract for that purpose, which brought him considerably in debt to Thomson.

On the 7th of October, 1844, Joseph J. Porter, as administrator de bonis non of Mrs. Porter, filed his bill for account and injunction against David L. Thomson, as agent of his intestate, and Thomas Talbird, Jr. as executor of Thomas Talbird, Sr., charging, among other things, Thomson with a large balance in hand in favor of his intestate, and

setting forth his insolvency, as well as the debt of Thomas Talbird, Sr. to Thomson. This last debt, which it was alleged Thomson was about to put in suit, the bill prayed that Thomson might be enjoined from collecting, and the representative of Thomas Talbird enjoined from paying, in order that he (Porter) might have the benefit of it, by way of discount against the balance charged by the bill to be due by Thomson to his intestate's estate, it having been understood, (the bill alleged) at the time of the contract, and always afterwards by Thomson, that said debt was to be paid in this way only.

The bill was taken pro confesso against Thomas Talbird, Jr. Thomson filed his answer on the 24th of February, 1845, denying, among other matters, the plaintiff's allegations as to his liabilities as agent of his intestate, and the largeness of his indebtedness. He admitted a contract with Thomas Talbird, Sr., for boarding and lodging the infant children of Mrs. Porter, but denied that he ever had any understanding or agreement with Thomas Talbird, Sr., to the effect pretended by complainant, or that his demand should be paid by the discount of a debt which he did not owe, and averred that no such proposition was ever made to him, or entertained or acted upon by him.

In November, 1845, Thomson having commenced suit at law against the representative of Thomas Talbird on the contract for board, the plaintiff Porter applied to the Com-

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missioner for an injunction, according to the prayer of his bill, which was granted.

At February sittings, 1847, the Commissioner submitted to Chancellor Dunkin his report on the accounts of the parties, bringing Thomson in debt to the plaintiff \$682.73 by way of balance, after allowing him, in addition to other deductions, a credit for \$1,250.65 for the accounts of Mrs. Porter with "D. L. & J. Thomson," which he reported as having been sufficiently proved by the books of the firm, which were in evidence on the references. Exceptions to this report were filed by both parties, all of which were overruled by his Honor, excepting the following, on the part of the plaintiff, which were sustained:

"1st. Because the Commissioner has allowed the defendant David L. Thomson, credit for three accounts for goods and merchandize, said to have been sold and delivered to Mrs. Mary Porter, the complainant's intestate, by the firm of David L. & James Thomson, amounting in all to \$1,260.65, whereas it was proved by the cross-examination of the said David L. Thomson, after he had sworn to his books, that nearly half of the said goods, or a very considerable portion of them, were got by the members of Mrs. Porter's family, and her servants with a pass book, and charged to her by their direction.

"2d. Because a merchant's book of original entries, if supported by his oath, is evidence only of a sale and delivery to the person charged, and if it appears that the goods were delivered to others who called themselves the agents of the party charged, it is not competent for the merchant to prove their agency by his own oath, or that the person charged admitted the agency afterwards, or that he saw the goods so charged in his possession.

"3d. Because neither the agents nor the written orders of Mrs. Porter, if there were any, nor the pass book by which the goods were delivered to her servants, were produced or offered to prove the right of the said David L. & J. Thomson to charge the said Mrs. Mary Porter with the aforesaid goods.

"4th. Because the Commissioner has refused to set off against the accounts of the said D. L. & J. Thomson, the reasonable value of the board and lodging of the said David L. & James Thomson, and the family of the said David L. Thomson, for more than three years, or to give the estate of the said Mrs. Mary Porter any credit therefor; and it is submitted that the reasonable presumption is, if the goods were got by the said Mrs. Mary Porter from the said D. L. & J. Thomson, that they were to be paid for by their board."

In regard to these exceptions his Honor decreed as follows:

"In relation to the first, second, third, and fourth exceptions, it is ordered and decreed,

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that an issue at law be made *up, in which the defendant D. L. Thomson, as survivor of D. L. & J. Thomson, shall be plaintiff, in the nature of an action for goods sold and delivered, the object of which issue shall be to ascertain the amount due by the complainant's intestate on the store account of D. L. & J. Thomson, independent of any payments alleged to have been made thereon; in which issue the administrator of Mary Porter, deceased, shall be at liberty to rely in discount on any demand for board against the said D. L. Thomson or James Thomson, deceased, if upon the evidence adduced, the jury should be of opinion that board was to have been charged or discounted; and that the Judge of the Court of Common Pleas be respectfully requested to certify the verdict, with the evidence on which the same was founded. It is further ordered, that the injunction to stay the proceedings at law, of D. L. Thomson v. Thomas Talbird, executor, be dissolved, with liberty to the complainant to renew his motion against enforcing the judgment, after the same shall have been rendered."

At the Spring Term of the Court of Common Pleas, 1848, the feigned issue was tried before his Honor Judge Frost, when the jury found for the plaintiff \$1,250, being the amount of his account, without reference to any payments made thereon, and \$350 as a discount for board. From this verdict and the Judge's charge, Porter appealed to the

Chancellor. At the same Court, Thomson obtained against the representatives of Thomas Talbird, on his claim for board of the infant children of Mrs. Porter, a verdict for \$900, from which no appeal was taken.

In May following, the plaintiff renewed before the Commissioner his motion for an injunction, which was granted. In October of the same year, Thomson moved, before his Honor Chancellor Dunkin, at Chambers in Charleston, to dissolve this injunction, which motion was refused, his Honor declining to interfere before the regular hearing of the case.

At February sittings, 1849, the case came on to be heard before his Honor Chancellor Johnston, on the appeal of the plaintiff, and on the motion of the defendant, Thomson, to dissolve the injunction, when the following decree was rendered:

Johnston, Ch. When the Commissioner's report on a former occasion came before Chancellor Dunkin, he overruled the defendant's exception, and the sixth and seventh exceptions of the plaintiff; and the first five of the plaintiff's exceptions, ordered an issue at law upon certain terms specified in that order.

The case was heard before Mr. Justice Frost, and the jury, under his instructions, found the following verdict at April Term, 1848.

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*"We find for the plaintiff (Thomson) twelve hundred and fifty dollars, being the amount of his account, without reference to any payments made thereon; and for the defendant (Porter) three hundred and fifty dollars, as a discount for board."

Judge Frost has certified to this Court the proceedings upon the trial before him, upon which this verdict was rendered: and Mr. Treville moves on behalf of the complainant, that the case be remanded to the Commissioner, with instructions upon certain points, set forth in what he has entitled grounds of appeal from the trial at law.

There can be no doubt upon some of the points. Judge Frost has stated the manner in which the book account of Thomson was proved before the Court: and the charge which he gave as to the competency of the shop-keeper to prove the agency of persons to whom the goods were delivered, or to prove the existence of a pass book as an authority to deliver the goods.

I think no doubt can be entertained as to the propriety of his charge. Certainly when the goods were not delivered to the person charged with them in the book, the shop-keeper is not competent to shew, by his own evidence, that the person to whom they were delivered had an authority, either by pass book or otherwise, to call for and take up the goods on that person's account.

It appears by the testimony that the defendant in this case, when proving his book

account, was unable to say what goods were delivered to Mrs. Porter, and what to her servants or children. He knew that some goods were delivered to her, but could neither state what specific articles were so delivered, nor what proportion they bore in the whole account.

It is very clear that this is not proof of any one item in the account.

But it appears also that some of the book entries were proved or admitted to have been made by Mr. Thomson's partner, who is understood to be dead. I think that upon these entries, the fact of delivery of the goods charged in them, is to be presumed *prima facie*. It is the best evidence the instances admit of, and is entitled to be weighed and considered, and if there is no contrary testimony, and I see none, these entries should be allowed.

The jury, however, appears to have been instructed, that there was no alternative but to find the whole account or none. It is not the province of this Court to entertain an appeal from the law Court, whose assistance it has asked. But if not satisfied with the verdict, it cannot adopt it. I must say I am not satisfied with this verdict, and shall remand the account to the Commissioner with instructions. I have intended what I have said, for instructions upon the point

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of *evidence. On the reference before the Commissioner, he will let in any other competent testimony which may be produced. Perhaps notice may be given and the pass book produced.

I think the jury was warranted by the evidence to find the charge they did for board, and so far the finding is confirmed.

It is ordered, that the report be recommended for further investigation, on the points not decided by Chancellor Dunkin, whose decision is conclusive upon the points decided.

A motion was made to dissolve the existing injunction, which is refused.

From this decree the defendant Thomson appealed, on the following grounds:

1st. Because although it is not competent for the shopkeeper, of his own motion, to prove either the agency of the persons to whom he delivered the goods for the purchaser, or the existence of the pass book as authority for the delivery, yet if the defendant chooses to make the shop-keeper his witness, for the purpose of proving these facts, it is not competent for the Court to reject the testimony, because it has established the contract of sale in another way than that proposed by the plaintiff.

2d. Because when the shop-keeper is called to prove the entries in his books, he can properly be cross-examined only on his books, and if after the examination and cross-examination on that issue is ended, the defendant goes on to interrogate the witness on a different method of proving the account,

to wit, the delivery of the goods by the agency of other persons, or by a pass book, or by the personal acknowledgments of the purchaser, of the receipt of the goods to the shop-keeper, subsequently to the delivery, he ceases from that moment to be the witness of the complainant, and becomes the witness of the defendant, and his testimony is competent against the defendant.

3d. Because the witness Thomson, having been called to prove his book of original entries merely, it follows that when the defendant proposes to examine him as to the delivery of the goods, he proposes to examine him on new matter, a right which although undoubtedly in him, the plaintiff on the examination in chief could not exercise. But by doing so, the defendant made him his own witness, and if in the course of the examination and cross-examination on such new matter, the account was proved on the plaintiff's oath by other means than the book of original entries, it was too late for the defendant to object to the testimony, as either irrelevant, irregular, or incompetent; and it is, therefore, respectfully submitted, that his Honor erred in ruling that Thomson's testimony on such new matter was incompetent.

4th. Because in view of the facts before

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the Court, his *Honor erred in not dissolving the injunction, the doctrine of set-off having no application in the case.

E. & H. Rhett, for the motion.

DeTreville, contra.

CALDWELL, Ch. delivered the opinion of the Court.

The first, second and third grounds of appeal, relate to the competency and sufficiency of the evidence to establish the account of D. L. & J. Thomson, for goods sold and delivered to Mary Porter, of whom the defendant is the administrator *de bonis non*.

The Act of 1721¹ recognizes that it had been before allowed for law in the Province, "that books of account shall be allowed for evidence, the plaintiff swearing to the same, by reason that the merchants and shop keepers in South Carolina have not the same opportunity of getting apprentices and servants to deliver out their goods and keep their books of account, as merchants and shopkeepers have in South Britain," &c.

The necessity and convenience of such a rule, and its early adoption in the practice of the Courts of this country, in addition to its distinct recognition, are, perhaps, sufficient to raise the presumption, that there had been a previous Act authorizing the admissibility of such evidence, and modifying, in some material parts, the Statute of 7 James I, chap. 12. It is now immaterial from what source the rule originated, as it

¹ P. L. 116.

is permanently established and its construction well settled. When the merchant or shopkeeper relies upon his books as evidence of his sale and delivery of goods, he must produce his original entries, which must be such as are usually made in the course of business and trade, and he is competent to prove his own entries and the delivery of the goods; the rule was adopted for that class of cases, but does not apply to the case where the goods are taken up on an order, or where they are entered in a pass-book, and in either case delivered to a third person and not to the purchaser; there the plaintiff must furnish other proof of the sale and delivery of the goods than his original entries, which cannot supply the production of the order, or the pass-book, which would be the best evidence to establish the contract. If these be lost or destroyed, then the common law rule of proving their existence, contents and loss must, if required, be enforced. So in the case of a merchant or shopkeeper making the entries himself from the statement of his clerk, the latter must prove the delivery of the goods, and the former is incompetent to establish it.

While the law grants this extraordinary privilege to the plaintiff to prove his account where he makes the sale, entry and delivery of the goods, it has, with great propriety,

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not *prohibited or restricted the defendant from ascertaining by a cross examination, the circumstances under which the entries are made. This is frequently the only shield against a false or fraudulent account. When it appears on the plaintiff's cross examination that he did not deliver the goods to the defendant, or delivered them to a third person, although he made the original entries, the books of account must be excluded, as they are neither within the letter or spirit of the Act—they are not the best evidence of which the case admits, and the withholding of the other higher and better proof raises a presumption against the justice of the claim.

The case of *Clough v. Little*, 3 Rich. Rep. 353, is an illustration of these views. The plaintiff brought suit for cotton bagging sold and delivered to defendant, and produced his books of original entries, and testified to them as made by himself; he was then asked by defendant's counsel if he had sold and delivered the bagging himself personally to the defendant. The question was objected to, on the ground that the plaintiff's examination should be confined to the proof of the entry. Justice Gantt held that the question was admissible, and the plaintiff answered that his clerk reported to him the terms agreed upon between him and Little re-

specting the sale of the cotton bagging, and upon that report, the plaintiff made the entry and delivered the bagging to a drayman, who told him the defendant had sent for it. A nonsuit was ordered, and the Court of Appeals, in refusing the motion to set it aside, say—that as book entries made by merchants and shop keepers in the regular course of their business, are admitted in evidence from convenience and necessity, the best security which the rule furnishes is, that they must be supported by their oaths, and that were useless, unless the defendant could cross-examine them for that is the only means of purging their consciences. By this rule, the merchant is allowed to be a witness for himself, and there is no case in which, according to the rules of the Common Law, an *ex parte* examination where the witness is present, and in the power of the Court, has been admitted or allowed as evidence.

The plaintiff, in the case under consideration, on his cross examination, failed to prove a delivery of the goods to the intestate, and his testimony, as neither her orders or pass book was produced, or any proof made in relation to them, was as insufficient as it was incompetent to establish his account. But the entries made in the books by his deceased partner stand upon a different footing; the proof of their being in the handwriting of one who is dead, and of their being made in the regular and usual course of business, is sufficient to raise the presumption that the goods were sold and delivered to the intestate, and must prevail *pro tanto*, unless it be rebutted by proof on the part

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of the defendant. *As the evidence was insufficient to sustain the verdict as to the part of the plaintiff's claim for the goods he entered in the books of account, the Circuit Chancellor was right in referring that part of the case to the Commissioner.

The question of set-off was not finally adjudged by the Chancellor on the circuit. As the continuance of the injunction cannot have that effect while the accounts of the parties are under reference, it would, therefore, be premature to entertain that question here, as it can only be brought up in the regular way, by exceptions to the report of the Commissioner, which must first be heard on the circuit before they can come here.

It is, therefore, ordered and decreed that the appeal be dismissed, and that the circuit decree be affirmed.

DUNKIN and DARGAN, CC., concurred.

JOHNSTON, Ch., absent at the hearing.

Appeal dismissed.

4 Strob. Eq. 66

ANN McNISH et al. v. BENJ. E. GUERARD et al.

(Charleston. Jan. and Feb. Term, 1850.)

[Trusts ⇐134.]

Where a tract of land was conveyed to a father in fee, as trustee, in trust for his children then alive and named in the deed, and such other children as may be born of the body of his wife, "to be divided among them equally, share and share alike: And until such division shall take place, to be occupied and used entirely and specially for the maintenance and support of the aforesaid children;" the Court held, that the legal estate in the land vested, not in the father, but in his existing children named in the deed, subject to open and admit such other children as his wife might have.

[Ed. Note.—Cited in *Faber v. Police*, 10 S. C. 390; *Bouknight v. Epting*, 11 S. C. 75; *Gibbes v. G. & C. R. Co.*, 13 S. C. 242; *Howard v. Henderson*, 18 S. C. 188; *Wieters v. Timmons*, 25 S. C. 493, 1 S. E. 1; *Ayer v. Ritter*, 29 S. C. 138, 7 S. E. 53; *Holmes v. Pickett*, 51 S. C. 280, 29 S. E. 82; *Harkey v. Neville*, 70 S. C. 135, 49 S. E. 218; *Breeden v. Moore*, 82 S. C. 540, 64 S. E. 604.

For other cases, see Trusts, Cent. Dig. § 177; Dec. Dig. ⇐134.]

[Estoppel ⇐94.]

A married woman who had a legal interest under a deed, and who held it out as an equity, and applied for trustees to protect it as such, with the design of procuring the sale of the supposed legal estate of the trustees, freed from the equity, was not allowed, upon discovering her mistake, to visit its consequences upon a purchaser whom she had thus misled. Her bill praying relief, dismissed without prejudice.

[Ed. Note.—Cited in *Herndon v. Moore*, 18 S. C. 353; *Jones v. Hudson*, 23 S. C. 500.

For other cases, see Estoppel, Cent. Dig. §§ 245-247, 276-284; Dec. Dig. ⇐94.]

[Partition ⇐48.]

Where the bill prayed partition of a tract of land, a distributee who had conveyed his share to another, and who resided in the State of Georgia, was held not to be a necessary party.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 118; Dec. Dig. ⇐48.]

[Trusts ⇐169.]

In the transfer of a trusteeship, a conveyance from the original trustees to their successors is not necessary. The practice is to make such transfer by order of the Court, in accordance with the Act of 1796—5 Stat. 277.

Per Johnston, Ch.

[Ed. Note.—Cited in *Sullivan v. Latimer*, 35 S. C. 428, 14 S. E. 933.

For other cases, see Trusts, Cent. Dig. § 222; Dec. Dig. ⇐169.]

[This case is also cited in *Trapier v. Waldo*, 16 S. C. 282, as to the duty of purchasers at judicial sales to ascertain if the court has jurisdiction and if all necessary parties are before it.]

Before Johnston, Ch., at Gillisonville, Feb. Sittings, 1849.

On the 29th of January, 1829, Dr. Thomas E. Screven conveyed in fee, a certain tract

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of land called "The Bower," *and described in the pleadings, to John McNish, as trustee of his eight children, Honoria McNish, John H. McNish, Charles L. McNish, Thomas J. McNish, Laura McNish, Mary C. McNish,

Jane D. McNish, and Susannah McNish; "to have and to hold the said tract of land," &c. "in trust for the aforesaid children, and such other children as may be born of the body of Ann McNish, wife of John McNish; to be divided among them equally, share and share alike: And until such division shall take place, to be occupied and used entirely and specially for the maintenance and support of the aforesaid children." It does not appear that this deed was ever registered.

On the 5th of February, 1831, the same grantor conveyed, in fee, a certain other tract of land, also described in the pleadings, and known by the name of "Stock Farm," being adjacent to the former tract, to Jeremiah Fickling and Richard J. Davant; "to have and to hold," &c. "upon this special trust and confidence, that they the said Jeremiah Fickling and Richard J. Davant, and the survivor of them," &c. "do permit and suffer the said Ann McNish" "to take the rents and profits of the said land," "for and during the term of her natural life; and from and immediately after the decease of the said Ann McNish, then in trust for all and singular such child, or children, as she, the said Ann McNish, shall at the time of her death, leave alive and surviving her, share and share alike, as tenants in common, and not as joint tenants, their heirs, executors," &c. "absolutely forever." This deed was duly registered in Beaufort, where the land lies, the 7th of March, 1831.

A petition, (which does not appear to have been put in evidence in this case) seems to have been presented in the name of Mrs. Ann McNish, the cestui que trust for life, under the last mentioned deed, praying that her sons John H. and Charles L. McNish be substituted in place of Fickling and Davant, the trustees. This petition was referred; and upon the coming in of the report, it was ordered that they be substituted accordingly;—this substitution to take effect upon a copy of the order by which it was made, being endorsed on the original trust deed and duly recorded, as required by law. This order was made the 27th of January, 1838.

This application for substitution of trustees, thus conditionally granted, seems to have been intended to promote objects then in view, but as yet not disclosed to the Court.

At the same term, a petition was filed by John McNish, the trustee under the first deed, and another by John H. McNish and Charles L. McNish, the newly substituted trustees under the second deed, praying for leave to sell both the tracts of land together, and setting forth the reasons of the application, consisting mostly of the unproductiveness of

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the land to Mrs. *McNish and her family. On these petitions separately, orders were passed the 29th of January, 1838, referring

it to the Commissioner to report specially on the facts stated in the petitions, the advisableness of granting the order of sale prayed for, and the gross value of the two tracts of land, respectively.

The Commissioner reported, recommending the sale of the land as prayed for: Whereupon the Court, on the 2d of February, 1838, passed an order, that, upon the trustees giving bonds with approved sureties in double the value of the lands held in trust by them, respectively, conditioned for the faithful discharge of their trust duties, the land to be sold by the Commissioner upon terms prescribed, part cash and part credit, and the cash and securities proceeding from the sale, be delivered and assigned by the Commissioner to the respective trustees, to be held by them upon the trusts declared in the respective deeds: they having first given the bonds, &c. above mentioned.

Still, no sale was made. The endorsement upon the original trust deed, and the registration, required by the order of the 27th of January, 1838, could not be effected, for reasons which will hereafter be stated. Thus matters remained till January Sittings, 1841.

At that time a new petition, (not put in evidence) appears to have been brought before the Court. Who are the parties to it cannot be accurately learned without the production of the petition itself, nor what was its specific object. Its general design may be inferred from a report upon it, presented at this term, as well as from a deed executed by the Commissioner, hereafter to be mentioned. This report is entitled "Ex parte C. L. McNish, H. McNish, J. H. McNish." By the second of these is probably meant Honoria McNish. From the report it appears that an order (not put in evidence) had been passed requiring the Commissioner "to inquire into the facts stated in the petition." And the report states the execution of the deed to Fickling and Davant, as trustees for "Stock Farm," and sets forth the trusts therein declared. It then states the order substituting new trustees, passed at January Term, 1838, and the condition upon which it was suspended; and informs the Court that the original deed having been sent for registration in the Secretary's office in Charleston, had been lost there, so that the endorsement required to be made on it could not be made.

That, on this occasion, the deed for the other tract, to John McNish as trustee, had not been proved. And the report closes with a statement of evidence, taken to show that the land, in its condition at that time, was "comparatively" valueless: both tracts, together, not being worth more than fifteen hundred dollars: and that a sale of it would be advantageous to the cestui que trusts.

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*On hearing this report, Chancellor Harper, by an order, similarly entitled, and

passed the 28th of January, 1841, confirmed it, and ordered that the endorsement and registration required by the order of the 27th of January, 1838, be dispensed with. "That upon the trustees, C. L. McNish and J. H. McNish, giving bond and security in double its value, for the faithful discharge of their trust duties, the property mentioned in the petition, be sold by the Commissioner, and the proceeds be delivered to the trustees, to be held by them subject to the trusts respectively in the trust deeds." Terms, cash for one third; credit for the balance, one, two, and three years.

Upon this C. L. and John H. McNish gave the bond, &c. required: and the Commissioner, on the 1st of March, 1841, proceeded to sell the land—selling both tracts together—at public auction: and C. L. McNish became the purchaser at fifteen hundred dollars.

On the same day the Commissioner conveyed the land thus sold to the said purchaser, in fee, by deed, reciting the foregoing order, as the authority for the sale, and that it was made upon a petition filed by C. L. McNish, J. H. McNish, and H. McNish, the 25th of January, 1839. "And the case being at issue came on to be heard at January Sittings, 1841, when the said Court, after full hearing thereof, and mature deliberation in the premises, did order, adjudge and decree," &c. referring to the foregoing order of the 28th of January, 1841, "as by reference thereto in the registry of the said Court will appear." This deed was recorded in the Registry of Mesne Conveyances, the 17th of May, 1841.

C. L. McNish, the purchaser, paid in no money, but receipted to the Commissioner for the price which he had bidden for the land.

On the 29th of December, 1843, the said Charles L. McNish, by a deed containing no recitals, except that the land "was purchased by him, at a sale made by the Commissioner in Equity for Beaufort district, under the order of the Court of Equity at Gillisonville, on the 1st day of March, 1841," conveyed the land, in fee, with full warranty, to Benjamin E. Guerard, at the price of two thousand and twenty-five dollars.

With this deed, C. L. McNish delivered to Mr. Guerard, the purchaser, the deed which he had received from the Commissioner, the 1st of March, 1841, and containing the recitals already mentioned: and by his direction Mr. Guerard paid over the purchase money into the hands of George Pope, who was surety to the bond the substituted trustees had been required to give the Commissioner.

The bill is filed by Mrs. Ann McNish, the wife of John McNish, (suing by next friend) and by six of her children, to wit: Honoria, Laura, Jane, Mary, Thomas and Susannah,

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*the latter being an infant, and suing by next friend, as the bill states.)

After stating the conveyance of "The Bower" to John McNish, and of "Stock Farm" to Fickling and Davant, and the substitution of Charles L. and John H. McNish, in place of the two latter, as trustees, but averring that no conveyance of the premises was made by the old to the new trustees; the bill proceeds to state:

That, afterwards, in the year 1830, John McNish, representing himself as trustee, applied to this Court to sell "The Bower;" and, at the same time C. L. McNish and John H. McNish, representing themselves as trustees, petitioned the Court to sell "Stock Farm;" and such proceedings were had that an order was taken, directing the Commissioner to sell the said tracts of land, and take securities from the trustees for the due application of the purchase money.

That C. L. and J. H. McNish did give such securities, but John McNish gave none.

That Mr. Davant, the Commissioner, sold the land on the 1st of March, 1841, in one lot, and set down C. L. McNish as the purchaser, at the sum of fifteen hundred dollars; but he paid no money, and only gave his receipt to the Commissioner for the purchase money, and the Commissioner conveyed the land to him.

It is further stated that the Commissioner reported these proceedings to the Court (which, by the evidence, he did at May Sitting, 1841) and that the report was confirmed (of which statement there was no evidence.)

The bill proceeds to state the sale and conveyance made by C. L. McNish to Benj. E. Guerard, the 29th of December 1843; and that C. L. McNish soon afterwards died, intestate, leaving a widow, (since married to Alvin N. Miller,) and two infant children, named in the bill, all of whom reside in Savannah, Georgia; he having never received the purchase money for said lands; which had been paid by Mr. Guerard, the purchaser, into the hands of George Pope, and was retained by him, Pope, for his indemnity against the bond into which he had entered, as surety for the said C. L. McNish's discharging the duties of a trustee.

That John H. McNish (to whom the legal estate in "Stock Farm" would survive, if the same had been conveyed by the prior trustee to himself and Charles L. McNish, as it should have been) lives in Savannah Georgia; where John McNish, the husband of the plaintiff, Ann, also resides. That no administration has been taken out on C. L. McNish's estate.

The plaintiffs aver that they were not parties to the proceedings in this Court above referred to, nor were consulted in relation to them, nor consented to the sale of said plantation, and have never received any part of the purchase money.

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*They insist in their bill that "The Bower" was not a trust estate; the use being execut-

ed in the children of John McNish, six of whom are plaintiffs: and the order for the sale of this tract was made exparte, on representations for which the plaintiffs are not responsible, and was taken at the risk of those who moved for it, and of them only.

That the legal estate of "Stock Farm" was in Fickling and Davant, and the equitable estate in the plaintiff, Ann, for life, with remainder to her children. That neither the legal nor equitable estate was represented when the order for sale was made, or the sale confirmed: and that the said order was made by consent of C. L. McNish and J. H. McNish, and binding only on them.

That the said order did not authorize the Commissioner to sell "The Bower," and "Stock Farm," in one lot; and that the sale to C. L. McNish confounded interests which are distinct.

That the said C. L. McNish, assuming the character of trustee of the plaintiffs, had no right to purchase, and that the Commissioner had no right, in any case, to convey to him, without receiving the purchase money. And, for these reasons, the deed of the Commissioner is inoperative to convey to C. L. McNish any thing more than the interest of John H. McNish; who may be bound because he was consenting to the transfer of the property.

That as C. L. McNish and John H. McNish had no title beyond two eighths of "The Bower" in possession, and two eighths of "Stock Farm" in remainder, no more was effectually conveyed by the deed of C. L. McNish to Benj. E. Guerard.

That the plaintiff, Ann, is entitled to a life estate in the whole of "Stock Farm," and the other plaintiffs are entitled to six eighths of the freehold and inheritance of "The Bower."

And that the said Benj. E. Guerard knew when he contracted with C. L. McNish, that he was, or acted as, a trustee for the plaintiffs; and by the deed of the Commissioner,—which was delivered to him,—he was bound to know there was a decree, and to see who the parties to that decree were, and to know all the facts stated in the bill.

That the plaintiffs have applied to him for a partition of "The Bower," and a delivery of "Stock Farm." That though willing to come to a fair settlement with the plaintiffs, he insists that the money which he paid into the hands of George Pope be refunded to him, if he is obliged to yield the land. But George Pope is dead, and his executor, Franklin H. Pope, refuses to refund the money in his hands to any person but the personal representative of C. L. McNish, and as no administration has been granted on that estate, no efforts at a settlement with Franklin H. Pope, or which depend on him, can succeed; and, therefore, Mr. Guerard,

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insisting that he has a right under the deeds of the Commissioner and C. L. McNish, to

hold as his own, all the property which they undertake to convey, refuses to make partition of "The Bower," or to deliver "Stock Farm" to the plaintiff, Ann McNish, as requested.

The bill prays process against Guerard, Fickling and Davant; and against John McNish, John H. McNish, and the personal representative of C. L. McNish, whenever they may come within this jurisdiction; that the sale of the premises, as to all but two-eighths of "The Bower," and two-eighths of the remainder of "Stock Farm," be declared null and void. That the plaintiff, Ann, be put in possession of "Stock Farm," and that a writ for the partition of "The Bower" may issue; and general relief, &c.

Fickling and Davant have consented to be considered formal parties; no decree being required as against them.

Benjamin E. Guerard pleads that he is an innocent purchaser of the premises from C. L. McNish, who was in actual possession, claiming in fee, for the price of two thousand and twenty-five dollars, which he actually paid to George Pope, at the request of the said McNish, at the time he received his conveyance; and that he took the conveyance and paid the said price without notice of any interest, legal or equitable, existing in any other person than his said grantor, or that said grantor was trustee of the plaintiffs; or of the proceedings in the Court, referred to by the plaintiffs in their bill.

He admits that he has lately heard of the conveyance, from Dr. Screven, of "The Bower," but contends that the statute of uses does not apply to the terms of the deed; the effect of which was to vest the legal title in John McNish, for the special purpose of the maintenance and support of the children, &c.

He has also lately heard of Dr. Screven's conveyance of "Stock Farm" to Fickling and Davant, in trust for Mrs. McNish during her life, with contingent remainder to such of her children as might survive her; and also of the transfer of the trust to C. L. and J. H. McNish, which so far as he knows, was unaccompanied by any conveyance from the old to the new trustees; but, as he is advised, the laws and practice of this Court do not require a conveyance in such cases.

He admits that he paid the purchase money, upon his purchase from C. L. McNish, to George Pope; but it was done at the request of the said McNish.

He admits that said McNish delivered him the Commissioner's deed, at the same time with his own; but denies that beyond the facts appearing on said title-deed, (from which he avers he drew the conclusion "that the proceedings were regular,") he knew any

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thing, at the time, of the provisions of the trust deeds, or of the actual parties to the

proceedings, or of their several interests in the premises, or of the alleged irregularity of the Commissioner's sale to C. L. McNish, or that no money was paid by the purchaser (on the contrary, it appeared, by the title-deed of the Commissioner, that the sum of fifteen hundred dollars was some way paid by the purchaser); nor did he know, as averred in the bill, at the time of his contract, that the said C. L. McNish either was or acted as trustee of the plaintiffs; nor could he learn from the said title-deed that the plaintiffs had any interest, by trust or otherwise, in the premises.

He suggests that he has made valuable improvements: and though he is unwilling to surrender the possession of the premises, he has offered every aid in his power to put the plaintiffs in possession of their rights, as against Charles L. McNish and George Pope, and his executor, Franklin H. Pope, to whom he insists the plaintiffs should look for redress.

Decree of July 12th, 1849.

Johnston, Ch. It will be a convenient method to consider the case, in relation to each parcel of land, separately, where the grounds taken by the plaintiffs apply to them distributively, and not in common.

It is assumed by the bill, and has been argued at the hearing, that, by the statute of 27th Henry 8, commonly called the Statute of Uses, the legal estate of "The Bower" was transferred to the children of John McNish: and, therefore, there was no title or estate in him subject to the conveyance made by the Commissioner, under the order of the Court.

If this view be sustained, and there be no authority found for the sale of this tract but the application of John McNish, the consequence would be that the Commissioner's deed conveyed no title to Charles L. McNish, the purchaser; and his conveyance to the defendant, Guerard, served only to vest Guerard with a title to his own distributive share: and then the land is subject to partition between Guerard and the other seven children.

For the purpose of this partition, however, (if it comes to that,) John H. McNish should be made a party: and I am of opinion that, though resident beyond the limits of the State, he may be made a party, by publication; he having an interest in the land, the subject matter on which the Court is to act, and which lies within its jurisdiction. It is every day's practice to proceed in this manner.

But does the statute execute the uses declared in this deed?

The conveyance is to John McNish, to

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have and to hold "in trust for the aforesaid" (eight named) "children, and such other children as may be born of the body

of Ann McNish, and to be divided among them equally;" "and, until such division, to be occupied and used entirely and specially for the maintenance and support of the aforesaid children."

It has been argued, that there is a co-existence of the three circumstances stated (1 Cruise 412) to be necessary to the execution of a use by this statute; a person seized to uses; a cestui que use in esse; and in use in esse.

If the use is such as the statute executes, it makes no difference that some of the cestuis que use are not in esse, to wit: such other children as may yet be born of the body of Mrs. McNish. All persons capable of taking lands by common law conveyance, may be cestuis que use; and it has been held that a remainder of an estate, given directly to several, may vest in those capable at the time; and open to admit those who afterwards become capable.¹

But the embarrassing question is whether the use is such as the statute executes. No distinction existed between uses and trusts before the statute. All were trusts, and enforceable as such. But the statute serves to execute some of them; and these are extinguished as trusts, and converted into legal estates or interests. What are now recognized as trusts, and enforced in equity, are such uses as the statute does not execute.²

Without going specially into the cases, it may be laid down as the result of them, as applicable to this case, that where he to whom a conveyance is made has some duty to perform, for the perfect performance of which it is necessary that the legal estate be in him, the statute does not apply. He shall be regarded as vested with the legal title; and the person interested in the performance of the duty required, has an equity, which he may enforce against him in respect to the legal estate thus held by him. This is a trust, and not a use executed.

The second mode, says Cruise,³ of creating a trust arose from an opinion delivered by the Judges in 36 Henry 8, that where a man made a feoffment in fee, to his own use, during his life, and after his decease that J. N. should take the profits, this was a use in J. N.; contrary, if he said that after his death his feoffees should take the profits and deliver them to J. N. This would be no use in J. N., because he could have them only by the hand of the feoffees. Thus the feoffees would have the legal estate, and consequently J. N. could only have a trust, which would be enforced in equity. This rule, says he, has been applied to devises.

But a distinction has been made between a devise to a person in trust to pay over the rents and profits to another, and a devise in trust to permit that other to receive the

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rents and profits. In the first case, it was held that the legal estate should continue in the first devisee, in order that he might be able to perform the trust; for where he is directed to pay over the rents, he must necessarily receive them. But in the second case, it has been adjudged, that the legal estate is vested by the statute, in the person who is to receive the rents.⁴ And he quotes *Broughton v. Langley*, 2 Lord Raymond, 873, where lands were devised to trustees and their heirs, to the intent to permit A. to receive the rents for life, &c., and it was determined that this would have been a plain trust at common law; and what at common law was a trust of a freehold, was executed by the statute, which mentioned the word trust as well as use. And that the case of *Burchett v. Durdant*, 2 Vent. 312, which had been determined otherwise, was not law.

But in all the cases the true intention of the instrument, and not its words merely, was consulted. And, although, in cases where it was manifest, that the grantor or deviser intended to create a trust, and the statute positively interfered and declared that no trust should exist, the Courts were obliged to sacrifice the unlawful intention, yet, in all cases of difficulty, there has been a leaning to take the instrument out of the operation of the statute, so as to give it operation according to its true design.

Thus in *Harton v. Harton*, sent out of Chancery for the opinion of the King's Bench, where Jacques, the testator, devised an estate to trustees and their heirs, upon trust to permit his niece Bridget Harton, a married woman, to receive the rents, during her life, for her separate use, &c., Lord Kenyon, Ch. J. said, whether this be a use executed in the trustees, or not, must depend upon the intention of the deviser, which is to be collected from the will. This provision, it appears, was made in order to secure to several femmes covert a separate allowance, free from the control of their husbands; to effectuate which, it is essentially necessary that the trustees should take the estate with the use executed, otherwise the husband of each taker would be entitled to receive the profits, and so defeat the very object the deviser had in view. And the whole Court (Kenyon, Ashurst, Grose and Lawrence,) certified accordingly; that construction being necessary (as they conceived,) to give legal effect to the testator's intention, to secure the beneficial interest to the separate use of the femmes covert.⁵

¹ 1 Cruise, tit. ii. chap. 3 & 7; Id. p. 277, N. Y. of 1823, by Ingraham. 1 Cruise, tit. ii. chap. 3, sec. 27; 2 Stra. 1172; *Hatterly v. Jackson*, citing Co. Lit. 188; Pollex. 373; and Mo. 220.

² Sed vide 1 Cruise, tit. ii. chap. 3, § 26, latter sentence.

³ 2 Cruise, tit. 12, Trust, cap. 1, sec. 12, 13.

⁴ Id. sec. 14.

⁵ 7 Durnf. & East. 652, cited 2 Cruise, tit. 12, cap. 1, sec. 19; et vide, sec. 18.

It is not necessary to mention the case of *Jones v. Say & Sele*, in which the provision was for the separate use of a married woman; and so far conformable to the case just quoted; because, besides that provision, there was the additional direction that the trustees pay the rent over to the femme covert. But upon its being mentioned by Mr. Justice Lawrence in *Harton v. Harton*, in reference to the first provision spoken of, Kenyon, Ch. J., remarked, that in that

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view, *it had been approved by Lord Hardwicke in *Bagshaw v. Spencer*.⁶

But, however the Court may be disposed to deflect the general principle, so as to conform to the intention, it must gather that intention by a fair construction of the instrument.

It must have been observed, that I am now considering the following words in the deed before me: "and until such division shall take place, (the land) to be occupied and used entirely and specially for the maintenance and support of the aforesaid (S) children."

I do not perceive, in these words, evidence that it must have been the intention of the grantor, that the land was to be occupied, or the rents received and disbursed, by the trustee for the maintenance of the children. I do not know that I am at liberty to consider the situation of the family in giving construction to the words of the deed. A very strong persuasion certainly arises from the fact, that these children were infants, and that the deed was made to their father, with a direction for their support—that it was meant this support should be administered through him. But on the other hand, if the statute carried the legal estate to the children, all this could be, and must necessarily be, attended to by guardians. It is not like the cases referred to, of provisions made for the sole benefit of femmes covert; where there would be a legal impossibility of their enjoying the bounty intended, without regarding the legal estate as vested in the trustee.

The case of *Porter v. Doby*, 2 Rich. Eq. 49, quoted by defendant's counsel, was one in which the trustee was expressly required to apply the proceeds of the plantation conveyed to him, to the support and maintenance of the *cestui que trusts*; and therefore, falls within the distinction pointed out by Cruise.

The case of *Silvester v. Wilson*, 2 Durn. & East. 444, also quoted, may come within the same distinction. The testator devised to trustees, in trust to receive the rents and profits, yearly and every year, during the life of his son, John Wilson, and directed that such rent and yearly profits be applied for the subsistence and maintenance of the

said John, during his natural life, as aforesaid; with devises to heirs of his body upon his death, &c. Ashurst, J. delivering the opinion of the Court, in the first place, puts the decision upon the ground, that the trustee was to receive and pay over; which, he says, is, upon the authorities, sufficient to vest the legal title in him; and then, by way of strengthening the construction, he remarks: "but there is a circumstance in the present case, which makes it still stronger; for it is not barely to receive and pay, but the testator directs that such rents, issues and profits shall be applied for the subsistence and maintenance of the said John Wilson. The testator, therefore, seems to

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*mean that the trustee should be invested with some sort of discretion with respect to the application. And if the tenant for life had proved dissolute and extravagant, and had squandered his money in gaming, to the defrauding of his creditors, it is by no means clear that the trustees would not have been justified, either in a Court of Law or Equity, in paying such creditors, before they had paid over the surplus to the tenant for life; as the testator seems to have had some jealousy of his son's conduct, and to have wished that the trustees should have an eye to the application of the money."

This certainly is not putting the case upon the ground, that if the trust declared had been merely that the rents and profits were to be applicable to the son's subsistence, without indicating that the trustee was to make the application, the legal estate would have vested in the trustee, by construction, in order to enable him to perform that duty.

I am not free from doubt, however, in ruling that this case is not applicable to the provisions of the deed before me. But such is my conclusion, upon the best view I am at present able to take of it.

On the whole, I must determine that the legal estate of "The Bower," vested, not in John McNish, but in the existing children named in the deed, subject to open and admit such other children as Mrs. McNish may have.

This is the only point, however, in relation to this tract, which I feel prepared to decide. It has been assumed in the bill, that the only authority for the sale of this parcel of land, was the order made in 1838, upon the petition of John McNish. I am not satisfied of this. The sale was made under the order of Chancellor Harper, of 1841, which was grounded upon the petition of Ch. L. McNish, John H. McNish, and H. McNish. I think it would be unsafe to decide so much of this case as relates to "The Bower," until John H. McNish is made a party, and until further inquiry be made into the contents of that petition, and who were parties to it. From the terms of the order, it would not be surprising if it should turn out that

⁶ 1 Eq. Ab. 383 cited 2 Cruise, 306 and 456; and 7 D. & E. 655, S. C.; 8 Vin. Abr. 262.

C. L. and John H. McNish were substituted in place of John McNish, as well as in place of Fickling and Davant; and that all parties interested in both tracts of land were before the Court, on this application for the sale of the land. As I shall hereafter hold in relation to "Stock Farm," that none of the children had, or yet have, such an interest in that plantation, as required them to come before the Court; it is natural to conclude that the petition to which I have alluded, had reference to "The Bower," in which they had an interest. And it may be, that when the petition and other evidence are produced, it will appear that all the children were be-

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fore the Court; and that the application was for a sale for partition. I may be over cautious in refusing to proceed without further inquiry; but, on the whole, I think that course is the safest; and I shall adopt it. Certainly the plaintiffs have no cause to complain of this; for so long as the pleadings are not produced upon which the order was made, I should be bound to presume that they contained full authority to support the judgment which was rendered on them.

I now proceed to consider the points in relation to "Stock Farm."

If it were necessary, I should hold that the statute executes the uses of the deed for this tract of land; and that the effect of the instrument is to create a life estate in Mrs. McNish, with contingent remainder to such of her children as may survive her.⁷ She being still alive, and it being, of course, uncertain which of the children, if any, may be alive at her death; none of the plaintiffs, except herself, has, as yet, any such interest as authorized them to disturb the defendant, Guerard, in his possession.

It is manifest, however, that regarding this estate as a legal estate in Mrs. McNish, with contingent remainder, no title, whatever, passed from the Commissioner to Charles L. McNish, the purchaser; and, he having none himself, no estate passed by his conveyance to Guerard. Guerard, therefore, as to this tract, is not constituted a co-tenant, as in the case of "The Bower." In this view, he is a naked trespasser, and Mrs. McNish's remedy is at law. A remedy in this Court can arise, therefore, only by considering this as a trust estate, or by regarding Mr. Guerard as having dealt with one held out to him as a trustee for the parties interested under the deed for this land.

I take it for granted, that Guerard stands chargeable with notice of the contents of Dr. Screven's deed to Fickling and Davant, creating the estate. It was duly registered; and I will not stay to inquire whether, by

any subtlety of reasoning, the registration was not notice to him of its contents.

I assume, also, that the recitals in the Commissioner's deed, which was delivered to him along with the deed of his grantor, compelled him to take notice of the decree of Chancellor Harper, under which the land was sold. As that order, however, related back to a previous order, one of the terms of which it suspended, his investigation must have furnished him with the fact that the new trustees were substituted for the original trustees upon the petition of Mrs. McNish, herself, the only person who now has a standing in Court against him. It was she, therefore, who held out C. L. McNish as her trustee.

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*Now, conceding, as I do, that her interest under this deed is a legal interest, and not an equitable one, the question is, whether she who, herself, on that occasion, held it out as an equity, and applied for trustees to protect it as such, and with the manifest design of procuring sale of the supposed legal estate of the trustees, freed, of course, from the equity, shall be at liberty, upon discovering her mistake, to turn round and visit its consequences upon one whom she thus misled, and who, perhaps, was as much mistaken as herself, and as innocent? I apprehend there is no principle known to this Court which would sustain such a proceeding as that; and I should be equally surprised and shocked, if any precedent could be found for it.

I am not speaking of estoppels; nor do I forget the disabilities of married women, generally, to create them. But neither married women, nor infant, nor any one else, whatever their disabilities, can be sustained in an unconscientious claim. And it would be unconscientious to mislead a third party by one's own representations, and then unravel the transaction, upon the ground that they were misrepresentations. If there is a right of action at law in such a case, this Court will leave the party to that remedy.

It is not necessary to decide any other questions in relation to "Stock Farm." But some points of much interest have been suggested, relating to the practice of this Court, which I think it would be improper to pass by without expressing an opinion upon them.

It is objected, that the transfer of the trusteeship, (assuming now, that this is a trust estate) was incomplete for want of a conveyance from the original trustees to their successors. The Statute 7 Anne, chap. 19, (Public Laws, 97) is appealed to for the purpose of showing, that by the laws and practice of England, such a conveyance is necessary. That statute shows, that where it was necessary for a trustee to convey, and he was a minor, he could not convey until the statute enabled him. Whether, in the substitution of trustees, by the Court, if the

⁷ Mr. Petigru had changed the ground taken in the bill; and, at the hearing, contended that this was a legal, and not an equitable estate; and that the use was more clearly executed as to this trust than as to the other.

Court indulged in such a practice, the transfer would be incomplete without a conveyance, the statute does not inform us. But suppose it would have been necessary in England, does it follow that it would be so here? We have a case, on the subject of conveyances, (in partition cases I think) which shows that this Court is entitled to a practice of its own; and prefers its own convenient forms, which it has long pursued and established, to those of England;⁸ and to the same effect was the decision in *Pell v. Ball*, 1 Rich. Eq. 361, on the subject of partition by sale in invitum.

Our uniform practice is to make the transfer of trusteeships by the order of the Court; and I presume there is not a member of the profession living, who ever saw it

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done in any other way. And this practice manifestly arose out of the Statute of 1796.⁹ This statute enables the Court of Equity "to permit one or more of the first or former trustees to surrender his, her or their trust, and to appoint one or more trustees in his, her or their room, as to the Court may appear fit, proper and advisable. And the trustee or trustees so appointed and substituted shall then be considered, to all intents and purposes, as vested completely, &c. and the first or former trustees shall be therefore completely exonerated and discharged. Provided, always, that a certificate of such substitution shall be endorsed by the Register or Commissioner in Equity upon the original trust deed, if the trust be created by deed, and the deed can be found," &c. and so of a will.

The former trustee surrenders to the Court; which may be by petition, or consent endorsed on the petition of another person, or in any other way the Court may approve. The Court to which the surrender is made, delegates the trust anew, (and takes security from its appointee) and grants a certificate which is to be endorsed, &c. These are the only conditions or requisites prescribed; and the Act declares that whosoever is so substituted shall then be trustee in place of the preceding trustee, who shall be discharged of his liability, and of course of his office.¹⁰

Suppose it were otherwise. Suppose the practice was to make a conveyance. Would not the Court, in support of its order of substitution, be bound to presume that a conveyance was made? It is to be observed that the bill does not seek to set substitution aside, but the ground taken is, that it is a nullity, and to be treated as such. In that view every formality must be presumed which the order taken presupposes.

There is another view equally satisfactory. On any principle that can be assumed, the

conveyance must be regarded as a merely formal act to give validity to the order for substitution. And what should prevent the Court, the original trustees being before it, from ordering them, even now, to execute the instrument?

Another objection—also made upon the assumption that this is a trust estate, is that the cestui que trusts were not parties to the application for the sale. I have said that Mrs. McNish was before the Court—though not, perhaps, formally as a party to that petition, yet to a petition manifestly looking to the sale, and making preparations to procure an order for it.

But, if this were otherwise, and if not only Mrs. McNish, but all the children, should have been before the Court; I do not think the order of sale is to be regarded as null. There is a manifest difference between what the Court should do in the progress of a suit, and what it should do after it has pro-

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nounced its adjudication in the case. It should be very cautious, before it gives judgment, to see that all interested parties are before it; and that the issues are regularly joined and fully discussed. But after judgment given, that and every other Court is to regard it as a valid judgment, regularly rendered according to the forms of proceeding required in the forum. Certainly strangers and third persons are entitled so to regard it; and are not bound to look up the necessary prerequisites to fortify the record. Every thing will be presumed; unless the application to vacate it be directly made, and not collaterally, as in this case.

The view I have taken leads to a dismissal of the bill, as it regards "Stock Farm;" and to granting leave to the plaintiffs to make a party of John H. McNish, for the partition of "The Bower," if upon further inquiry to be directed, that partition turns out to be proper.

But the former order will be granted without prejudice to the plaintiffs's right to amend their bill so as to obtain full redress by a proceeding which they have neglected, but may, perhaps, yet adopt successfully. And if they adopt it and succeed in it, it will, of course, (as it will be predicated on an affirmation of the sale) supercede the partition of "The Bower," and, also, the inquiry I shall direct.

I do not perceive why the plaintiffs may not make the fund in the hands of Mr. Pope's executor responsible for the price bid by C. L. McNish for these two parcels of land. Although C. L. McNish might not be entitled to draw out of the Commissioner's hands so much of that money as may be supposed to have arisen from the sale of "The Bower," yet he did draw it out. And it was probably by his orders that a fund sufficient to indemnify the owners of both tracts was paid over

⁸ *Spencer v. Bank*, Bail. Eq. p. 468.

⁹ 5 Cooper Stat. 277.

¹⁰ 2 J. C. R. 245.

to Mr. Pope, who received it for that purpose.

It is true these lands should have been separately sold; because the proceeds of each tract was to follow a different destination. But may not the price of the two be apportioned upon testimony as to their relative value? Will there be any difficulty in making a personal representative of Charles L. McNish, and amending the bill by making that representative and the executor of Pope, parties? The plaintiffs will, however, proceed as they may be advised. The Court may not perceive difficulties which really exist to this proceeding.

It is ordered that the bill, so far as respects "Stock Farm," be dismissed; but without prejudice to the plaintiffs's right to amend and proceed as above indicated. The plaintiffs to pay the costs of the suit up to this stage of the proceedings.

It is further ordered, that the bill be retained and set down for further hearing, by the inquiry referred to in the foregoing opinion, in relation to "The Bower;" and that the plaintiffs have leave to make a party of John H. McNish.

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*The complainants appealed from the foregoing decree, for the following reasons.

1. That John H. McNish has no interest in the suit; all his right having passed to the defendant, Guerard. That not being a citizen or resident of the State, all that was requisite in his behalf was to make him a party, so far as to prevent a plea in abatement. That to this extent, he is effectually made a party by the present proceedings. That the Act of 1784 does not invalidate the former practice of Chancery, but is intended to give a further remedy, in cases where such a decree is prayed against a person abroad as would require something to be done on his part if he were within the jurisdiction.

2. That even if the deed of the Commissioner to C. L. McNish for "Stock Farm" is inoperative, the complainants were right to come to this Court to have the same set aside, instead of treating it as a nullity, by suing in the court of law, and provoking a collision between the two jurisdictions.

3. That there is no ground for further inquiry disclosed by the pleadings or evidence in the cause.

4. That the complainants, Honoria McNish, Laura McNish, Jane DuPre McNish, Mary Catharine McNish, Thomas Julius McNish, and Susan Dupont McNish, were entitled to a partition of "The Bower," and the complainant, Ann McNish, to a decree for the possession of "Stock Farm."

H. C. King, Complainants' Solicitor.

The defendant, B. Elliott Guerard, appealed, on the following grounds.

1. Because the original conveyance of "The Bower" to John McNish, was not put in evidence at all at the hearing, nor was its loss

either alleged or accounted for, nor was the subscribing witness, Beck, called to prove its existence, if ever it had any, nor was any proof offered of its contents, excepting what was represented by counsel to be a copy from a record in the Register's office, with the name of a single witness attached; and it is, therefore, respectfully submitted, that with these facts before the Court, his Honor erred in not dismissing the bill as to "The Bower," for want of evidence of title in the complainants.

2. Because his Honor decreed that by the terms of the deed, as evidenced by the copy submitted, the trust was executed in the children of Ann McNish; whereas, it is submitted, that the better construction is, that the legal estate is in John McNish, and the equitable interest only in the children.

E. & H. Rhett, Appellant's Solicitors.

JOHNSTON, Ch., delivered the opinion.

The Court is satisfied with so much of the

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decree as relates to Stock Farm, except, that as the case is to be retained for further inquiry in relation to The Bower, which may result in a decree in favor of the children of Mrs. McNish, it is thought that no order should have been made on the subject of costs at this time. It is, therefore, ordered that the question in relation to costs be reserved until the further hearing of the case.

It is thought by this Court, that the leave given to make John H. McNish a party for the purposes of the partition of The Bower, (if the case be further prosecuted with a view to the partition of that tract) was unnecessary. In announcing the judgment of my brethren that he will not be a necessary party for that purpose, I merely take the liberty to say, that I entertain some doubts upon the subject.

The majority of the Court also concurs with so much of the decree as holds the uses in The Bower to have been executed; and that no legal title vested in the nominal trustee, John McNish.

A majority of the Court also concurs in the order for further inquiry directed by the decree, upon the ground, that if the Chancellor was not satisfied, it was within his discretion to order the case to be further heard.

It is ordered, that the decree be modified according to the foregoing opinion.

CALDWELL and DARGAN, CC., concurred.

DUNKIN, Ch. The children of Mrs. McNish seek partition of The Bower, and Mrs. McNish prays to be put in possession of the Stock Farm, and these are the points considered by the decree. For the adjudication of these matters, I am of opinion that John H. McNish is not a necessary party, and such I understand to be the judgment of a majority of this Court.

On the state of facts disclosed by the pleadings and proofs, I rather think Mrs. McNish would not be permitted to disturb the title of the defendant in Stock Farm, but that she should be confined to her claim on the fund;¹¹ and I should be better satisfied if, instead of dismissing her bill, she had been permitted to amend with this view. But there is no ground of appeal to this effect; and I concur in the conclusion that she is not entitled to a decree for the possession and delivery of the premises.

Decree modified.

¹¹ Note.—The bill set up no claim to the fund.

4 Strob. Eq. *84

*NICHOLAS V. BAILEY and ELIZA A. H. BAILEY, per pro. amie, v. KER BOYCE et al.

Charleston. Jan. and Feb. Term. 1850.)

[Wills \Leftrightarrow \$800.]

Testator left at his death, his widow and an only daughter, and by his last will and testament, devised and bequeathed to them each, absolutely, "one moiety" of all his estate, both real and personal. The widow having accepted of the provisions in her favor under the will, subsequently set up a claim to be endowed of all the real estate of testator. Her claim was rejected as inconsistent with the provisions of the will and conflicting with the evident intention of the testator, to make an equal partition of his property.

[Ed. Note.—Cited in *Braxton v. Freeman*, 6 Rich. 36, 57 Am. Dec. 775; *Hair v. Goldsmith*, 22 S. C. 572, 573, 574; *Bannister v. Bannister*, 37 S. C. 534, 16 S. E. 612; *Walker v. DesPortes*, 92 S. C. 526, 75 S. E. 960.

For other cases, see *Wills*, Cent. Dig. § 2074; Dec. Dig. \Leftrightarrow \$800.]

Before Dargan, Ch., at Charleston, June Sittings, 1848.

George Henry died in August, 1837. He left a considerable property, real and personal; and he also left surviving him, his wife, Eliza Woodward, one of the defendants, and his daughter, Eliza A. H. Bailey, one of the complainants, and wife of the complainant Nicholas V. Bailey. The real property of George Henry, deceased, consisted chiefly of houses and lots in the city of Charleston, and in the towns of Columbia and Camden, and his personal estate of slaves and choses in action, the latter being debts due him in the mercantile houses of Ker Boyce & Co., Boyce & Henry, and Boyce, Henry & Walter. By his last will and testament, duly executed, and which he left unrevoked, after giving a few legacies of inconsiderable amount, he gave to his wife, Eliza Henry, one half of his estate, real and personal, and the other half to his daughter, Eliza A. H. Henry, now Eliza A. H. Bailey, and appointed Ker Boyce and John Magrath the executors of his will. The will was admitted to probate, and the executors qualified and possessed themselves

of the real and personal estate. The widow of the testator afterwards intermarried with William T. Woodward, and in contemplation of the solemnization of the marriage, and pending the same, the widow of the testator, and the said William T. Woodward, executed a deed of marriage settlement, dated 14th October, 1839, by which, among other covenants and agreements, the said Eliza Henry conveyed to the said William T. Woodward, his heirs and assigns, "one half part of all her property, real and personal, devised and bequeathed to her by the will of the said George Henry, deceased," the other half being conveyed to the trustees for her own use, &c. The marriage was duly solemnized, and afterwards William T. Woodward died in August, 1842, having duly executed his will, bearing date 14th December, 1841. William T. Woodward devised and bequeathed to his wife the one half of her share in the real and personal estate of George Henry, which she had conveyed to him by the deed of mar-

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riage settlement, and which remained undivided, and this he devised and bequeathed to her in bar and in lieu of all claims of dower in his real estate. The widow, Eliza Woodward, elected to take her dower of the lands of her late husband, William T. Woodward, and by the proper judicial proceedings, her dower has been assigned to her, and she put in possession thereof. By this election of the widow, the devise and bequest to her lapses into the estate of William T. Woodward, to be disposed of as by the terms of his will is directed. The heirs at law and legal representatives of William T. Woodward, are consequently interested in the estate of the said George Henry to the extent of one half of the real and personal estate devised and bequeathed by him to the said Eliza Woodward. And this being a bill for the partition and for an account of the estate of the said George Henry, they are made parties defendants. The real estate has all been sold, and the proceeds are now to be distributed. And the only question presented at this time for the judgment of the Court, is upon the claim set up by the defendant Eliza Woodward, to be endowed of the real estate of her first husband, the said George Henry. She has accepted the provisions in her favor under the will, as far back as the date of the marriage settlement deed, but contends that such acceptance is not inconsistent with her claim of dower, not being in bar or lieu thereof, or repugnant thereto; whilst this claim is resisted on the part of the complainant, on the ground, that although the provisions for Mrs. Woodward in the will are not expressly given in bar of her right of dower, it is so repugnant to the other provisions of the will that she will be put to her election; and that she has already elected to take under the will, and therefore is now concluded from

asserting her right to dower. And this is the only question which I am now to consider.

The right of dower is a highly favored claim, and will always be sustained, unless in opposition to the declared intentions of the testator, or in such manifest repugnancy to the will, that the claim to dower and the provisions of the will cannot stand together. The rule thus stated seems plain enough. But when it comes to be practically applied on the question, as to what is such repugnancy as will deprive the wife of her right of dower, or put her upon her election, it not unfrequently presents embarrassments and difficulties. One thing is very clear, and for this there is a host of authorities, that it is not sufficient to make the claim of dower repugnant to the provisions of the will, in a sense that will put the widow upon her election, that the former will make some encroachments or inroads upon property generally devised to other persons by the will. The repugnancy which is to have this effect must be a technical repugnancy; that

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is to say, a *repugnancy as explained and illustrated by the decisions upon the subject. To such an extent has this claim been favored, that Courts of Justice have been charged with extravagancies in sustaining the right of the widow to her dower. But if we will look a little into the nature of the right, it seems to me that the course of the decisions can be vindicated as being perfectly consistent with the rights of the husband and those claiming under him. Dower is an estate to all intents and purposes; an estate of freehold for the life of the wife in one third of the lands of which the husband was seized during the coverture. It is inchoate during the coverture, but becomes consummated and vested at the death of the husband. And it is as much her estate as if it had been conveyed to her by a stranger, or by the husband before the marriage, or as if it had descended to her as her own inheritance. It is not a part of the husband's estate at his death; she does not take it as such, but in her own right by the law of the land. The assertion of her right to dower, therefore, no more bars her of her devise or legacy under the will, than the assertion of her right to her separate estate, or to her entire land or chose in action which survive to her. Her claim to these last mentioned interests is not more perfect, or independent of the will of the husband, than is her right of dower. If he affect to dispose specifically of any of these interests of the wife to others, and makes provision for her by his will, he may by express words, or by a necessary implication, put the widow to her election. It is clear that a mere devise in general terms of the whole of the testator's real estate, does not create such a manifest implication of intention on the part of the testator to dispose of her estate of dower, or such a re-

pugnancy as will put her to her election. For he might intend to give only what he had a right to dispose of. The dower of the wife, at his death, constitutes no part of his estate, that will descend to his heirs, or that can be controlled by his will. And when he disposes of the whole of his real estate, or a particular part of it, he must be construed to mean such part of it as he had a right to dispose of, and as would constitute a part of his estate at his death; and not which belonged to the wife by another and independent title.

When the testator, George Henry, gave to his wife the one half of his real and personal estate, without any violence to the rules of construction, he may be construed to mean that he gave her that estate, subject to her own claim of dower, which she held by an independent title, and which (as if she held it by a title derived from a stranger) would be merged in the fee devised by the will. And when he gave to his daughter the other half of his real estate, by the same consistent rules of construction, he may be supposed to mean that he gave her the half of that

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estate which belonged to *him, and which he had a right to control. Thus the words of the will would in every sense be fully satisfied by her taking one half of his estate, the dower of the widow constituting in contemplation of law no part thereof.

It is not to be denied that there are decisions of the English Chancery Courts, that seem to be opposed to the view that I have taken of this case.¹ In the case of *Chalmers v. Storril*, 2 Ves. & B. 222, the testator gave to his wife and his two children, "all his estates whatsoever, to be equally divided amongst them, whether real or personal." He then specified and described the property devised and bequeathed by him. The master of the Rolls, (Sir William Grant) in pronouncing his judgment, observes, as to the widow's claim of dower, "whether she took under the will an absolute interest, or for life only, it is a case of election; the claim of law, &c. being directly inconsistent with the disposition of the will. The testator directing all his real and personal estate to be equally divided, &c., the same equality is intended to take place in the division of the real, as of the personal estate, which cannot be if the widow first takes out of it her dower, and then a third of the remaining two-thirds. Further by describing his English estates, he excludes the ambiguity which Lord Thurlow, in *Foster v. Cook*, 3 Bro. C. C. 347, imputes to the words "my estate" as not necessarily excluding dower. Here the testator says the property thus bequeathed by him consists of these particulars. It is therefore the property itself thus describ-

¹ *Gordon v. Stephens*, 2 Hill's Eq. 429; *Brown v. Caldwell*, 1 Speer Eq. 322; *Whilden v. Whilden*, *Riley's Eq.* 205.

ed that is the subject of the devise, and not what might in contemplation of law be the testator's interest in that property. This, therefore, is a case of election."

It is to be observed, that the case now being considered, is unlike the case of *Chalmers v. Storril*, in the fact, that in the latter the testator's will contained a specification of the property; a circumstance on which the master of the Rolls laid great stress. In *Foster v. Cook*, the testator had given "all his estate and substance," and in reference to the argument to be deduced therefrom, that there was a necessary implication of intention to exclude dower, Lord Thurlow remarked, "because he gives all his property to trustees, am I to gather from his having given all he has, that he has given that which he has not?" In *French v. Davies*, 2 Ves. 576, Lord Alvanly said, that in order to exclude the claim of dower, it ought "to be clear, plain and incontrovertible, that the testator could not possibly give what he has given, consistently with her claim of dower." And this seems to be the principle on which this class of cases is always adjudicated. And it seems to me that the decision in *Chalmers v. Storril*, which has been followed by *Dickson v. Robinson*, Jacob, 503 and *Roberts v. Smith*, 1 Sim. & S. 513, is neither in harmony with this principle, nor with the current of decisions. The construction applied to all the cases

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where *dower has been allowed out of lands devised by the testator to others, is, that the testator only meant to devise the estate in those lands which he had a right to devise. "In order to raise a case of election, it must be clear and conclusive; for if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the implication will be, that he did not mean them to apply to that, over which he had no disposing power."² Now, applying this doctrine to the construction of George Henry's will, he gives one half of his estate, real and personal, to his daughter Eliza. According to the principle which has just been cited, (and on which alone the widow can be dowable of lands devised to another,) what does he mean by the one half of his real estate? Do not the words, in connexion with the principle of construction, explain themselves? Did he mean to include in the devise the estate of another? Suppose a stranger to his house, to have possessed a title for life to one third of those lands, could it by any possible construction be contended that the testator meant that outstanding estate for life to pass by the terms of the devise? Is the case in any way different where the widow possesses the outstanding title for life? For the purpose of illustrating this principle more fully, I will imagine a

case. Suppose the testator seized of an estate, in one third of which A B has an estate for life in his own right; and the testator devises all his real estate to A B and another, equally to be divided between them; would any one be so extravagant as to say, that in the partition of the estate so derived, that A B would not be entitled to take out his third for life, and then divide equally with his co-tenant the residue, which was the testator's real estate, and which alone fell within the description? That is precisely the case which we have before us. The testator, George Henry, gave to his daughter one half of his own estate, not of his wife's estate, and has not indicated by words, nor by necessary implication, that the legacy and devise to his wife would be in bar and in lieu of dower. I refer to 1 Jarman on Wills, 402 and 403, for his able, and in my judgment, conclusive argument against the authority of *Chalmers v. Storril*.

It is ordered and decreed, that Eliza Woodward be endowed of the lands of her first husband, George Henry, one half of which claim is included in her own share of those lands, and the other half in the lands devised to testator's daughter. And as the lands have been sold, it is ordered that it be referred to the master to report the value of the dower, according to the principles of this decree, to be paid out of the purchase money. The claim for dower can in no event be chargeable on that portion of the real estate conveyed by Eliza Woodward to her late husband, William T. Woodward, before the marriage. And it is so adjudged and decreed.

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*Complainants appealed from the decree, and moved that it be so modified as not to allow dower to the widow, in any portion of the lands of testator, the provisions of the will being manifestly intended in lieu of dower.

Peronneaus & Hayne, Compl'ts. Sol'rs.

Mrs. Eliza Britton and her husband moved the Court of Appeals to modify the decree of the Chancellor in this case.

Because the decree is inconsistent with itself in refusing to allow the widow's dower as against the representatives of Woodward, when the only interest conveyed to Woodward was that which was given her by the will of George Henry.

Memminger & Jervey, for the motion.
Bailey & Brewster, contra.

CALDWELL, Ch., delivered the opinion of the Court.

George Henry, by his last will and testament, of the 9th of February, A. D. 1836, among other things, devised as follows:—"I give, devise, and bequeath unto my beloved wife, one moiety or half part of my estate, real and personal of whatsoever kind and description I may die possessed of, to her, and

² 1 Jarman on Wills, 393.

her heirs and assigns absolutely and forever. I also, give, devise, and bequeath unto my dear daughter, Ann Boyce Henry, the other moiety or half of my estate, real and personal, of whatever kind and description, when my said daughter shall attain the age of twenty-one years, or day of marriage, which shall first happen; the said proportion of my daughter's estate, to be under the control and management of my beloved wife during said period; provided, my said wife remains single and unmarried. And it is my further will and desire, that my beloved wife shall educate my dear child, and keep her under her management and care, for which she shall be entitled to the whole income of my daughter's estate, so long as my said wife shall remain single and unmarried, and no longer. But should my said wife marry, it is my will, and I direct, that my daughter's proportion of my estate, real and personal, shall be managed by my friends, Ker Boyce and John Magrath, my executors hereinafter named; and the income arising from my daughter's proportion, shall be invested for the use, benefit and behoof of my said daughter; still, my beloved wife is to have the sole controul, management and care of my daughter, in educating and bringing her up, for which she shall be allowed a full and adequate compensation. In requesting my executors to take charge and management of my daughter's proportion of my estate, in the event of my beloved wife marrying, is not from a want of confidence in her, who has been an affectionate wife and doating mother, but to protect my dear child's property

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from being subject to the controul *or intermeddling of any future husband who may feel no interest in her welfare."

The testator died in August, 1837, and his widow, Eliza Henry, entered into a deed of marriage settlement with William T. Woodward, on the 14th of October, 1839, conveying to him and his heirs and assigns, one-half part of all her property, real and personal, devised and bequeathed to her by the will of George Henry; the other half being conveyed to the trustees, therein named, for her own use. William T. Woodward devised the half she had conveyed to him by the deed of marriage settlement, to her, by his will of the 14th December, 1841, and died in August, 1842. She elected to take her dower in his lands, which has been assigned to her, and of which she has possession. All the real estate of George Henry has been sold, and the proceeds are to be distributed; and she claims her dower in his real estate; and the question is, is she entitled to it?

The law so highly regards the widow's right to dower, that the husband can neither alienate it in his lifetime, or devise it at his death, although he has the extraordinary power to deprive her of every other interest

in his estate. As the husband has the absolute right to dispose of his estate, he may, in making provision for his wife by will, annex the express condition, that it shall be in lieu and bar of her dower; her acceptance of the legacy is, in law, a renunciation of her dower. The second class of cases is where the testator has not expressly excluded her claim of dower, but if she enforces it, it is inconsistent with the provisions of the will and defeats the testator's intention. This is denominated a bar by necessary implication.

There has been great contrariety of opinion in many of the cases in the English reports, and it seems that every case must depend upon the plain and manifest intention of the testator, and the inconsistency of the claim of dower with the provisions of the will. In one of the earliest cases which was carried up to the House of Lords, a man devised a moiety of his estate, after payment of his debts, legacies and portions, to his wife for life; it was held that this would not bar her of dower, but she ought to elect whether she would insist on her dower or waive it and take under the will.³

In *Chalmers v. Storril*, the words of the will were, "I give to my dear wife, Anna Maria Chalmers, and my two children, namely—my daughter, Anna Maria Chalmers, and my son, John Chalmers, all my estates whatsoever, to be equally divided amongst them—whether real or personal—making no distinction in favour of the male, as it is my intent that my daughter shall have an equal share with my son of all my property," &c. Sir William Grant, the Master of the Rolls, was

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of opinion that it was a case of *election on the part of the widow, and that her claim of dower would be directly inconsistent with the disposition of the will; the equality in the division of the real estate would have been defeated if the widow took out of it her dower, and then a third of the remaining two-thirds.

Sir Thomas Plumer, who succeeded him as Master of the Rolls, adopted and applied the same principle in *Dickson v. Robinson*, where the testator gave his real and personal estate to his widow, upon trust, for the equal benefit of herself, his two daughters, and the child or children with which she was then pregnant.

And Sir John Leach, the Vice Chancellor, in the more recent case of *Roberts v. Smith*, held that where the testator devised gavel-kind lands to his wife and two other persons, in trust, as to one moiety for his wife during her widowhood, and as to the other moiety for his children, the wife must elect between her dower and the provision under the will. This case recognizes and approves the principle in *Chalmers v. Storril*.

³ Decided in 1715, 3 Bro. Parl. Cases, 478.

Notwithstanding Mr. Jarman's disapproval of the three last cases, he has produced no case to contradict, much less to overrule them. His objection arises from the presumption "that as a testator means to dispose of his own interest, exclusively of that of any co-owner, it follows that every devise is first to be read as applying to that interest, and unless some repugnance or inaptitude occurs in such an application of the testator's language, there is no ground for extending the devise to that portion of interest which is not disposable by him."⁴

No rule is better established than that one cannot claim under and against a deed or will. Where a testator disposes of property not his own, but which belongs to the legatee, the latter cannot come in and take a legacy under the will without relinquishing his right. This occurs in cases where the title is clear and established. The claim of dower, during the lifetime of the husband, is contingent and inchoate; it cannot be enforced until after his death, and when he devises the whole estate out of which it is to be taken to his wife and children to be equally divided, her asserting her claim of dower, not only disturbs her co-tenants in the enjoyment of their estate, but defeats the main object of the testator, an equal partition of the property. If the testator had, in this case, declined to make a will, the Act of distributions would have given the widow one-third and his daughter the other two-thirds of his estate; in such case no claim of dower could have been set up; and can it be inferred, that when he has established a more favorable division of his estate between them, that he used such inappropriate terms, "one moiety," when he meant that his widow

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should take her third *out of his real estate, and then come in for an equal part of the remainder of his real and of the whole of his personal estate?

The widow's demand of dower would thus defeat the manifest intention of the testator, to put her and his daughter upon a perfect equality, and while it would destroy the proper proportion he had devised to each of them, would disturb his daughter in the enjoyment of the moiety which he had expressly provided for her.

The ingenious suggestions of Mr. Jarman are not sufficient to raise the presumption, that the testator's intention is not defeated by the claim of dower, and cannot be permitted to prevail against the construction that should be put on the provisions of the will, and the authority of so many decided cases. Our own cases do not in the slightest degree conflict with these views.

It is therefore adjudged and declared, that the said Eliza Woodward is not entitled to be endowed of the real estate of her first husband, George Henry. And it is ordered and

decreed that the Circuit decree be modified according to this opinion.

DUNKIN, Ch., concurred.

JOHNSTON, Ch., absent at the hearing.

Decree modified.

DARGAN, Ch., dissenting.—In this case, I have heard nothing in the argument, or in conference, to change or modify my views as expressed in the circuit decree. Indeed, my opinion is confirmed; for, after a full research, no other authorities could be cited, against that opinion, than those very cases which I had already considered before making up my judgment; all of which are cited in the decree itself. These cases I regarded as, in the highest degree, apochryphal, and their inconsistency with the current of English decisions, and the principle to be deduced therefrom, has been clearly demonstrated, by one of the ablest modern commentators on English Law, (Jarman, on Wills.) The first of the cases (Chalmers v. Storril, 2 Ves. & B. 222), was but little argued, and not elaborately considered. There was not a precedent cited in support of the opinion of the Court, either by counsel or the Master of the Rolls.

The main ground of the decision was the presumed intention, on the part of the testator, of creating an equality between his wife and children. But, as if half conscious that his conclusion needed support, he proceeded to strengthen it by alluding to the fact that the testator has, in his will, described the estate disposed of—"Further," says Sir William Grant, "by describing his English es-

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tates, he excludes the *ambiguity which Lord Thurlow, in Foster v. Cook, 3 Bro. C. C. 347, imputes to the words 'my estate,' as not necessarily excluding dower."

In Dickson v. Robinson, decided by Sir Thomas Plumer, (Master of the Rolls), Chalmers v. Storril was implicitly followed as an authority; and no other reason, or authority, but the previous decision, is given, either in the argument or judgment of the Court.

The same remarks apply to the case of Roberts v. Smith. There has been no decision to this effect, by the Lord Chancellor, or by the House of Lords. Every judicial opinion from these high sources looks entirely the other way, as I will presently attempt to show. But, in the stead thereof, we have the decision of three English judges, of inferior rank, or rather of one—for the two last of this series of cases followed the first, as a precedent, and, simply, because it had been previously so decided. And I am in no way bound, on the authority of these cases, to yield my own deliberate convictions, even as to what is the English law upon the subject. I have said, in the circuit decree, that the decisions that I have been commenting upon, are not in harmony, ei-

⁴ 1 Jarman, on Wills, 402.

ther with the general principles of law, or the general current of the decisions.

I purpose, now, taking a glance, first, at the decisions of the English Courts on this subject—and, then, I will bring under review what the Courts of the States of this Union have said on the same subject.

In the first place, I will remark that, in the construction of a man's will, we are not to presume that he has affected to devise or bequeath that which does not belong to him, or which he has no right to dispose of; but the contrary is a fair and legitimate presumption. This general proposition must command universal assent, for the contrary presumption, I think, would be an absurdity. In *Dummer v. Pitcher*, Mylne and Keene, 262; S. C. 7 Con. Eng. Ch. R. 309, the testator, in his life, had caused certain stocks to be transferred to himself and his wife, in their joint names. The Court held, that, on the death of the husband, this stock survived to the wife. The testator, by his will, gave to his wife, for life, "the interest on all his funded property, or estate, of whatsoever kind." He also made other and additional provisions for her. And the question was—whether the wife was to be put to her election?—or, in other words, whether she was entitled to take the stock, as hers, by right of survivorship, and the other benefits conferred on her by the will. And it was decided that she was entitled to both. The Lord Chancellor said, "There is nothing more undoubted in law, than that, to make a case of election, the intention must appear certainly and clearly, both as to the property assumed to be disposed of, and as to the im-

or justify, very many of the cases, in which the widow has been held to be entitled to her claim of dower, and also to the provisions of the will in her favor, notwithstanding the former, upon a less stringent rule of construction, would seem to come in conflict with the will. All the cases on the subject, both English and American, concur in establishing one doctrine, (a doctrine which the two chancellors, who sat with me on the hearing of this appeal, admit,) that the implication which puts the widow upon her election in a claim of dower, must be a necessary implication. There is, of course, some latitude here as to what is a necessary implication, or inference. A necessary implication, or inference, arising on the face of a will, or deed, I apprehend, unless words have lost all certainty, means a construction, the converse of which would be unreasonable, far fetched and forced. Starting out on the presumption that the testator did not intend to do that which he had no right to do, (to deprive the widow of her dower,) if there be not a necessary implication in the sense of the foregoing definition, to exclude her from her dower, or to compel an election, then she will be entitled to both claims. But, if the intentions of the testator to the contrary be clearly and unambiguously expressed, or indicated, so as to raise a necessary implication that he intended her to take under his will, in lieu of her dower, she will be put to her election. This is the result of the cases, and nothing more can be made of them. And they establish, on the broadest foundations, the principle that the widow's claim, both to her dower and the provisions

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plied condition to be fulfilled. *A person is not, without the strongest indications of such an intent, to be understood as dealing with that which does not belong to him. As for his supposing himself to have rights which he has not, unless it appears plainly upon the face of the will, it would be most dangerous to be guided by any conjecture that may be raised to this effect, or to let in extrinsic proof of it." Again, he says, "There is nothing to justify the Court in believing that the testator intended to give what is not his own." This principle is applicable to all cases of election. It is, in an especial manner, applicable to cases where the right of dower is involved. For dower is a claim highly favored in law, as none will deny. And, in the construction of a will involving the widow's right of dower, we must start out with the presumption that the testator did not intend to control or exclude the right; because, he has no more right to do so, than he has to dispose of choses in action which survive to her; or any other estate, or interest, which belongs to her in another and independent right, and which he had no power to control or dispose of. In my opinion, this principle alone can explain,

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*for her under the will shall prevail, except against a necessary implication, or an expressed intention.

Chancellor Kent, in *Adsit v. Adsit*, 2 Johns. Ch. R.—, says—"To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will, and repugnant to its provisions, or some of them. The title to dower is paramount to the testator's title, and he has no control over it." "Every devise, or bequest," he says, "imports bounty, and does not naturally imply satisfaction of a pre-existing incumbrance."

In *Birmingham v. Kirwan*, 2 Sch. & Lef. 450, Lord Redesdale said—"It is to be collected, from all the cases, that, as the right of dower is, in itself, a clear legal right, an intent to exclude that right, by voluntary gift, must be demonstrated either by express words, or clear and manifest implication. If there be any thing ambiguous, or doubtful—if the Court cannot say it was clearly the intention to exclude—then the averment that the gift was made in lieu of dower cannot be supported; and, to make a case of election, that is necessary—for a gift is to be taken as pure, until a condition appear. This I take to be the ground of all the deci-

sions. *Hitchin v. Hitchin* proceeds clearly on this ground, and all the cases seemed to have followed it," &c. In the case last cited, the testator devised his house and the premises to his wife for life, at a rent below the actual value, she keeping the same in repair, and not alienating, except to the remainderman. He also gave her other legacies, consisting of stock of cattle, household goods, plate, &c. The testator also devised his freehold property to trustees, upon trust. Out of the rents and profits, or by sale or mortgage thereof, to pay debts; and, next, to raise the sum of £6,000—of which sum he directed £200 to be paid to his wife, and the residue, in various proportions, to other persons. As to all the rest of his lands, including the "remainder in the estate," devised to his wife for life, the testator devised the same, subject to debts and legacies, to John Birmingham for life—remainder to his son. It was decided, that the widow should not take dower out of the estate given to her for life, but that she was endowable out of all the other real estate, given to other devisees, though said real estate was chargeable with a pecuniary legacy to herself.

The case of *Lord Dorchester v. Earl of Effingham*, *Cooper's Rep.* 319, was heard by the same judge who heard *Dickson v. Robertson*, (Sir Thomas Plumer, then Vice-Chancellor.) Lord Dorchester, by his will, gave to his wife £500, and other benefits. He devised to her, for life, Stubbings House and fifty-three acres attached thereto, being part of the Stubbings estate. He directed that all his landed estate, and other property, should be attached to his title as close as possible, and bequeathed certain debts due from government, and other personal estate not disposed of, to his executors, to increase

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his *landed estate. Hear the Vice-Chancellor. "It is clear that the will does not, in this case, express in terms that the widow is to be barred of dower. If she is to be barred, the Court must collect it from inference. A Court must be cautious in doing this, it being dangerous to collect, by guessing and conjecturing, that a testator meant what he has not said. The testator, in this case, might not have been apprised of anything about dower, when he sat down to give his wife the house and grounds about it, for her life: probably he had no intention, in any way, as to dower out of the rest of his estate." "As to the words in the will," he said, "about attaching the testator's land to his title as closely as possible, they create no inconsistency with the claim of dower. That claim may postpone or abridge such object in the testator's will, but is not absolutely inconsistent and incompatible with it, and both may stand together." It was held, that the widow was not put to her election, and was endowable out of the Stubbings es-

tate, except such portion of it as had been devised to herself for life. It is to be remarked that these cases, and others that may be cited, establish the doctrine that the claim of dower, operating as a postponement or abridgement of devises to other persons, does not present such an implication as will exclude dower.

In *Lawrence v. Lawrence*, 2 Vern. 365, the testator gave legacies of personal property to his wife. He also devised a part of his real estate, of the yearly value of £130, to her during her widowhood, and the remainder of his whole estate he devised to the plaintiff. Lord Somers held, that the provisions of this will presented to the wife a case of election. But this decree was afterwards, on a re-hearing, before Lord Keeper Wright, reversed, because it did not appear that the testator intended to bar the wife of her dower. The decision in this case, in substance, was that a devise to the widow of a part of the lands, out of which she was dowable, does not exclude her from her right of dower as to the rest, though devised to others, the devise and sole possession of a part of the lands out of which the dower is to issue, not being deemed inconsistent with the assertion of a right to a third of the whole. The same question, under the same will, was made, fifteen years later, before Lord Camden, by the remainderman, whose estate had fallen in. The decree of Lord Camden re-affirmed the right of the widow to her dower. And, on appeal to the House of Lords, after argument, it was held, "that so much of the complainant's bill as relates to the questioning of the dower of the said Dulcebella Lawrence, should be dismissed," with costs.

So, in the case of *Hitchen v. Hitchen*, 2 Vern. 403, the testator devised certain real estate to his wife for her life, and devised the residue of his lands to other persons.

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The Lord Keeper held, *that the devise to the wife was not to be looked upon as any recompense, or bar of dower, but as a voluntary gift.

J. Leman devised lands to his wife for her life, and devised other lands to his brother (the plaintiff) and his heirs. The defendant, the widow, enters upon the lands devised to her, which were of more value than her dower, but not devised to her in lieu and satisfaction of dower; and, afterwards, brings dower against the devisee of the other lands, and recovers dower and costs against him, who brings his bill in this Court to be relieved against the judgment, &c. Parker, Ch., in referring to the case of *Lawrence v. Lawrence*, 8 Viner's Abr. 366, said "this point is determined already by the House of Lords, that there is no relief in this case in equity, and, therefore, the bill must be dismissed."

The unmistakable conclusion to be deduc-

ed from these cases is, that, whenever the dowerable estate is devised in general terms, it passes cum onere, and does not exclude dower—though other lands, or even a part of the same estate, is devised to the widow, and she has taken under the will.

But let me resume my review of the authorities. Mr. Justice Story holds the following language: "A case of election cannot ordinarily arise, where the property is devised in general terms; as, a devise of all my real estate in A. Such a devise," he holds, "is subject to the right of dower, for it is not apparent that he (the testator) meant to dispose of any property but what was strictly his own, subject to that claim." Again, in sec. 1083, the same author remarks, "if a testator should bequeath property to his wife, manifestly with the intention of its being in satisfaction of dower, it would create a case of election. But such an intention must be clear and free from all ambiguity. It will not be inferred from the mere fact of the testator's making a general disposition of all his property—although he should give his wife a legacy, for he might give only what was his own, subject to dower. There is no repugnancy in such a devise, or bequest, to her right of dower. The right to dower being, in itself, a clear legal right, an intent to exclude that right, by voluntary gift, ought to be demonstrated by express words, or by clear and manifest implication."⁵

In Dawson v. Bell, 1 Keene, 763, the testator devised all his free-hold and copyhold lands to his children, equally to be divided among them, subject to an annuity to his wife during her widowhood. He also gave her all his household goods, &c. It was contended that the gift, by the testator, of all his real estate, for the purposes of his will, was inconsistent with the abstraction of one-third of those estates for dower, in addition to the benefits given by the will to the widow. The Master of the Rolls said: "That the testator had himself no intention to leave his wife her claim of dower, when he made this will, cannot be reasonably

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doubted. But the *question is, whether the disposition of the will is of such a nature as to be inconsistent with the enjoyment of dower by the widow. In the consideration of this question, when a testator speaks of all his estate, he must be held to mean all his estate, subject to the legal rights against them; and among these is the wife's right to dower. In this case, the testator gave all his freehold messuages, &c., subject to the payment of the annuity to his wife; and I cannot say that this devise is clearly inconsistent with the enjoyment of her dower by the wife. She must, therefore, be decreed to be entitled to the enjoyment of both the annuity and her dower."

⁵ Story Eq. sec. 1087.

In Harrison v. Harrison, 1 Keene, 765, the testator gave all his farms, lands, estates, &c., upon trust, to receive the rents and profits, and to pay to his wife, during her widowhood, £200 per annum—the residue to his son during his minority: his son, on his attaining twenty-one years, to be let into the possession of the estates, subject to the annuity in favor of the widow. It was held not to be a case of election. The Master of the Rolls, speaking of the devise to the son, says, "prima facie, his (the testator's) farms, lands, estates, &c., must mean his real estate, of which he had the power of disposing: which would be his real estate, subject to the lawful claims; and one of these lawful claims would be the dower of the wife."

In Jackson v. Church, 7 Cowen, 287, the testator devised to his wife, durante viduitate, his dwelling-house and gardens, together with certain personal property. The rest of his estate, real and personal, he gave to his two sons, one of whom was to keep his mother's live stock, and to contribute to her support, if requested. The question was, whether the wife was entitled to both dower and the benefits given her by the will? It was held that her taking the latter was no bar to her claim of dower. The Chief Justice said: "There is, in this provision, nothing inconsistent with the claim of dower. The devise to the two sons will be less valuable, but that constitutes no objection.

"There is no incongruity in enforcing the claim to dower and the devise. The two stand well together," &c.

Kennedy v. Nedrow & Wife, 1 Dallas, 415, [1 L. Ed. 202,] is strikingly analogous to the principal case. Richard Johnson devised and bequeathed to his wife, Ann, a certain house and lot, &c., household goods, and live stock, to her and her heirs forever—also, a legacy of £1,000, to his said wife, and some small pecuniary legacies to his brother and his brother's three sons; to his sister, Ann Nedrow, his three hundred acre tract of land, situate in, &c., to her heirs and assigns forever; to his wife, Ann, "the one moiety, or undivided half part of all that my five hundred acre tract of land, situate, &c., to her heirs and assigns forever, provided," &c. "The other moiety, or undivided half part of my said five hundred tract,

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I give and *devise unto my three sisters, Ann, Catherine and Rebecca, each one-third, to them, their heirs and assigns forever," &c. The widow had before brought her action for the partition of the five hundred acre tract, and her half had been assigned to her. And she now brought her action for dower out of the other moiety that had been devised by the testator to his three sisters, and had been assigned to them. The question for the opinion of the Court was, whether, upon the whole will, the devises

and bequests therein contained, or any of them, to the said Ann, the demandant, are sufficient in law to bar the said Ann of her dower. It was well considered; for the Chief Justice, in delivering the opinion of the Court, remarked that, in the argument, the whole law upon the subject had been exhausted. "Dower," says the Chief Justice, (McKean,) "is a legal, equitable and moral right.⁶ It is favored, in a high degree, by law, and, next to life and liberty, held sacred.⁷ In the will before the Court it is nowhere expressed that the devise to the demandant shall be in lieu of dower; but it is contended that the intention of the testator, collected from the whole will, appears to be that the demandant shall be barred," &c.; "that the devise to her are of lands, in fee; and that these being of four times the value of the dower, ought to be considered a recompense or satisfaction for it." "No devise," he says, "to the wife, even of an estate in fee simple, although ten times more valuable than her dower, will, of itself, be a bar of dower; but it will be considered a benevolence, and she will be entitled to both. Nor, in such a case, will equity interfere against the wife: for I cannot find any instance in which relief on this subject has been given, but the following—first, where the implication, that she shall not have both the dower and the devise, is strong and necessary: second, where the devise is entirely inconsistent with the claim of dower; and, third, where the claim of dower would prevent the will from taking effect in toto.

"In short, the authorities are numerous and explicit, that dower cannot be barred by collateral recompense; that the devise of anything cannot be averred to be in bar of dower, because a will imports a consideration in itself; and a devise without other matter, is to be taken as a benevolence, and the devisee deemed a purchaser."⁸ The Chief Justice concludes with a long array of authorities which he cites, and announces the unanimous opinion of the Court, that the devise to the demandant cannot be deemed a satisfaction of her dower. In addition to the authorities cited by the Chief Justice, see *Sample v. Sample*, 2 Yeates, 43; *McCullough v. Allen*, 3 Yeates, 10; *Wood v. Wood*, 5 Paige, 601; *Fuller v. Yeates*, 8 Paige, 325. In *Incedon v. Northcote*, 3 Atk. —, Lord Hardwicke held, that where the husband had devised to the wife in remainder, the very estate out of which she claim-

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ed her dower, it was not a bar or satisfaction of the dower as being inconsistent with the will. In speaking of the inconsistency of the claim with the provisions of the will, he observes "but Lady Northcote does not

claim to overturn the will, but only a temporary interest, and is only taking out an excrescent interest for a time, and afterwards it will go as the testator intended." That a rent charge or annuity in favor of the wife, charged upon the real estate devised to some other person, would not exclude the widow from her dower by putting her to elect between the annuity and the dower, is clear beyond all dispute. Not only does this appear from the cases of *Hitchen v. Hitchen* and *Harrison v. Harrison*, already cited, but from a review of all the English cases.⁹ The earliest of the later cases all run this way, with a temporary corrupted current in the times of Lord Camden and Lord Northington. Lord Hardwicke's decision was in accordance with the principle which I have asserted, in *Pitts v. Snowden*, Cited in Appen. to 1 Bro. Ca. Different decisions were made by Lord Camden in *Villavald v. Lord Galway*, Amb. 682, by Lord Northington in *Arnold v. Kempstead*, Amb. 466, and by Sir Thomas Sewell in *Jones v. Collier*, Amb. 730. In subsequent cases these decisions have been overruled, and it is settled law, that the wife is not put to her election (ipso facto) by an annuity charged upon real estate devised to others in general terms. (*Pearson v. Pearson*, 1 Bro. 292, by Lord Rosslyn; *Brown v. Perry*, Dich. 685, *Foster v. Cook* 3 Bro. 747, by Lord Thurlow; *Straham v. Sutter*, 3 Ves. jr. 349, by Lord Alvanly, in which the cases are reviewed. *French v. Davies*, 2 Vesey, jr. 572.)

The language of Lord Thurlow in *Cook & Foster*, is worthy of remark. He says, "as to the other point, (the claim for dower,) the wife has a charge upon the estate paramount to the will. She has an absolute right to the third part, it is not his to deprive her of it. But here it is to be gathered from circumstances, that she is not to have it. And because he has given all his property to the trustees. I am to gather from his having given all his property, that he has given that which he had not? So far from a plain declaration, I have nothing even to lead me to think that he meant to deprive her of it. She must therefore have her dower." The testator had given her an annuity charged upon real estate devised to others.

In *Holditch v. Holditch*, 2 Younge and Coltyer, —, the Vice Chancellor (Knight Bruce) says, "I feel bound by the present state of the authorities to say, that a gift of an annuity to the testator's widow, though charged on all the testator's property, is not sufficient to put her to her election. I consider myself equally bound by the authorities to say, that a mere gift of an annuity so charged, and a gift of the whole of the testator's real estate, though specified by

⁶ Prec. in Chan. 244.

⁷ Lilly's Abr. 666.

⁸ 2 Freem. Rep. 242; Prec. in Chan. 133.

⁹ *Adsit v. Adsit*, 2 John. Ch. 428; *Hall v. Hall*, 1 Bland, 135; *Blake v. Barbury*, 1 Vesey, 522; *Thompson v. Nelson*, 1 Co. 447.

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name to some other person, are *not of themselves sufficient to put the widow to her election. And moreover, that a gift of a portion of the real estate to the wife for life or during widowhood, is not sufficient as to the residue to put the widow to her election." "To put the widow to her election, on the ground that her claim of dower is inconsistent with the intention of the testator as to some other devisee or legatee, there must be something beyond the mere devise or legacy. There must be such circumstances attending the gift, that if dower be admitted, the devisee or legatee will be disappointed of the enjoyment of the property in the mode pointed out by the testator. It is the mode and not the quantity or extent of the interest, that may make the claim of dower inconsistent with a devise to another, for certainly in all cases where the widow's claim of dower comes in conflict with the devise to another, the value of the estate is to that extent diminished."

I might multiply authorities to an indefinite extent. As to this kind of argument I have said enough; I will only say, that our own cases cited in the Circuit decree are harmonious with the general current of the decisions. I think I have said enough to shew that *Chalmers v. Storil*, which has been followed by the Court of Appeals in this case, is unsupported either by precedent or authority. It is anomalous and has been severely criticised and condemned by one of the ablest modern authors upon English law, (*Jarman on Wills*.)

The decision was put in that case, as it is in the case now before this Court, upon

an inference of a supposed intention of the testator, unfavorable to the claim of dower, from his having given the lands in moieties. Can such an inference arise sooner from this provision, than if he had given the land in three or more shares, or if he had given a particular tract or part? In the case last supposed, it could with the same propriety be said that the testator intended his devisee to take all the estate he had given him. Yet we have seen how little such a devise avails against the claim of dower on a question of satisfaction.

But the provision in Mr. Henry's will, that his wife and daughter should have his real estate in equal moieties, is perfectly consistent with the claim of dower. If the widow takes her dower, she only takes her own estate; the moiety given to her, she takes subject to her own claim of dower, which merges with the fee; and the daughter takes of the testator's estate an equal share, when she takes it subject to the widow's claim of dower. The misapprehension arises from considering the testator, when he speaks of his estate, as speaking of his wife's estate. The argument deduced from the fact, that the testator used the same language in disposing of the personal estate, is not entitled

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to much weight, as long *as we find in the books such cases as *Forth v. Chapman* and *Mazyck v. Vanderhorst*. But there is no inconsistency whatever, if we consider the testator as disposing only of what he had a right to dispose of. Then the words are consistent and appropriate, whether applied to the real or personal estate, and in no way repugnant to dower.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY, 1850.

CHANCELLORS PRESENT.¹

HON. JOB JOHNSTON,
“ B. F. DUNKIN,
“ G. W. DARGAN.

4 Strob. Eq. *103

*BENJ. F. SIMS, Ex'r of Nathan Sims, et al.
v. A. R. AUGHTERY, Adm'r of
D. H. Sims, et al.
(Columbia. May, 1850.)

[Wills ⇨620.]

After making other provisions in his will, testator directed that all the residue of his estate, of what nature soever, should “remain in the possession” of his wife until his debts were paid, and during her widowhood, under the direction of his executors, and after her death, “all such estate, with the increase arising thereon” should “be collected together,” appraised and equally divided, &c. *Held*, that the widow was entitled under the will, only to a comfortable maintenance and support, and that a purchase of slaves made by her from the income, inured to the benefit of testator's estate.

[Ed. Note.—Cited in Jackson v. Jackson, 56 S. C. 348. 33 S. E. 749.]

For other cases, see Wills, Cent. Dig. § 1438; Dec. Dig. ⇨620.]

[Adverse Possession ⇨106.]

Defendants had been in the unbroken possession of the slaves in controversy, claiming them in their own right, and adversely to the plaintiffs, for a period of nearly twenty-five years before the commencement of the suit; *held*, that this lapse of time gave rise to all the presumptions that might be necessary to consummate and quiet the title of defendants to the slaves.

[Ed. Note.—Cited in Harper v. Barsh, 10 Rich. Eq. 152.]

For other cases, see Adverse Possession, Cent. Dig. § 620; Dec. Dig. ⇨106.]

[Equity ⇨339.]

The effect of a settlement in full is prima facie to bar all claims which might or should have been brought into it; and must be rebutted by stronger and more direct evidence, than is afforded by the formal and unsatisfactory answer of a party who had been brought

in debt in the settlement, and who had slumbered over his claim, alleged to have been omitted therefrom, for years, and until after the death of the other party to the settlement.

[Ed. Note.—Cited in Barr v. Haseldon, 10 Rich. Eq. 60.]

For other cases, see Equity, Cent. Dig. § 685; Dec. Dig. ⇨339.]

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[Equity ⇨339.]

**Held*, that a defendant in an action at law, on certain notes which, it was alleged, had been omitted in a settlement in full, previously had, had a right to come into this Court to seek a discovery from the plaintiff at law, in regard to the circumstances attending that settlement. And that the Court having entertained the bill for that purpose, had a right to retain it for judgment.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 685; Dec. Dig. ⇨339.]

[Equity ⇨43.]

Held, that complainant had a right to come into this Court to raise a question, which the Law Court, considering it as falling within the peculiar province of the Court of Equity, had refused to decide.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 164; Dec. Dig. ⇨43.]

[Equity ⇨330.]

Although a bill is multifarious, which seeks to restrain distinct actions at law, and relating to different estates, yet, if the defendant does not make that defence at the proper time, by plea, or waives it, it is a matter of discretion with the Court whether it will act upon the objection to the bill, on its own motion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 663; Dec. Dig. ⇨330.]

Before Dunkin, Ch., at Union, June Sit-
tings, 1849.

Circuit Decree.

Dunkin, Ch. The principal object of these proceedings is to restrain certain suits in trover, instituted by the defendant, A. R. Aughtery, and certain other suits at law, in-

¹ Chancellor J. J. Caldwell died between this and the preceding Term.

stituted by the defendant, John F. Sims. The subject will be more easily understood by considering, in the first place, the matters involved in the case of A. R. Aughtery.

The complainants are the executor and legatees of Nathan Sims, deceased. Aughtery, as the administrator of David Hopkins Sims, deceased, has sued the complainants in four actions of trover, for the recovery of several negroes which passed to them under the will of Nathan Sims, deceased. These negroes, or those from whom they are descended, were eleven slaves, purchased by Nathan Sims from his brother, Reuben Sims, in 1836, in whose continued possession they had been since 1821. The defendant derives title as the legal representative of D. H. Sims, who died under age, and intestate, in August, 1827. Defendant took out letters of administration on the 19th February, 1846.

To elucidate the respective merits of the title set up, it is necessary to advert to the will of James Sims, Sr. He was the grandfather and common ancestor of the complainants and the defendants' intestate. His will was admitted to probate on the 1st January, 1795. The testator left a widow, two daughters and five sons. After providing for his daughters, the testator proceeds as follows, viz: "Then my will and desire is, that the residue of my estate, of what nature soever, shall remain in the possession of my wife, Elizabeth, under the direction of my executors, until my debts are fully paid, and during her widowhood; to be delivered as a loan to either of my five sons, as they may need, agreeably to the opinion of my executors; not to be removed beyond the limits of the State, ever debarring the delivery of a slave to my son James; and after the death or intermarriage of my

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wife, all *such estate, with the increase arising thereon, to be collected together and appraised by three justices of the peace, for this county, with the assistance of my executors, which I give to be equally divided between my four sons, Matthew, John, Nathan and Reuben, they paying to my son James one-fifth part of the appraisement of the slaves, and one-fifth of the residue of such estate to be delivered to him, and to their heirs forever."

John Sanders and Peter Brazilman qualified as executors, and Elizabeth Sims as executrix of the will. The estate, consisting of land and negroes, stock, &c., was left in her possession, and so continued until her death, in March, 1820. She made a will, dated 28th May, 1810, by which she bequeathed two negro women, Hannah and Matilda, with their children, Hannah and Edy, to Ephraim Lyles, jr. and his lawful children, but in the event of his death, without lawful issue, then to her grandson, David Hopkins Sims. Ephraim Lyles was appointed executor, proved the will, and qualified thereon, on the 28th April, 1820.

On the 12th August, 1820, proceedings were had in this Court between the several parties interested, under the will of James Sims, sr., and the surviving executor, John Sanders, for the purpose of making a partition of the residue, according to the provision of the will. The witness, Col. Benjamin Maybin, proved that the partition was made in 1821; he attended as representing the interest of the children of James Sims, the younger, who was then dead. The negroes now claimed by this defendant, as the administrator of D. H. Sims, deceased, were brought into the partition as part of the estate of James Sims, sr., and went into the possession of the sons, Matthew, Nathan and Reuben. Matthew got one of these negroes, Nathan one, and the rest fell into the share of Reuben. Reuben rather objected that so many of them fell into his lot, and he and Nathan spoke of an exchange, but it was not made. Lyles had then set up a claim to the negroes, and the sons objected to account to the witness for the money value of the share of James Sims, jr.'s children in these negroes, until Lyles's claim was disposed of. This account was afterwards adjusted with the witness by a note from each of the sons, for the share of James's children. The balance of the note of Reuben Sims was settled by his legatees, the defendants, James Sims, and his brother John F. Sims as surety.

About the time of this partition, Lyles, as the executor of Elizabeth Sims, deceased, instituted three several suits in trover, against Matthew Sims, Nathan Sims, and Reuben Sims, to recover from each such of the negroes, embraced in the will of the testatrix, as had fallen into their possession respectively. A verdict was rendered against Mat-

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thew Sims, *and an appeal was taken. The judgment of the Court was pronounced by Mr. Justice Johnson, at November Term, 1823. It had appeared on the trial, that the two negro women bequeathed by Elizabeth Sims, had been purchased by her from the income of her husband's estate, and that until a few years before her death, she always spoke of these negroes as part of the estate of her deceased husband, but having become displeased with her children, she said that she had taken counsel on the subject, and was advised that she had the power of disposing of them, and had determined to leave them to the plaintiff. The defendant had contended, as his first ground of appeal, that under her husband's will, Mrs. Sims had only the right of possession, and the enjoyment of what was necessary for her support and maintenance; and that the fund with which they were purchased, was so much surplus, and belonged to the estate, and that, therefore, the negroes were the property of the estate of James Sims, deceased. "It is not necessary to the determination of this case," says the Court of Appeals, "to enter into the

consideration of this question, and as the case will probably find its way into another Court, possessing competent powers, it is thought advisable to leave it unfettered by any opinion of this Court." The Court holds, however, that as Mrs. Sims had purchased the negroes, the legal title or property was in her, and was moreover subject to administration, and might be liable to other claims of equal or paramount right. "It is necessary, therefore," conclude the Court, "that this fund should go into the hands of the executor, to be disposed of in the manner provided by law." The learned Reporter, in a note, says that it is clearly the rule of law, as held by the Court, that the legal title in such case was in the executrix, Elizabeth Sims, but that a different rule, (or rather a modification of the rule,) obtains in equity: "if an executor," says he, "purchase with the funds of the estate, it is at the option of those entitled to the estate, to charge him with the money and interest, or to take the property purchased."

Very soon after the opinion of the Court of Appeals was delivered, to wit: on the seventh day of February, 1824, a bill was filed in this Court, by Matthews Sims, Nathan Sims, Reuben Sims and others, against Ephraim Lyles, executor of Elizabeth Sims, deceased. The bill, among other things, refers to the proceedings in partition already had, and alleges that Lyles, as executor, had instituted suits, "to obtain the said negroes which were allotted as part of the estate of James Sims, deceased, in partition, settlement and division of his estate, under his will, as appears by the proceedings had of record in this honorable Court in the said case," &c., and prays an injunction, &c. An interlocutory order of injunction was made by Chancellor Gaillard, on the 14th Febru-

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ary, *1824. In the month of October, following, Ephraim Lyles departed this life, intestate and insolvent. No administration has been had on his estate, or on the estate of his testatrix, Elizabeth Sims, further than the same may have been administered by him.

In this connection, it may be only necessary to add, that Col. Maybin testified that the two negro women which Mrs. Sims bequeathed to Lyles, had been purchased in Charleston, in 1805, by Nathan Sims, with the proceeds of the crop of cotton which Mrs. Sims had made the previous year—they were at that time two African girls, and were purchased by the sons for Mrs. Sims. He testified also, that after the death of the testator, James Sims, a negro belonging to the estate, and worth five hundred dollars, had been sold to pay a debt said to be due to Brazilman.

At this stage it is proper to consider the question which the Court of Appeals, in 1823, declined to consider, as being more proper

for the determination of a tribunal differently constituted. The testator directs that "all his estate, of what nature soever, shall remain in the possession of his wife, under the direction of his executors, until his debts are paid, and during her widowhood, and after the death of his wife, all such estate," (i. e. of what nature soever,) "together with the increase arising thereon, shall be collected together and appraised," &c. The whole estate was to remain in possession of his widow, so long as she remained such; on her decease, that estate, with all the intermediate accumulations, was to be collected together and distributed among his five sons. The testator was a planter, deriving an income from his crops, more it is said than was sufficient for the wants of his family. His wife was neither to be stinted nor circumscribed in the enjoyment, but if he had intended that on her decease the surplus of the crops or other income should be divided among his sons, it would be difficult to adopt more appropriate terms than the language used by the testator, "all the estate which had been left in the possession of my wife," together with the increase arising thereon, "I give to be equally divided," &c. Regarding Mrs. Sims as holding under this bequest alone, the Court is of opinion that her interest in the estate, as well as "the increase arising thereon," in the land, negroes and crops, ceased with her life. But Mrs. Sims was the qualified executrix of her husband. The negroes were purchased with the funds of the estate in her hands. The application of the trust fund must be clearly proved, says Chancellor Harper, but when established, "an executor is in equity a trustee, and such purchases made by him, are subject to all the rules which apply to resulting trusts." When it is remembered that a negro belonging to the estate, worth probably twice the value of these two African

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girls, in 1805, was *sold to pay a debt of the testator, it is no hardship to assume that she acted in a fiduciary relation to declare that the slaves thus purchased, became part of her testator's estate, and were rightly divided under the provisions of his will, thus quieting a title which has been sanctified by an undisputed possession of nearly a quarter of a century.

But assuming that Elizabeth Sims had an absolute estate in the slaves, the legal title vested in her executor on her death, in March, 1820. It was so declared by the Court of Appeals, in November, 1823, and that "it was necessary that the property should go into the hands of the executor, to be disposed of in the manner provided by law." At that time the negroes now in dispute were in the possession of Reuben Sims, holding under the partition of 1821, and in open and avowed hostility to the title of the executor. They were held by him and those

claiming under him, from that time until the 21st February, 1846. "The lapse of twenty years," say the Court in *Riddlehoover v. Kinard*, 1 Hill Eq. 378, "is sufficient to raise the presumption of almost any thing that is necessary to quiet the title of property." "If there had been no will and no administration, administration would nevertheless be presumed, and that defendants had acquired a title from the administrator." According to the judgment of the Appeal Court, the legal title in these slaves was in the legal representative of Elizabeth Sims, and it is so now, unless it be in the complainants. After a possession of twenty-five years, the Court will presume a sale by the executor for the purpose of paying the debts, an administration de bonis non after Lyles's death, and a sale by such administration, or almost any thing else, in order to quiet the long possession.

But Aughtery administered in behalf of the distributees of David Hopkins Sims, who died a minor, in August, 1827; his next of kin were his father, Reuben Sims, and his brothers and sisters, the defendants. It is admitted by the answer, that in 1836, or before, Nathan Sims purchased from Wm. B. R. Farr, a tract of land for the use and benefit of Reuben Sims's family, for three thousand dollars, and it was thereupon agreed by the said Nathan Sims and Reuben Sims, that Reuben Sims was to transfer and deliver to Nathan Sims eleven negroes, (those now in dispute,) for the price of three thousand one hundred dollars, and in consideration thereof, Nathan Sims agreed to pay for the said tract of land so purchased of Farr; that Nathan Sims gave his note to Farr for the land, took possession of the slaves, and held them until his death, in 1844, and his family have since held them. Reuben Sims and his family took possession of the land purchased for them from W. B. R. Farr. He and they held it until his death, in 1844, and his family (the defendants,) have (in the language of the answer,) "continued to

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reside *upon the said land up to the present time, receiving the rents and profits of the same." If all the defendants were minors, (and the youngest is now about twenty-seven or eight years of age,) it is insisted, on the part of the complainants, that they cannot hold the land and disaffirm the contract. It seems to the Court that this view is well sustained on authority as well as reason. It affords, too, a satisfactory reply to that part of the defendant Aughtery's answer, in which he professes his readiness to do justice to the acts of kindness done by Nathan Sims to the family of his brother Reuben Sims, and avers that he instituted his several suits in trover for the purpose of having justice done between the parties, but insists that this Court has no authority to take cognizance of or interfere in this mat-

ter; pleads to the jurisdiction and craves the judgment of the Court thereon.

It is proper now to advert to the case of the other plaintiff at law, John F. Sims. His father, Reuben Sims, was sold out by the sheriff in 1827. The Court will not pretend to state all the facts fully or very accurately, in relation to this branch of this case. The pleadings and the proofs which accompany this decree, will supply any omission and correct any inaccuracy. The eldest lien on Reuben Sims's property after sale, (as the Court understands,) was a judgment in favor of W. B. Farr, for some ten thousand dollars. Nathan Sims came forward as the friend of his brother: bought Farr's judgment, perhaps for twenty-five hundred dollars, and thus obtained the controul of the property of Reuben Sims. He continued for several years to act as the friend of his brother and family. It is alleged in the answer, that the proceeds of the crops were received by him until 1836 or 1839, and it is proved that he furnished the family with supplies, &c. John F. Sims, the defendant, lived on the place, and managed from 1836 to 1839, inclusive. The crops, he says, were still sold by Nathan Sims, Col. Reuben Sims being present. Reuben Sims died in 1840, and a division took place among the defendants in December, 1841. About fifty-six slaves were divided among the widow and children of Reuben Sims. It appears by the statement in evidence, that the land and eight slaves were allotted to the widow, and the rest of the slaves divided among the children. In the month of October, following, (1842) a settlement took place between Nathan Sims and the family of Reuben Sims. The circumstances connected with it are most fully detailed in the testimony of John P. Sartan, a witness called by the defendants. He married a daughter of Reuben Sims, but he was not objected to by the complainants. He said that they went to the house of Nathan Sims for the purpose of settling. There were present, beside himself, Dr. Milton Goudelock, (who had married

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a daughter) A. R. Aughtery, (the defend*ant, who had married another daughter,) John F. Sims, (defendant) and James N. Sims (as he thinks); the negroes had been previously divided. The object was to ascertain the debts of Col. Reuben Sims to be paid by his heirs, "so that it might be known how much each had to pay." A memorandum of the debts was produced, among them was the Farr debt, put down at \$3500, held by Nathan Sims; the judgment was open for a much larger amount. Nathan Sims had also an account among the debts to be paid by the children; a paper like that now produced, was present, and there were several other papers on the table. The children were going to divide the debts among them; calculations were made by those capable of calculating. Dr. Goudelock made some ob-

jection to one of the negroes which had been allotted to him, and Nathan Sims took the negro at the valuation. In the course of the day, witness heard Dr. Goudelock say, that Nathan Sims ought to have made a shewing, but he does not recollect whether it was said in the presence of Nathan Sims; "finally, all agreed to the settlement." Witness "concluded it was a final settlement among them. Witness married one of Reuben Sims's daughters, and has been always willing to stand by the settlement; thought Nathan Sims had had a great deal of trouble in managing the property, and that he was working for the benefit of the children." Another witness, George Ashford was examined before the Commissioner. He attended at Nathan Sims's in August, [quere October?] 1842, as creditor of Col. Reuben Sims, deceased. He supposed the parties were making a final settlement. Nathan Sims had a judgment of W. B. Farr, on Reuben Sims, which he said he had purchased for the benefit of Col. Reuben Sims's children, and all he wanted was for them to pay him what he had given for it. He said he had given his note for about twenty-five hundred dollars, for the judgment. There was a list of debts owing by Col. Reuben Sims, for some of which Nathan Sims was probably bound. Each of the children of Reuben Sims was to pay certain debts, and each to pay their proportion of the Farr debt. He thinks, as the debts were called out the paper (now produced) referred to, was marked so as to indicate by whom they were to be paid. Mr. Aughtery was to pay witness upwards of fifteen hundred dollars. Nathan Sims told them that a number of the debts in the exhibit they were not bound to pay, but advised them to pay them.

The paper to which these witnesses referred, was in the handwriting of Nathan Sims, and forms part of the evidence in the cause, as explanatory of their testimony. It may be only necessary here to remark, that in the statement of debts to be paid by the children, Ashford's debt of \$1553 is set down to Aughtery, and the debt due by Reuben

as plaintiff, and the other in the name of Richard O'Neale, as plaintiff. To restrain the prosecution of these suits, is another object of this bill. The cause of action in the former case is a sealed note of Nathan Sims to W. B. R. Farr, for \$1000, dated and in the latter, a sealed note of Nathan Sims to R. O'Neale, for about \$594, dated . Complainants charge that, in February, 1836, when Nathan Sims purchased the eleven negroes from Reuben Sims, a statement was made and is entered in Nathan Sims's book, in which he charges, as paid for Reuben Sims, a debt to Sartor of \$607; to Starnes, of \$1386.47, and to W. B. R. Farr, of \$2000, amounting to \$3993.47, and credits the purchase of the negroes, \$3100, leaving a balance due Nathan Sims of \$893.47; they charge the \$2000 thus paid was part of the purchase of the land of \$3000; thus leaving the \$1000 note to Farr to be paid by Col. Reuben Sims; that accordingly, soon after, and while the property was under the management of the defendant, John F. Sims, this note was taken up by him out of the proceeds of the crops; that in the same manner the O'Neale note had been given by Nathan Sims for the benefit of the family, and was paid by John F. Sims in the same way; and that afterwards, in settling with the family of Reuben Sims for the proceeds of the crops, he had received credit for the sums thus paid, and a balance was due by him on the account. The answer of John F. Sims in relation to these transactions is very unsatisfactory. He says that he purchased the O'Neale note, about the year 1840 or 1841, and paid for it out of the proceeds of his cotton crop, which he had sent to Columbia. The note was, in fact, deducted by O'Neale from the sales of cotton belonging to the family of Reuben Sims, which had been placed in his hands by Nathan Sims, and so the Court thinks, appears from the answer itself. The defendant says he purchased the Farr note about the year 1837 or 1838; but he does not say whether it was or was not paid for out of the proceeds of the cotton be-

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Sims to Col. *Maybin for James Sims's children's share of the negroes divided in 1821, was put down to James N. Sims, and was afterwards settled (as Col. Maybin testified) by James N. Sims's note, with John F. Sims as surety. Nathan Sims survived nearly two years after this settlement, and died on the 27th of June, 1844, leaving Benjamin F. Sims his executor, and the other complainants, his devisees and legatees.

On the day before A. R. Aughtery instituted his suits in trover against the widow and children of Nathan Sims, to wit:—on the 20th of February, 1846, John F. Sims, the defendant, caused two suits to be entered against Benjamin F. Sims, executor of Nathan Sims, deceased. One of the suits is presented in the name of W. B. R. Farr,

longing to the family of Col. *Reuben Sims. The defendant does, however, "deny that he was allowed any credit in the settlement with the other members of the family for the said notes in accounting for the cotton crops sold by him." The Court does not suppose that in this denial the defendant means to say he paid these notes out of the proceeds of the cotton crops, and settled with or paid the family the amount of sales without deducting the sums thus paid to Farr and O'Neale. But he may mean that he never had a settlement with them at all, or that he never settled for the crops out of which these debts were paid, or it may mean that he purchased, with his own money, in 1837 or 1838, a note which W. B. R. Farr then held on Nathan Sims for \$1000, and about 1840 or 1841, purchased in the same way a

note of N. Sims to R. O'Neale for \$594, and that he has never been allowed for them in any settlement with the family. There are very grave difficulties in coming to the last conclusion, which should be removed by much stronger and more direct evidence than a mere dry and formal answer. The defendant offered no evidence whatever in relation to his purchase of the notes; the time or the mode in which he had paid for them. In the absence of any such proof—in the absence of any denial in the answer that the Farr note was paid from the proceeds of the cotton belonging to Reuben Sims's family, and the admission that the note was taken up in 1837 or 1838, the Court is led strongly to the conclusion that this note was paid, as the O'Neale is admitted to have been paid, from the proceeds of cotton belonging to the family, and not from the individual funds of the defendant, John F. Sims. The entries in Nathan Sims's book, made by himself in February, 1836, are evidence of nothing but the fact that such entries were made by him, and so the Court ruled at the hearing. But in October, 1842, there was a settlement between Nathan Sims and the family of Reuben Sims; John F. Sims was present; was fully competent to understand and to act, and was bound by what was then done. On the supposition that the Farr note of \$1000 and the O'Neale note of \$594, had been long since settled by the family, as the complainants charge they in fact were, and of right ought to have been, from the proceeds of their cotton, it is quite intelligible that no notice should have been taken of them. But if they were a debt due by Nathan Sims to the family, why were they not introduced? If they were introduced, they were certainly adjusted. But the defendant, John F. Sims, admits and insists they were not brought into that settlement. He says it was a partial settlement. But he admits that the account filed with the complainant's bill, and marked exhibit (D) contains a statement of the debts, a portion of which the parties then agreed to pay, and he insists that the amount at

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which Na*than Sims put down his claim under the large Farr judgment, shall be concluded by that statement, and he admits that he and his two brothers assumed to pay to Nathan Sims the amount due to him on his account of \$2275, and that he gave his note, with W. W. Sims and R. G. Sims (his brothers) to Nathan Sims for the amount, which has since been sued to judgment and is now nearly paid; that he, with Milton Goude-lock and R. G. Sims, gave another note to Nathan Sims for the amount due to him on the Farr judgment, as appeared by exhibit (D) "that some of the parties, to wit:—Milton Goude-lock and James N. Sims, have not paid all the debts assumed to be paid by them, as indicated by the initials on the exhibit (D); and the defendant, John F. Sims," further

admits, "that at the time of this settlement, and when he executed these notes to Nathan Sims in his lifetime, he had in his possession the Farr and O'Neale notes, and states as a reason why the Farr and O'Neale notes were not then brought to view was that after he purchased the said notes, he had laid them away, expecting them to be accounted for by the said Nathan Sims on a final settlement, but that it did not occur to him until some time after he had given a note for the Farr judgment, that the said O'Neale and Farr notes had not been accounted for by the said Nathan Sims, and after examining the matter more fully, he came to the conclusion and ascertained that the said O'Neale and Farr notes had not been satisfactorily accounted for," and he thereupon instituted suits thereon against the complainant, as executor of Nathan Sims, deceased.

"It would be most mischievous," says Mr. Justice Story, "to allow settled accounts between the parties, especially when vouchers have been delivered up or destroyed, to be unraveled unless for urgent reasons, and under circumstances of plain error, which ought to be corrected." S. 527. The Court is well satisfied that the O'Neale and Farr notes were matters between Nathan Sims and the family of Reuben Sims. But conceding that they had been purchased by John F. Sims, and that they were for adjustment between him and Nathan Sims, the Court is of opinion that, *prima facie*, at least, the settlement of October, 1842, and the execution of the two notes by John F. Sims to Nathan Sims, amount to a presumed adjustment of all existing demands between them. But one of the notes of John F. Sims so given, was afterwards sued to judgment, and the judgment has been nearly satisfied. In the mean time he had "laid aside" the O'Neale and Farr notes, on which, according to his statement, Nathan Sims owed him between two and three thousand dollars, and he did not wake up to the knowledge that "these notes had not been satisfactorily accounted for" until nearly five years after the

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settlement, and nearly two years *after the sleep of death had fallen upon him who was most competent to explain or confute.

It is ordered and decreed that the defendant, A. R. Aughtery, be perpetually enjoined from prosecuting his suits at law in trover, instituted by him, and that he pay the costs of the said suits at law; and that the defendant, John F. Sims, be perpetually enjoined from prosecuting his suits at law, instituted by him in the names of W. B. R. Farr and Richard O'Neale, against Benjamin F. Sims, executor of Nathan Sims, deceased, and that he pay the costs at law of said suits. It is finally ordered and decreed, that the costs of the proceedings in this Court

be paid by the defendants, A. R. Aughtery and John F. Sims.

The defendants appealed, on the following grounds, viz:

1. Because the Chancellor erred in deciding that Mrs. Elizabeth Sims was not entitled, under the will of James Sims, to any portion of the proceeds of the plantation and labour of the slaves belonging to his estate, in her own right, and that purchases of property made by her, from the income of the estate, enured to the benefit of the estate of James Sims.

2. Because the Chancellor erred in deciding that the defendants were barred by lapse of time, when there has been a continued minority from the death of Ephraim Lyles, in 1824, down to the informal settlement of complainant's testator and the defendants, and until a short time before the commencement of the suits at law, both the defendants and complainant commencing their suits at law at the same court.

3. Because the so-called settlement ought to be opened and is not binding on the defendants, as some of them were minors and others just arrived of age, ignorant of their rights, and were completely in the power of testator, and there was no showing on the part of testator of his actings and doings as agent or trustee of the defendants. The informal settlement was in October, 1842, and the suits in trover were commenced February 21, 1846, and the suits on the O'Neale and Farr notes on 20th February, 1846, and the suits of B. F. Sims, executor, v. John F. Sims et al, commenced 19th February, 1846.

4. Because the Chancellor erred in deciding that the O'Neale and Farr notes were included in the settlement of October, 1842, and, therefore, paid by N. Sims, relying upon a mere presumption of evidence against the positive oath of the defendant, John F. Sims; and the decree is erroneous as to the facts of this branch of the case; first, as to the time that elapsed before John F. Sims instituted proceedings at law upon them. Secondly, as to his suffering himself to be sued on a note given to N. Sims, and the money forced out

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of him *before he proceeded on the O'Neale and Farr notes, &c. and there are no such items in the said settlement as these notes.

5. Because there was a plain and adequate remedy at law on every branch of the case, and there was not such a community of interest as authorizes all the parties, defendants, to be included in one bill; and, therefore, this Court cannot entertain jurisdiction.

6. Because the decree is against equity and evidence; and from the case made by the pleadings and evidence, the injunction ought to be dissolved and the bill dismissed, or an accounting be had between the parties.

Herndon, for the motion.

A. W. Thomson, contra.

DARGAN, Ch., delivered the opinion.—In the natural order of discussion, the first question on this appeal is, whether the Chancellor, who tried the cause on circuit, has adopted the proper construction of the will of James Sims, sen. I will not repeat the clause in question, which has been quoted at length in the circuit decree. It is, substantially, as follows: He directs that all the residue of his estate shall remain in the possession of his wife during her life, or widowhood, under the direction of his executors, with a discretionary power, on their part, to deliver any portion of it, as a loan, to any of his sons, with the exception of his son James, who was inhibited from receiving any part of the negro property. After the death of his wife, "all such estate," (that is, the estate which he had previously directed to be left in the possession of his wife,) "with the increase arising thereon," was to "be collected together," and appraised, and equally divided among his four sons, Matthew, John, Nathan and Reuben; they paying to James one-fifth of the appraised value of the estate.

The widow, Mrs. Elizabeth Sims, from the income of the estate thus left in her possession, purchased two negro girls. These negroes she, at first, acknowledged to belong to the estate of her husband; but, afterwards, disagreeing with her children, she asserted her own independent right to the negroes. She resolved to dispose of them and their issue, then four in number, by her last will and testament. This she did; and bequeathed them to Ephraim Lyles, whom she appointed as her executor, and, if he should die without lawful issue, then she gave the same negroes to Hopkins Sims.

The question, in the first place is, whether these negroes belonged to the estate of James Sims, sr., or to the estate of Elizabeth Sims—and that involves the question, what estate, or interest, did Elizabeth Sims take in the

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estate of her husband, *which he directed to be left in her possession? It will be remarked that the will gives her nothing in direct terms. Whatever she takes, must be given to her by implication. And there is another feature in the will equally clear. Whether she takes a life interest, or merely a maintenance and support, she takes no legal title to any portion of the estate, but merely an usufructuary right, or interest. But the question is, whether she was entitled to the whole income, or only enough thereof to afford her a comfortable maintenance and support. If she was entitled to the whole income, then the negroes, purchased with a portion of it, became her own property. And, if she was only entitled to a support, the negroes purchased with the rents and profits of the testator's estate, will, of course, in equity, be regarded as the property of the estate. Though the interpretation of this part of the will is, in my view, not free from

embarrassments, I incline to think that the construction adopted by the Chancellor, is the best that can be given. The inquiry, in such cases, must always be, what did the testator mean? In this instance, the testator directed that "the residue of his estate, of what nature soever, should remain in the possession of his wife," with a power, on the part of his executors, (of the nature of a power of appointment,) to deliver any part, or all of the estate, to either of his four sons named, as a loan, under certain restrictions. At her death, he directs that "all such estate," that is, all "his estate of what nature soever," being the estate that he left in the possession of his wife, "with the increase arising thereon," should "be collected together," appraised and divided. Were the person in whose possession he had thus left his estate, other than his wife, it would be difficult to come to the conclusion, or to imply that anything whatever was intended to be given by these terms, to such person. I think that the implication rests solely on the relation which the testator bore to the person who was to have the possession, and the moral obligation to provide for the support of his wife. I could not do less than to imply this much in her favor. But, as the implication rests solely upon the moral obligation, and it cannot be said that this extended farther than to provide for her a comfortable support and maintenance, it would seem that the implication should not be extended farther.

But what does the testator mean when he directs that all such estate as he had left in the possession of his wife, with the increase arising thereon, should, at her death, be collected together, be appraised and divided? And, especially, what does he mean by the phrase "with the increase arising thereon?" It is urged that these words mean the natural increase of the slaves. It would be an awkward and unusual form of expression, to

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speak of the increase arising on *slaves. It is usual to say the natural increase, or issue of slaves. If the testator had said "the increase arising on the slaves," the words would, of course, mean nothing else than the issue of the slaves. But the testator has not so expressed himself. If he had so intended, it would have been natural and easy for him to have done so, and in forms of expression more appropriate than that employed in this clause. The word increase does not, *ex rei termini*, import issue, or increase in the way of natural procreation. But it is a general term, and, when applied to estates or property, and unexplained by the context, means all species of augmentations and additions, whether from natural procreation, crops, rents, interest, or dividends. It does not appear in this instance, as explained by the context, to have been used in the restrictive sense, but we are

warranted the rather, by the context, to suppose it to have been used in the general sense. If there had been bank stocks, and choses in action, flocks and herds, among the property, which the testator left in the possession of his wife, (and this, to some extent, may have been the fact,) would it be said that the accretions, or "the increase arising thereon," or so much thereof as was not consumed in support of the wife, ought not, under the provisions of the will, to have been brought into the division?

This is the result of my best and most deliberate judgment though, as I have before stated, I do not think that the construction which has been given is free from difficulty.

When the judgment of the Court must be given upon a construction not entirely satisfactory, it is gratifying to know that the judgment may be supported upon other grounds, and upon arguments that are invincible. We will now suppose the negroes in controversy to have been the property of Mrs. Elizabeth Sims, at the time of her death. Conceding this, these complainants are not entitled to recover the negroes. Mrs. Elizabeth Sims died in March, 1820, and the defendants have been in the unbroken possession of the negroes, claiming them in their own right, and adversely to the plaintiffs, from the death of Mrs. Sims to the present time. Their adverse possession has continued for about twenty-five years before the commencement of this suit. This lapse of time will give rise to all the presumptions that may be necessary to consummate and quiet the title of the defendants to this property. On this subject, the Chancellor, following strictly the course of the decisions, makes these observations: "After a possession of twenty-five years," he says, "the Court will presume a sale, by the executor, for the payment of debts, an administration, *de bonis non*, after Lyles's death, a sale by such administration, or almost anything else, in order to quiet the long possession." This is strong language; but not stronger than is warranted by the authorities, or de-

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manded *by a stern and imperative public policy. In regard to property not the product of manual labor, there is, perhaps, no title extant, in any part of the world, that could withstand the searching scrutiny of justice, and which, if traced to its origin, would not be found to be based upon fraud, rapine, spoliation or conquest.

This is especially true in relation to property in slaves. But we do not pause to inquire into the rights of the original captors to remove them from their native and desert homes, nor into the legality of all the intermediate transfers, since they were landed from the slave-ship upon our shores. The lands in America are not less the property of their present possessors, because the bold cavaliers of England and Spain seized them

at the point of the sword, or because William Penn and the Pilgrim Fathers acquired them from the simple aborigines, by more peaceful, but not much less unconscientious means. And, to go farther back, the title of the aboriginal tribes, who were in possession of the country at the time of its discovery, was acquired, (certainly, in some instances, and probably in all,) by the same means that were employed to oust and root them out. The same necessity that dictates the recognition of the de facto rights of nations and of governments, as to their territorial possessions, must prevail, more or less, among the members of social and political communities. Hence, among all people, where the rights of property are respected, some importance is attached to the mere fact of possession. Among rude tribes, simple occupancy is considered a sufficient title. In civilized communities, possession is regarded as only prima facie evidence of right. But, still, the necessities and repose of society make it the policy of the law to adhere to the principle of de facto right. For, when a possession, which, in its inception, was merely prima facie evidence of title, or which, in fact, may be proved to have been wrongful, has continued for a sufficient length of time, it becomes right and perfect, as if acquired under all the formalities and solemnities of the law. The law requires diligence in the assertion of a right by legal actions. Life is short, parties and witnesses are mortal, memory is frail, written muniments are spread upon perishable materials and are subject to many accidents, and time throws a veil of obscurity over transactions of the distant past. Under circumstances like these, is it either unreasonable or unjust, that he who has a claim should be required to assert it within a limited time? If he goes to sleep, and suffers his claim to lie dormant, can he complain if, when he wakes up, the Courts refuse to entertain his complaint?

To quiet titles founded upon possession, we have two systems of rules, that are different in their character, and the extent of their operation. Statutes of limitations are

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a part *of the *lex fori*. When the bar of the statute is set up by plea, Courts do not, in general, affect in the judgment to decide upon the right or title of the parties, but simply refuse their remedial action. I say that this is the general rule. For by the provisions of our own statutes of limitations, and the judicial constructions which have been put upon them, a party who has held lands or chattels in possession for the statutory period, is considered to have acquired a good title upon which he can himself maintain his action. The statutes of limitations in South Carolina do not extend to all cases. They do not bar actions upon specialties, or upon decrees and judgments, or suits in equity. There are provisos also, by which the

rights of persons under certain disabilities are saved. Though the Court of Equity following the law have adopted the equity of the statute, and applied it to cases where the cause of action is of a legal character, and in fact, to all cases where a Court of law would be bound by it, (except where there is some peculiar countervailing equity,) yet these statutes do not afford sufficient relief against the prosecution of stale and antiquated demands; nor are they of any avail, in many instances, to prevent the disturbance of titles consecrated by a long continued possession. Hence we have another system of rules, founded upon what is called the doctrine of legal presumptions, which prevail alike in Courts of Law and Equity, and which are eminently subservient to the quieting of titles, and the prevention of litigation arising upon obscure and antiquated transactions. If these legal presumptions require a longer period than statutory bars to acquire force and effect, they are more general in their operation. They are highly conducive to the peace of society, and the happiness of families; and relieve Courts from the necessity of adjudicating rights so obscured by time, and the accidents of life, that the attainment of truth and justice is next to impossible. Whenever things have fallen into this condition, it is a good and a wise rule, that would respect the possession, and leave it undisturbed as the legal test of right and title.

These legal presumptions, by which conflicting claims and titles are set at rest, I have endeavored to show are natural and necessary. They spring spontaneously out of the institution and relations of property. As to the precise time at which they arise, each independent community must judge for itself. We have adopted the law of the mother country. In South Carolina, as in England, by the lapse of 20 years without admissions, specialties and judgments are presumed to be satisfied, and trusts discharged. Twenty years continued possession will raise the presumption of a grant, from the State, of deeds, wills, administrations, sales, partitions, decrees, and the Chancellor has said of almost

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anything, that *may be necessary to the quieting a title which no one has disturbed during all that period. And it is the opinion of the Court, that the rule has been well applied in this case.

There is another view in favor of the right of the complainants that may be superadded. The suits in trover brought for the recovery of these negroes, which have been enjoined, are brought in behalf and in the name of A. R. Aughtery, administrator of Hopkins Sims. He claims the negroes by virtue of a limitation in the will of Elizabeth Sims, by which he was to have the negroes, in the event of the death of Ephraim Lyles without, &c. My opinion is, that the limitation to Hopkins

Sims is void for remoteness. I will not quote the words of the bequest, nor pause here to discuss this point. I will suppose that the limitation was valid. Ephraim Lyles was the executor of Mrs. Sims. He qualified, and brought "suits in trover against Matthew Sims, Nathan Sims and Reuben Sims, to recover from each, such of the negroes embraced in the will of Elizabeth Sims, as had fallen into their possession respectively." This was about the year 1821. He got a verdict against Matthew Sims, and an appeal was taken, which was dismissed. On the 7th February, 1824, a bill was filed by Matthew Sims and others, against Ephraim Lyles, executor of Elizabeth Sims. The bill was for an injunction of the suits at law, on the ground, that the negroes did, in equity, belong to the estate of James Sims, sr., having been purchased with the income of his estate. On the 14th of February, 1824, an interlocutory order for an injunction was granted. In October, 1824, Lyles died, and the suit abated. It is said that Hopkins Sims, the alleged remainder man, is not barred by the statute of limitations, because he was an infant at the death of Lyles, and has only attained the age of 21 years within four years before the commencement of his action. But Ephraim Lyles, as the executor of Elizabeth Sims, represented not only the estate given to himself in the negroes by the will, but also that given to Hopkins Sims. He never had them in possession, but was seeking, by actions instituted in his character of executor, to recover the negroes from persons then in possession, who were the present complainants. The statute of limitations commenced to run against Lyles when he first qualified as executor. It continued to run on, notwithstanding there was no grant of the administration with the will annexed. The doctrine is (except in the case provided for in the Act of 1824,) that where the statute has once commenced to run, it will continue to run, notwithstanding subsequent disabilities. The claim of Hopkins Sims to the negroes, if he ever had a title, is barred by the statute of limitations.

In regard to that branch of the case which

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relates to the *suits brought by John F. Sims, against Benjamin F. Sims as the executor of Nathan Sims, I have but little to say, besides expressing my concurrence with the views taken by the presiding Chancellor. The effect of a settlement in full is, *prima facie*, to bar all claims which might or should have been brought into the settlement. The case is strengthened, when, as in this instance, the party who afterwards prefers an omitted demand, is the party who is brought in debt, is required to give his note, is sued upon it, is pressed for payment, and pays it with great difficulty. And more; he slumbers over his omitted claim for years,

and waits until the other party to the settlement is in his grave. He then wakes up, and says he has demands which were omitted in the settlement, for the omission of which he is able to give no satisfactory explanation.

If these had been admitted and introduced in the settlement, he would not have fallen in debt at all, for he had enough then to have balanced the account of Nathan Sims. If the sums were small, there would not be so much difficulty in believing that the O'Neill and Farr notes were omitted from forgetfulness or oversight. But the difficulty is enhanced, when the amount of the claim, (between \$2,000 and \$3,000) is considered. I am satisfied that the Circuit Court was right in holding John F. Sims concluded by the settlement.

The objection to the jurisdiction of the Court, made in the defendant's fifth ground of appeal, cannot be sustained. In the case of E. Lyles v. Matthew Sims, decided by the Law Court of Appeals in 1833, it was held that the legal title in the negroes was in Elizabeth Sims, and after her death in her legal representatives; and that this was the case, whether Elizabeth Sims took the whole income of the testator's estate, under the will, or only a support and maintenance during her life. This latter question the law Court declined to decide, considering it as falling within the peculiar province of the Court of Equity. The complainants had a right to come into this Court to raise that question. As to the actions at law upon the O'Neill and Farr notes, the jurisdiction of the Court can be maintained on the ground that the complainants had a right to come into this Court, to seek a discovery from John F. Sims, (who was prosecuting said actions) in regard to the circumstances attending the settlement. And the Court, having entertained the bill for this purpose, had a right to retain it for judgment.

The other objection embraced in the defendant's fifth ground of appeal, namely, that the bill was multifarious, is well founded. The actions at law upon the notes, and the actions of trover, had no such connection as to entitle the complainants to blend them in the same suit. They were entirely distinct transactions; the one relating to the estate

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of James *Sims, sr., and the other to the estate of Nathan Sims. But the objection should have been taken at an earlier stage of the proceedings, and by plea. The defendant cannot now, as a matter of right, make that question. If the defendant does not choose to make that defence in the proper form, or waives it, the Court would not be precluded from noticing it, and founding its judgment upon it. But it is a matter of discretion; and the Court does not think this a proper occasion to notice that objection on its own motion, and to dismiss the bill, and

to send away the parties to commence another course of litigation.

The appeal is dismissed, and the decree is affirmed.

DUNKIN, Ch., concurred.

Decree affirmed.

4 Strob Eq. 122

ELIZABETH JAGGERS v. ALEXANDER
ROBINSON, Administrator of Estes,
et al.

(Columbia. May, 1850.)

[*Courts* 488.]

The general rule is, that an issue shall be returned to the Court which orders it; and all objections to the finding must be made in the same Court. But where, on an appeal from the finding of an issue ordered by the Court of Appeals, that Court had not retained the Circuit decree, on which the issue was based, but had formally reversed it, the verdict, with the evidence, was sent to the Circuit Court, in order that the motion to set it aside should be heard by that Court, and a decree made upon it.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1320; Dec. Dig. 488.]

This was an issue sent down by the Court of Chancery, to try the question whether a certain deed, signed and sealed by Thomas G. Jaggars, conveying certain negroes to the plaintiff, had been delivered. Every other inquiry was excluded by his Honor, Judge Evans, before whom the issue was tried, at Chester, Spring Term, 1850. The jury found the delivery of the deed, and defendant appealed, and moved for a new trial.

M. Williams, Eaves & Thomson, for the motion.

Gregg & McAlilly, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

Every member of this Court is perfectly satisfied with the finding of the jury upon the issue ordered. Indeed, two of us were of opinion, so long ago as when the case was before the Court of Errors, that the delivery of the deed was sustained by the proof, and should have been decreed. We were still more satisfied when the Chancellor's decree of July, 1848, came before us: and the ordering of the issue was reluctantly consented to by one of the two, only to avoid the necessity of carrying a mere matter of fact before the Court of Errors.

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*It is, therefore, matter of infinite regret, that after all the cost to which the parties have been put by these proceedings, we are prevented, by a mere technical difficulty, from deciding a point upon which we are entirely free from doubt; and are again compelled to send it to the Circuit Court.

We are of opinion the motion for a new

trial cannot, in this case, (as it is situated,) be heard in this Court.

In *Ellerbe v. Ellerbe*, the Court of Appeals retained the decree appealed from, and ordered an issue upon some of the facts involved in the case. In that case the verdict was returned to that Court, and the motion for a new trial was made before it: and this process was repeated as often as four or five times, until the Court became satisfied upon the facts which were the subjects of investigation.

In other instances, where the issue was ordered by the Circuit Court, the return has been made to the Court from which it emanated: and the motion for new trial has been heard there.

The general rule is, therefore, that an issue shall be returned to the Court which orders it; and all objections to the finding must be made in the same Court.

But in all the cases to which I have referred, the Court, whether circuit or appellate, has retained the judgment until the issue was disposed of. In this case, however, by inadvertence, this Court, instead of retaining the decree appealed from, until the issue was returned, and then affirming or altering the decree according to the impressions produced by the verdict, reversed, and thereby entirely annihilated that decree; so that there is nothing now before us upon which to exercise appellate jurisdiction.

There is now no circuit decree: and we are compelled to send the verdict to the Circuit Court, in order that one may be made upon it.

The circuit decree of July, 1848, is entirely satisfactory to us, and would be now affirmed, if it had not been formally reversed; but we are, by this mere technical difficulty, forced to remand the case, with the evidence now taken, and the verdict, to the Circuit Court, that it may hear the motion for new trial; and, if that should be refused, give a decree on the case as it now stands.

And it is so ordered.

DARGAN, Ch., concurred.

DUNKIN, Ch. I do not concur in the intimation that the decree of the Appeal Court, May, 1849, reversing the circuit decree, was in any manner the result of inadvertence. Nor do I think that the correctness of that decree is properly now the subject of review. The decree of the Circuit Court was reversed because of the error of the presid-

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ing Chancellor in refusing the motion for an issue at law. This was the subject matter of appeal, as was demonstrated on the authorities cited. If the Chancellor had refused to receive testimony which, in the judgment of the Court of Appeals, was competent and might be important, the decree would be reversed, and a rehearing de novo ordered. It

might be that, in the sequel, the evidence, when heard, would not change the result. But this is proper, in the first instance, for the consideration of the Circuit Court. The delay and expense consequent upon any error in the Circuit Court are greatly to be regretted, but are sometimes unavoidable in the administration of justice.

I concur in the opinion that the motion to set aside the verdict should be addressed to the Circuit Court.

4 Strob. Eq. 124

THOMAS HAMER et al. v. SUSANNAH HAMER et al.

(Columbia. May, 1850.)

[*Descent and Distribution* ⚭107.]

If a child has been advanced, he is not compelled to bring such advancement into hotchpot, unless he claims some further share of the estate of the intestate. And it makes no difference whether he has been advanced in personal or real estate. The principle applies to the partition of the estate in the aggregate.

[Ed. Note.—Cited in *McLure v. Steele*, 14 Rich. Eq. 116.

For other cases, see *Descent and Distribution*, Cent. Dig. § 417; Dec. Dig. ⚭107.]

Before Dargan, Ch., at Cheraw, Feb'y Sittings, 1847.

The following Circuit decree sufficiently refers to the facts of the case:

The complainants and defendants are the heirs at law of John Hamer, late of Marlborough district, who died intestate, and the bill was filed for the partition of his real estate. The bill describes in a particular manner the lands, of which it is alleged the intestate was seized in fee at the time of his death, and charges that some of the defendants, to-wit: Wm. Hamer, Alfred Hamer, Eli Thomas, and the heirs at law of Daniel Hamer and Alfred Hamer, set up adverse titles to portions of land which the complainants describe as part of the real estate of the intestate. The bill charges that those defendants had no title, but that they were put in possession by the intestate in his lifetime; that the possession on their part was not adverse to that of the intestate; that it was undefined in extent; that it was expressly by and with the consent of the intestate; that during his life they never claimed any right or interest in the land, and that they were mere tenants at will. William and Alfred Hamer, and the heirs at law of Daniel Hamer, in answer to the bill, deny that a portion of the lands described in the bill was the

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property of John Hamer (the intestate) at the time of his death, or that it is subject to partition, and set up adverse title in themselves. They particularly describe the several portions claimed by them respectively, and the manner by which the title was ac-

quired, which they allege was by parol gift from the intestate, and inducted by him into the possession as of their own property. This defective title they claim to have been ripened and perfected by the statutes of limitations.

The case was heard at February Term, 1848, and the presiding Chancellor, on the evidence before him, decreed that the lands claimed by William and Alfred Hamer and the heirs of Daniel Hamer, and described in their answer, should be exempted from partition as being no part of the estate of John Hamer, dec'd.; adjudging that the title of those defendants to the said lands was paramount, he ordered a writ of partition to "issue to divide the lands, in the bill mentioned, amongst the distributees of the intestate, John Hamer, in the manner and according to the principles established by law, respecting the distribution of intestate estates," subject to the claims set up by the said defendants to portions of the land described in the bill, which claims were sustained by the decree.

On this decree a writ of partition was issued, and the writ directed the commissioners to make partition of the lands of John Hamer, described in the bill, except those portions claimed by William and Alfred Hamer, and the heirs at law of Daniel Hamer. The writ also directed the commissioners to assign an equal share, to wit: one fourteenth to William Hamer, one fourteenth to Alfred Hamer, and one fourteenth to the heirs at law of Daniel Hamer, and so of the rest. The writ further directed them "to have reference in said distribution to the relative value of the said lands, and to the tracts of land already given to the said Alfred, Daniel and William Hamer by the said John Hamer in his lifetime, so that you (the commissioners) make the distribution of the lands of the said John Hamer amongst his heirs at law aforesaid fair and equal, according to the principles established by law," &c.

The commissioners, at this term of the Court, have made return of their proceedings under the writ of partition. From an examination of this return, it appears that the commissioners have considered the lands given to William, Alfred and Daniel Hamer, as advancements, and in estimating their value, and that of the other lands of the intestate, it appears that the said William, Alfred and Daniel Hamer were respectively advanced beyond the amount of their several distributive shares. Each of them has been advanced, according to this valuation, to an amount about double their several shares; under those circumstances, the commissioners have already considered the lands thus

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given as advancements, but *as having been brought into hotchpot, or to be accounted

for at their value by the advanced heirs; they have accordingly made a valuation and partition of the estate of the intestate, predicated upon the principle that those advanced heirs were to account to the other heirs for the lands given to them by way of advancements. To this return of the commissioners, the heirs who have been advanced have filed various exceptions, which are herewith filed, and to which reference will be had as often as may be necessary. I will say, in the beginning, that whatever rights the advanced heirs may possess, those rights are not to be prejudiced by reason of any instructions contained in the writ of partition. That was based upon the decree of the Court, and was unauthorized and void, farther than the decree would warrant. And the exceptants complain, by affidavit, that they had no notice of the application for the writ, and therefore no opportunity of assisting in the selection of commissioners, three of whom were obnoxious to them: And farther, that they had no notice of the proceedings under the writ, were not present, and had no opportunity by notice of being present at the valuation of their lands, and that the said valuation was wholly *ex parte*. As they have been over advanced they except to their lands being brought into the valuation and partition, and claim the privilege of renouncing all claim in the distribution of their father's estate. On the other side it is contended, that not having heretofore renounced, they have elected to take a distributive share, which they cannot do without accounting for their advancements, and that they cannot now recede. This I think is substantially the issue between the parties.

That the lands acquired by the exceptants from the intestate in his life are advancements, there can be no doubt; there can be no principle of law more clear than that a child advanced, can claim no distributive share, without bringing in and accounting for the value of his advancements. And it is equally clear that one advanced to the value of, or above the value of, his share, is not obliged to account for such advancements, if he chooses to rest contented with that, and claims no farther distribution. This is all too plain and familiar to admit of discussion. The exceptants now renounce their distributive share; and the only question that could possibly be made, is whether they have heretofore elected, and so definitively as to be concluded by such elections. The complainants contend that they have elected to take their distributive share and to account for their advancements, because they have not heretofore formally renounced. This proposition, when analysed, amounts simply to this, that they have elected because they have not elected.

I think I am sustained by the authorities in laying down a general principle applicable

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to all cases of election, and pervading the whole law on the subject, which is this: where a person is bound to elect to take benefits under two or more instruments, or derived from two or more sources of title, he is entitled to make his election with deliberation, and with a full knowledge of his rights and interests. And it would not be difficult to produce cases where parties have been released by this Court from premature election, made under circumstances where the proper information was wanting for a judicious exercise of the discretion. The right to this deliberate exercise of the judgment in the matter of election, is particularly applicable to cases occurring under the clause of an Act of 1791,¹ under which this question arises; the Act provides that "in case any child, or the issue of any child, who shall have been so advanced, shall not have received a portion equal to the share which shall be due to other children, (the value of which portion being estimated at the death of the ancestor, &c.) then so much of the estate of the intestate shall be distributed to such child or issue as shall make the estate of all the children equal." How is it to be known whether the portion of the advanced child is under or over his distributive share, or the shares which the other children are entitled to take, until an appraisal and valuation are made? In some cases possibly it might be known without such proceedings, that a child was advanced above his share. But I apprehend, in a majority of instances, the opposite would be the true state of the case. The excess of the advancements over the distributive shares in the case before me is not so great, but that some uncertainty might have rested upon the result of a valuation; for it is always uncertain what valuation the commissioners may make, and different persons might adopt a different estimate. At all events, I think that one advanced child has the right to await the settlement of the estate and its valuation, and the ascertaining of the nett amount for distribution after the payment of debts and charges, for the purpose of knowing whether he is entitled to receive something farther under the provisions of the Act before he can be required to make a definite election. The application of any other principle would be unjust; for it would compel the advanced child at once to renounce his indisputable rights under the Act, or to make an unadvised and premature election, at the peril of forfeiting property to which he had already acquired an indefeasible title.

On looking into the case before me, as it is presented in the record, I see no ground whatever for supposition that the exceptants have elected to take a distributive share of intestate's real estate. I have said I see no

¹ 5 Stat. Large, 163.

reason for such a supposition in the case as it has been presented. It was said by the solicitor for the complainants, *arguendo*, that these exceptants have, in the distribution

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of the personal estate, accepted *and* received their several distributive shares; if this fact appeared upon the record, or were presented in the form of testimony, it might have the effect of imparting to the question a different aspect. I have already said that a child advanced can take no part in the distribution of an intestate's estate without accounting for the value of his advancements, to be estimated in the particular manner prescribed in the Act. And it makes no difference whether he has been advanced in personal or real estate. The principle applies to the partition of the estate in the aggregate. And if it had been made to appear that these exceptants had received a share in the distribution of the personal estate on its partition by the Ordinary, it might be that such participation in the division of the personal estate would have been considered an election by them, to come in as distributees, and to account for their advancements; or it might possibly have been held that they were entitled to be released from the consequences of a premature election, on their refunding the amount that they had received. One thing is very certain, if the fact exists, and a proper case had been made and presented, they would have been compelled either to account for their advancements or to disgorge what they had received. But this fact is *coram non iudice*.

It is not upon the record; it has not been spoken through the mouths of witnesses, nor presented in any of the forms of evidence. It is indeed asserted in the bill, that the administrator of the intestate has accounted before the Ordinary for the personal estate, and that a distribution thereof has been made before or by that officer, but it is not asserted expressly or by implication, that these exceptants received any portion. I cannot travel out of the record, or the case made by the parties themselves; nor can I predicate any order for leave to amend, after the trial and arguments upon suggestions of counsel as to facts that have not been admitted or proved.

Here I might pause, for it is sufficiently clear that the return must be set aside. But I will add a few words by way of commentary upon the mode of proceedings on questions of advancements: such questions should be made distinctly in the pleadings, which has not been done in this case. The bill denies that the lands claimed by the exceptants were advancements, and contends that they constituted portions of the intestate's estate; but contains no prayer that in case they should not be considered a part of the estate, they should be accounted for as advancements. What constitutes advance-

ments, is oftentimes a difficult question of law. And it is a question proper for the Court, and not for the commissioners, whose office is simply to execute the judgment of the Court. Up to the present trial there has been no adjudication by the Court on the question of advancements. Yet the commis-

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sioners have undertaken to adjudge that question; and not only that, but another oftentimes difficult question of law and of fact, viz: that the parties have elected.

The question of advancements being made in the pleadings, should have been referred to the commissioner, and there should have been a report from him on the subject, with exceptions thereto on the part of those who were dissatisfied. The Court of Law possesses concurrent jurisdiction with the Court of Equity in the partition of an intestate's lands. And the doctrine of advancements prevails equally in partitions made in that Court as in this. And where a resort is had to the Court of Law for a partition, and in a case where advancements are to be estimated, it may be necessary that this should be done through the intervention of the commissioners appointed to make the partition. It may be that the organization of that Court would admit of no other instrumentality than that which necessarily prevails in that Court in giving effect to the act of distributions. I will not say that the same mode of proceeding in this Court would be illegal; but I will say that a reference to the Master, if not a more legal, is certainly a more proper and convenient mode of adjusting these questions of advancements. The parties to these questions have the right to raise issues of law and of fact, to have counsel and to compel the attendance of witnesses, and to be heard in argument and by evidence on all controverted points. The commissioners, acting under a writ of partition, are but illy constituted and qualified to adjudge such matters. In fact they are limited to an estimate founded on their personal inspection and knowledge, and not upon information derived from witnesses examined on oath before them. They are to form their judgment upon their personal inspection, while the mode of valuation prescribed by the statute as to advancements renders it necessary that they should have reference to the state of the property at periods long anterior, and the mutations which it has undergone would render it extremely difficult in many cases for them to make such an estimate as the law requires. It is obvious for many reasons that it is most regular in this Court for such matters to be referred to the Master, and on the coming in of his report on advancements and its confirmation, the writ of partition should issue. I should in this case, now, refer it to the commissioner, to report upon the value of the advancements made by the intestate to the exceptants; but in the present stage of

the proceedings, this course would be unnecessary, as I consider them now to have renounced all participation in the distribution of John Hamer's estate.

It is ordered and decreed that the return of the commissioners in this case be set aside, and that a new writ do issue, to be directed to the same commissioners, and that

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they divide the *real estate of Thomas Hamer in equal shares among all the heirs at law of the said Thomas Hamer, with the exception of William and Alfred Hamer, and the heirs at law of Daniel Hamer. And it is further ordered and decreed, that those last named heirs be excluded.

The complainants appealed, on the following grounds:

1. Because it is sufficiently stated in the bill, and not denied in the answer of Alfred, William, and the heirs of Daniel Hamer, that they had already received their distributive shares of the personal estate of John H. Hamer, in a settlement before the Ordinary of Marlborough district, previously to the filing of this bill, for the partition of the real estate; which fact amounts in law to an election on their part, to take distributive shares of the real estate of said John H. Hamer as advanced heirs, by bringing those advancements into hotchpot; and his Honor erred in ruling that they had not elected, but might still withdraw from the partition of the real estate.

2. Because it was not known, until the decision of his Honor, Chancellor Caldwell, February Term, 1848, whether the lands claimed by Alfred, William and heirs of Daniel Hamer, in their answers, were not in fact still parts of the real estate of John H. Hamer, as charged in the bill; and their co-distributees could not, therefore, charge as advancements what they had previously insisted was part of intestate's estate. The co-distributees hence insist, that if the pleadings did not make out a case of election, on the part of these distributees, with the utmost clearness, the uncertainty about the legal title of these distributees to the lands severally claimed by them, and not dissipated until the decision of Chancellor Caldwell, was enough, under the circumstances, to entitle the plaintiffs and their co-distributees to amend, and his Honor, Chancellor Dargan, should have allowed an amendment, so that the advancements to these three heirs, in land, and their participation in the personal estate, might be particularly set forth.

3. Because the return of the commissioners in partition was in conformity with the decree of his Honor, Chancellor Caldwell, and with the manifest law and justice of the case, and should not have been set aside.

4. Because the decree of his Honor, Chancellor Dargan, although it set aside the partition made, does not direct in what other

manner the real estate of John H. Hamer should be divided.

5. Because from the charges of the bill, and the answers of Alfred Hamer, William Hamer and the heirs of Daniel Hamer thereto, the said parties were precluded from withdrawing from the partition, as advanced heirs.

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*6. Because the decree was in other respects erroneous and should be reversed.

Dudley & Johnson, for the motion.
, contra.

Curia, per DUNKIN, Ch. These proceedings are between the heirs at law of John H. Hamer, late of Marlborough district, deceased. The object was the partition of various tracts of land, described in the pleadings as the real estate of the intestate.

The bill recites the death of the intestate in 1840; that Robert C. Hamer, one of the heirs, had administered; that his accounts had been audited before the Ordinary, and the distribution of the personalty in his hands formally decreed by that Court, and that nothing remained for distribution but the real estate, of which the description and boundaries are set forth. The answers of the defendants admit the general allegations of the bill as to the death, administration, &c. and that the intestate left a considerable real and personal estate, distributable among his heirs at law; that the said personal estate has been administered by Robert C. Hamer, one of the complainants, to the extent in the said bill mentioned, and that nothing now remains of the estate of the said John H. Hamer to be distributed, except the lands of which the said intestate died seized and possessed, in Marlborough district.

Several of the defendants insist, however, by their answers, that some of the tracts of the land described in the pleadings were not part of the estate at his death, inasmuch as they had been long since given to the defendants, and had been held by them under the gift for a much longer period than was necessary to confirm their title under the statute of limitations.

After a hearing before the late Chancellor Caldwell, at February Sittings, 1848, an order was entered that "a writ of partition issue to divide the lands in the bill mentioned among the distributees of the intestate, John H. Hamer, in the manner, and according to the principles established by law, respecting the distribution of intestates's estates," excepting therefrom the several tracts claimed by the several defendants, "to which it appeared to the Court that the said defendants had acquired a valid, legal title in the lifetime of the intestate, by parol gifts from him to them, accompanied by an adverse possession of more than ten years."

Under this order a writ was issued, and the commissioners have made their return, in which, among other things, they recommend that large sums of money be paid by the defendants to the complainants, on account of the lands thus given to them by their father. Various exceptions were filed

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by *the defendants to this return; but the principal objection is, that the commissioners have forced the defendants to bring their lands into distribution contrary to the decretal order, whereas they were entitled to full information before they could be required to make an election, and that no case was made for that purpose. On hearing the exceptions, the presiding Chancellor set aside the return, and ordered a new writ to issue to divide the real estate among all the heirs of the intestate, with the exception of those who had been advanced, and directed that these should be excluded. From this decree the complainants appeal, on various grounds set forth in the brief. The substance is, because the return conforms to the decree of Chancellor Caldwell—or that, if it does not, the return should be set aside merely, but that the last decree materially varies from the original decree.

The decretal order of Chancellor Caldwell directs that the lands mentioned in the bill, except those which had been given to the defendants, should “be divided among the distributees of the intestate, John H. Hamer, in the manner and according to the principles established by law respecting the distribution of intestates’s estates.” The Act of 1791 prescribes, “that nothing herein contained shall be considered to give to any child or issue, &c. of the intestate a share of his or her ancestor’s estate, where such child or issue shall have been advanced by the intestate in his lifetime, by portions or portion, equal to the share which shall be allotted to the other children; but in case any child, or the issue of any child, who shall have been so advanced, shall not have received a portion equal to the share which shall be due to the other children, (the value of which being estimated at the death of the ancestor, &c.) then so much of the estate of the intestate shall be distributed to such child or issue, as shall make the estate of all the children equal.” If, then, a child has been advanced, he is not compelled to bring such advancement into hotchpot, unless he claims some further share of the estate of the intestate. It seems hardly necessary, however, to add, that it makes no difference whether he has been advanced in personal or real estate. “The principle applies to the partition of the estate in the aggregate.” The difficulty in this case arises from the fact that the parties have already made distribution of the personality among themselves, without the aid of this Court. The decretal

order of Chancellor Caldwell cannot be carried into effect, that is, the division cannot be made among the distributees of the intestate, in the manner and according to the principles established by the Act of 1791, as the commissioners have not the means of ascertaining whether the child advanced has or has not received his equal share of the estate of the intestate. A preliminary inquiry is, therefore, necessary. A previous

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distribution of *the personalty is stated in the bill to have been made and admitted by the answers, but none of the particulars are set forth. It is proper, therefore, that the commissioner should receive testimony and report upon this subject, as well as in relation to any rents which may have been received by the administrator as suggested in the return, and that he have leave to report any special matter, so that the Circuit Court may give such further directions as will carry into effect the decree of Chancellor Caldwell. A reference for this purpose is ordered, and the decree of the Circuit Court modified accordingly.

JOHNSTON, Ch., concurred

Decree modified.

4 Strob. Eq. 133

JOHN SIMONTON et al. v. JONATHAN DAVIS et al.

(Columbia. May, 1850.)

[*Fraudulent Conveyances* ⚡29.]

Where sheriff’s sales of several tracts of land of an insolvent debtor were procured by the interference of a party who himself purchased the lands at inadequate prices, after, by his conduct and conversation, having produced a public impression that the sales were for the benefit of the judgment creditors—that he was their agent, as well as the agent of the debtor—that the sales were nominal, and only to make titles through the agency of the sheriff for prices to be, or already procured privately and on time, the Court confirmed such sales as were afterwards made apparently in accordance with this impression, and ordered the proceeds, sought to be appropriated by the party, paid over for the benefit of the creditors; and set aside the sheriff’s sales and ordered re-sales of the other tracts to be made by the commissioner, also for their benefit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 81; Dec. Dig. ⚡29.]

Before Dunkin, Ch., at Fairfield, July Sittings, 1849.

The following Circuit decree contains a sufficient statement of the facts of the case.

Dunkin, Ch. It is proposed to do little more than to state the judgment of the Court upon the points submitted. A history of the transactions which gave rise to the litigation, must be learned from the pleadings and the evidence. It may suffice to say, that Dr. James B. Davis and Wm. K. Davis, although

owning very considerable estates, were embarrassed to manifest insolvency in the year 1845. Their father, Col. Jonathan Davis, was the proprietor of an independent estate, and became involved in pecuniary difficulties about that time, only in consequence of debts which he incurred as surety of his sons. It was not supposed, however, at that time, or even so late as the early part of 1846, that the embarrassments of Jonathan Davis

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amounted to insolvency. It was hoped by him and his friends that, by a judicious sale of the property of his sons, the debts for which he was surety might be satisfied, and, perhaps, \$20,000 saved from the wreck of his own fortune. In consequence of the multiplicity and variety of liens, there was great difficulty in making good titles to the property of James B. Davis and William K. Davis, except through the agency of the sheriff, and great hazard that, at such sale, the property would be sacrificed. To meet and obviate these difficulties, an agreement was made on the 3d day of March, 1846, which is filed as an exhibit with the answer of Nathan H. Davis. This paper is signed by Jonathan Davis, and by many of the judgment creditors of James B. Davis and William K. Davis, and, among them, by some of the complainants. It was stipulated, among other things, that the property of James B. and William K. Davis should be sold by the sheriffs of Richland, Newberry and Fairfield, the personalty on a credit of one and two years, and the realty on a credit of one, two, three and four years. Messrs. Caldwell & Goodwyn were appointed to receive the proceeds of the sales from the several sheriffs, and appropriate the same according to law. It was also stipulated that the agreement should be binding only in case it was signed by all the judgment creditors. Some difficulty was encountered in this last particular, and the defendant, Nathan H. Davis, was very active and efficient in bringing it about, and afterwards in carrying the agreement into effect. It is stated in the answer of Jonathan Davis, and so appears from the testimony, that, although some few inconsiderable minor judgment creditors had not signed the agreement, it was, nevertheless, acted upon by the parties. It was agreed, (says Col. Davis,) at the previous meeting in Columbia, to sell "all Jas. B. Davis's and Wm. K. Davis's" lands, as soon as practicable, at credit sales, and defendant understood his son, Nathan H. Davis, "was nominated as the agent of the judgment creditors, to cause the sheriffs of the different districts, in which the lands were situated, to advertise said lands, so that (says he) defendant neither caused such sales by himself or his agent." Under the terms of the agreement, sales to a large amount, both of real and personal estate, were made by the sheriffs of Richland and Newberry districts. So far as the Court can perceive,

the property commanded fair prices, and, whether it did or not, there seems to be nothing to impeach those sales, if, indeed, they are specifically called in question. These sales seem to have been made in March, 1846. The real estates of James B. Davis and William K. Davis, situate in Fairfield district, were sold by the sheriff of that district, under circumstances to be hereafter detailed, in May and July, 1846, for cash. The whole of

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the real estate was purchased by the defendant, Nathan H. Davis. The Home tract, belonging to William K. Davis, and which he had sold to A. K. Calhoun for \$4,900, was knocked down to N. H. Davis, for \$105. The Owens tract, sold as the property of James B. Davis, was bid off by N. H. Davis for \$5, and his bid transferred to Dr. T. F. Furman for \$1,500. The White House tract, belonging to J. B. Davis, for which complainants offer by their bill ten thousand dollars, was bid off by N. H. Davis for \$1,000. Three other tracts of land belonging to J. B. Davis, were bid off by N. H. Davis, at nominal or comparatively inconsiderable prices, and the bids transferred to his co-defendant, J. C. Furman, who is the son-in-law of Jonathan Davis. The White House tract was conveyed by N. H. Davis to J. C. Furman, in trust for Mrs. Davis, the mother of N. H. Davis, and her family. The Home tract of William K. Davis, bid off by N. H. Davis, was afterwards sold by him to J. J. Welsh, whose notes, given for the purchase money, defendant, N. H. Davis, by his answer, "insists are in his hands, free from any claim of W. K. Davis, or his creditors, and he claims the right to apply the notes according to his own discretion, or according to his own interests." The bill asks that those purchases by N. H. Davis should be declared either to be invalid, or made for the benefit of the creditors of James B. Davis and Wm. K. Davis. It was sufficiently proved that the property which was thus purchased by Nathan H. Davis for about \$1,600, was worth more than \$20,000. But the complainants rely on additional circumstances, which can be properly stated only by reciting the evidence of the witnesses.

Dr. Thomas F. Furman testified that he bargained with Col. Jonathan Davis, for the Owens tract in March, 1846. Col. Davis came to witness's house and proposed to sell the Owens tract; he said he was authorized to act under some arrangement of large judgment creditors in Columbia. Object was to get as large a price as possible, by getting some one to make private sale on credit; payments were to be in four annual instalments. He offered the tract for \$1,800; witness agreed to give \$1,500, but required sheriff's titles; witness understood the land was then under levy. Col. Davis said there would be no difficulty, as the land would be sold in that way; he said he thought no one would

overgo that sum, and, so far as he could, the sale was made by him. It was understood that if the land was bid off within \$1,500, witness was to be the purchaser. Dr. James B. Davis had purchased this land at Owens's sale. Col. Davis wished witness to be present at the sheriff's sale, but if he was prevented, he, Col. Davis, would purchase for him at any price within \$1,500. Witness attended at the April sale-day, and saw Col. Davis; he told witness the sale would not

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take place on *that day, as there was some difficulty in the sheriff's office; requested witness to return the next sale-day, when he thought there would be no difficulty. Witness attended in May, but did not reach the Court House till a little after noon; met Nathan Davis, who told witness he had purchased that land; asked the price, replied \$5. Witness remarked, he regretted he had not been earlier, as he would have preferred to have bid himself, so that the price which he was to give (\$1,500,) might appear as the consideration in the sheriff's title. Nathan Davis replied, he could arrange that, as he would take the sheriff's title, and then make a title to witness for the consideration of \$1,500. Witness said he preferred the title directly from the sheriff, even at the disadvantage of stating the price at \$5. Nathan Davis then said he would transfer the bid to him, and he could complete the arrangement which he had made with his father, Col. Davis. He transferred the bid. Some days afterwards Col. Davis and witness were at Winnsborough together. The sheriff made titles to witness, and witness gave to Col. Davis three notes, amounting altogether to \$1,500; the notes were payable to Col. Davis. Witness paid the first note, and was enjoined by Col. Gregg, (complainant's solicitor) not to pay the others. The notes were payable at the Branch Bank in Columbia, and there he paid the first note; this note had been discounted. Nathan Davis told witness that this note had been passed to James M. Taylor, the assignee of the De Bardelaben judgment, who had urged the sale of the White House place. He told witness the second note was in the hands of the sheriff to pay costs, and that the third note was in the Bank. Witness produces the sheriff's deed to him, which recites a purchase "by Nathan Davis, for Dr. Thomas Furman, for five dollars." Witness put memorandum in the deed a few days afterwards, that he had purchased from Col. Davis for \$1,500. Col. Davis told witness that the \$1,500 was for the creditors, and that he was acting under authority of an agreement made by the creditors at Columbia. Witness supposed the sheriff would sell on a credit; don't think he would have bid for cash. Col. Davis was not under any obligation to buy for him for cash; it was some time afterwards that he understood it was a cash sale. Witness did not understand that Nathan Davis

had any interest, but it was bid off by Nathan Davis for witness, as he, (witness) supposed in carrying out the agreement with Col. Davis, to wit, that he should bid for him if he was not present. Sheriff was present when the notes were given; thinks that he and Col. Davis came to Winnsborough together on the day of settlement. Mr. Stewart and Mr. McCants were present.

Jeremiah Cockrell was sheriff of Fairfield in 1846; levied on lands of J. B. Davis and

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W. K. Davis; sold three tracts to *N. H. Davis, for \$5 each; Little River tract, \$500; Owens tract, \$5; Steel tract, \$5; Cato tract, \$5; Home tract, \$105; White House tract, near Monticello, \$1,000; the last sold July, 1846; all bid off by N. H. Davis. He was directed to make levy on these lands by a letter from Caldwell & Goodwyn, and particularly by Nathan Davis. W. K. Davis also spoke to him. Letter of Caldwell & Goodwyn produced in March, 1846. Nathan Davis came to witness's office repeatedly to see him; he came to see him about the levy and sale of these lands. He insisted very strongly on the sale, and urged it upon witness till the sales took place. He gave as his reasons for pushing the sale, that the proceeds might be realized and a settlement made in Columbia. He insisted to have the land sold on credit; got Mr. McDowell to speak to witness; he referred to the agreement, of which witness had received a copy from Caldwell & Goodwyn. Witness declined; would not sell on credit. Nathan Davis still insisted on his proceeding with the sale after he refused to sell on credit. Witness was unwilling to go on with the sale; told Mr. Davis it was a bad season to sell, and that he saw no purchasers from that side of the district; none at all. Davis said he had been attending to the matter long enough; that he wanted to close the matter in Columbia, and he wished the sale to go on. No other person pressed him. Mr. Stanton, an execution creditor, had been pressing, but he withdrew, and would not press; on that day declined to do so. Witness refers to both the sales; certainly that in May; thinks (though not so positive) in July also. Witness objected that Dr. Furman was not present, who, he understood, had purchased one of the tracts. Davis said it made no difference about Furman being present; that they only wanted the sales in order to make titles, and the sale which had been made previously would stand. It was witness's impression, from the conversation with Davis, that this was the understanding in relation to all the lands sold by witness. Davis gave him no notice that he was bidding for himself; recollects none. Gave such notice to no one, that witness knew of; there were no creditors, no execution creditors present except Mr. Stanton, who seemed on that day to have no claim or interest in the sales. There were one or two

others who bid a little on the W. K. Davis's Home tract: no other bidding on any other tract but the bid of Nathan Davis. Witness saw Col. Davis and Stanton talking together; levies on three or four of the tracts were given by Nathan Davis; on one or two, perhaps, by W. K. Davis. After the sales witness received written directions from Nathan H. Davis as to the persons to whom titles were to be made; it was same day, or a few days afterwards: paper was produced, and is as follows: "Owens tract, 300 acres; titles to be

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made to Dr. Furman. The others will *be made to such persons as Col. Davis may direct. Bankable note, payable January next, to be left with the sheriff, will be satisfactory to both parties claiming the money; right to be determined by order of the Court, and the note to be held by the sheriff until the Court so orders."

(Signed)

N. H. Davis.

Cross-examined.—Is not positive that the executions came with the letter of Caldwell & Goodwyn, but certainly a copy of agreement did; also a list of cases. N. H. Davis and W. K. Davis came to the office and gave the levy; some of the creditors had not signed the agreement, and would not consent. Stanton was one, and he objected to a sale on credit. Nathan Davis tried more than once to induce witness to sell on credit. Simonton lives in Fairfield; the land was sold as he usually sells. The impression that was abroad operated against the sale; cannot say there was any thing unfair in the sale; the levy on the White House was by direction of James M. Taylor; thinks N. H. Davis did not direct this levy. J. M. Taylor wrote to witness 9th June, 1846; levy 11th June; that and W. K. Davis's tract sold in July; thinks N. H. Davis said nothing in July about selling on credit; proceeds of the White House and Little River tract applied to De Bardelaben's judgment, which was not paid in full. There was a difference between Taylor and Davis about this judgment. (In reply.) When he spoke of no unfairness at the sale, he referred to his own conduct. The impression had got abroad how the land was to be sold, and that deterred others. Witness did not wish to sell the White House tract; Nathan Davis insisted on his going on.

J. B. McCants had several conversations with N. H. Davis and W. K. Davis, about time of sheriff's sales in April and May, 1846. It was mentioned by one of them that the times were hard, and the lands would probably be sold low, but that it would not make so much difference, as Jonathan Davis was still considered good; that the creditors had given time; that if Jonathan Davis could get the lands he would sell them for their value, and that it would be for the benefit of him as well as the creditors. All was predicated on the idea that Col. Davis was good. N. H. Davis referred to the sale to

Dr. Furman, as an illustration of what his father would do—spoke of the agreement with the creditors, and mentioned sale to Dr. Furman for \$1500, to show what his father would do if some indulgence was extended here, as below; this was before he bid on the Owens tract; never heard Nathan Davis or Col. Davis say they intended to bid for their own benefit.

Cross-examined.—Frequently heard of the agreement by the creditors as to the credit sale; much talked of about the sheriff's office. N. H. Davis was very desirous that the lands should be sold, and wanted witness to exert

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his influence. *Up to May he has no doubt that N. Davis wished to have the sale on a credit; the embarrassments of Col. Davis very much, on account of his sons.

Thomas Stanton.—Witness, as executor of Owens, held a junior judgment against J. B. Davis. He had a conversation with Col. Davis before the lands were sold here. He told witness the lands would have to be sold at sheriff's sales, but he intended to apply the proceeds to the payment of his debts. Witness attended the sales in April and May; no land was sold in April. At the sale in May witness went to Col. Davis and said, if he did not do something for him in the case of his debt, he should make him pay as much for the land as any body else; that is that he intended to bid for the land and run it up, and he would make him pay as much to some one else, as he would have to pay him. Col. Davis then told him if he would not bid on the land, he (Davis) would pay Gladney for the witness \$400 next week, or he would sell him a negro. Joseph Gladney was buying negroes; witness* would have bid but for this; he did not bid in consequence of what Col. Davis said to him. Witness heard a conversation that morning between Nathan Davis and Col. Cockrell. Sheriff said it was a mighty bad time to sell the land. N. H. Davis replied he did not care; he intended to buy the land himself. He also said it was the second or third time he had been there, and the land must be sold. It was on hearing this that witness went out and had the conversation with Col. Davis. Col. Davis had frequently before that time told witness of their arrangements. Col. Davis told him all the lands were to be sold by the sheriff in order to make good titles to those who purchased the land. He requested witness to call and see a man about buying the Owens tract at six dollars per acre, but the man did not take it. This was the land purchased by Dr. Furman. Witness understood Col. Davis distinctly that the price for which he could sell the lands was to be applied to the creditors, and said he hoped if "good sales were made, they would save from 12 to \$15,000 to live upon after the debts were paid." He had before that promised to pay witness \$400.

Cross-examined.—At one time witness objected, in one sense, to give length of time to pay the money; went to see Col. Davis, at his request, in March; witness objected to give time. Col. D. offered to buy his execution; he then told witness of their plans, and he then agreed to pay witness \$400 at the sales day in April. Witness came here at that time, expecting Col. Davis to pay the \$400. Witness was not thinking of the sale of the land; don't recollect to have spoken to the sheriff till after the old gentleman (Col. D.) failed to keep his promise. Witness asked the sheriff if he should push the sale, or wait on Col. D. Sheriff told him

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Col. D. had, in a letter to him, promised to pay his execution. Witness is sure he did not insist on selling the land in May. Col. Davis told him in April if he pushed a cash sale he would never get a dollar. Witness did not push by telling sheriff to sell the land; Col. Davis and witness were in the passage in a corner, on a bench. Col. Cockrell saw them; their conversation was not to be heard. Witness came in May to bid for the Owens land; witness had a man coming with the money—Dr. Furman, who told him to bid for the land, and not to let it go under \$1500. Nothing passed between them as to cash or credit sale. Witness expected that Dr. F. would take the land at his bid; witness had \$150 at least in his pocket that day; he received it from B. Layton, Saturday before the sale. Joseph Gladney was straining on witness for \$400, and witness wanted this money to settle it. It was near a month after the sale before he saw Col. Davis; had found out before that Col. Davis had not paid Gladney. Witness has brought a charge against Col. Davis in the church for not keeping his promise.

D. B. Kirkland was present at the sales in May and July, 1846; was standing in the Court House; one tract was sold very low. Mr. Campbell came up and asked him if he knew why the lands were selling so low; replied he did not. Campbell then went away and returned, saying they were only selling to make titles.

Ralph Jones attended the sales in May and July, 1846. Witness made a few bids on W. K. Davis's land; bid \$100; did not know the cause of it selling so low; continued to bid till it reached \$100, then stopped and inquired of some person present the reason of the land selling so low; answered by some one in the crowd that the land had already been sold by Mr. Davis to Mr. Calhoun, and it was now sold only to make titles. Witness did not bid on any of the other lands.

Edward G. Palmer.—Was present at the sale in May, part of the time; was present when the first tract was put up at \$500, and knocked down to N. H. Davis. Another tract at \$5; witness was still more astonish-

ed, turned round, and said, "it is surprising, these gentlemen are said to be insolvent, and no creditors to bid up the property." The person to whom he spoke observed, "they were selling the property to make titles."

Major Lyles (examined for defendants) was in Winstonsborough at sales of J. B. Davis's lands. Three or four tracts were sold; witness saw them selling at a sacrifice; asked some one why they were sold so low; Stanton was standing by, and said he had sold that to J. B. Davis for \$1500, and he didn't expect to get any thing for it. Witness said, you ought to have bid for those lands; his reply was, it would be of no use, for he could not have got them, or some-

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thing to that effect. Witness said, you ought to have bid on them, and run them up, and you might have saved something. His reply was, that Col. Davis had promised to see him paid; does not recollect any other conversation.

J. B. McCants (examined for defendants.)—The substance of his evidence is, that on the day of sale of J. B. Davis's property, Col. Davis and Stanton were in his office; there was much conversation; Davis urging Stanton to consent to a credit sale, and Stanton, without replying to this, insisting on the fulfilment of a promise Col. Davis had made to him in regard to payment. The discussion continued till near the hour of sale.

The whole of the evidence in the cause is with the decree. The general principles by which this case must be adjudicated are sufficiently familiar. In contracts between man and man, mere inadequacy of consideration is not a sufficient ground for rescission. If the inadequacy be so great as to shock the conscience, it may afford evidence of fraud, and then the fraud vitiates the agreement. But sheriff's sales stand on a different principle, and are protected on grounds of public policy. No inadequacy, however startling, will authorize the inference of fraud—upon the same high principles, it has been held that such sales must be conducted with perfect fairness, and that no undue advantage shall be taken.

It is, first, proper to inquire into the circumstances under which Sheriff Cockrell proceeded to the sales in May. His deed to Dr. Furman recites the execution of the Bank of the State, for \$15,000, as his authority. This execution, and all the principal executions, were placed in his hands by Messrs. Caldwell and Goodwyn, and accompanied their letter of the 6th March, 1846. That letter directed a levy on the real estate in Fairfield District, and that it should be sold on the ensuing sale day, on the terms specified in the agreement of the plaintiffs in the executions, a copy of which agreement was enclosed in the letter. The terms of that agreement were a sale on a credit of

one, two, three and four years; some of these executions were held by complainants in this bill, and the instructions, thus given, were their instructions. When Stanton, or any other execution creditor, declined to assent to a sale on credit, the sheriff may very well have hesitated in departing from the usual course. But what, then, was the obvious line of conduct for the sheriff to pursue? Unless some execution creditor, who was no party to the agreement, insisted on pressing his execution, and by a cash sale, the sheriff should have stated his difficulties and waited for further instructions. Did any execution creditor whatever press for a sale in May? The sheriff positively swears that no one pressed, or instructed him to proceed, except N. H. Davis. There is no

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testimony whatever that *Stanton, or any one else holding an execution, opposed the remonstrances of the sheriff against a sale at that time, and under the circumstances insisted on by him. But, upon what principle and by what authority did N. H. Davis still insist that the sheriff should proceed with the sale, after the sheriff declined to sell on credit, and remonstrated against selling at that time for cash, or why did Cockrell listen to his instructions and act against his better judgment any more than the officious intermeddling of a stranger? If a stranger, accidentally acquainted with the instructions given by the plaintiffs to the sheriff, and conscious that they would depend on the observance of those instructions, had, nevertheless, induced the sheriff to press a sale for cash, without special notice to the plaintiffs, and, at such sale, had purchased property worth \$20,000 for \$1,600, it would seem very clear that such sale would be open to impeachment by the plaintiffs, and, perhaps, scarcely less clear that the sheriff would be liable, on his official bond, for any damage sustained.

But N. H. Davis was not such a stranger. His interference was bona fide; and the sheriff may have been well warranted in obeying implicitly the directions of one who seemed to represent the interests of the plaintiffs in the executions, and who spoke as with the authority of one who had a right to instruct, and whom the sheriff was bound to obey; whether N. H. Davis actually had such authority is not very important, provided Cockrell acted under that impression, and such impression was produced by, and might well be inferred from, the conduct of N. H. Davis. If the sheriff was mistaken, he erred in common with others who had better means of information. Col. Davis, repelling any charge of fraudulent practices on the part of himself, or his agent, at the sheriff's sale, as charged in the bill, says, "it was the written contract of the judgment creditors, entered into at a previous meeting in Columbia," to sell all James B.

and Wm. K. Davis's lands as soon as practicable, at "credit sales, and defendant understood" his son, Nathan Davis, was nominated as the agent of the judgment creditors, to cause the sheriffs of the different districts, in which the lands were situated, to advertise said lands, so that defendant neither caused such sales by himself, nor his agents, &c.

The testimony of Cockrell leaves it very clear that the cash sales in May were caused by the urgency of N. H. Davis; but he had no right to instruct but as the agent of the judgment creditors; he had no authority to insist on a sale by the sheriff on other terms than those prescribed by the agreement made at Columbia. The creditors may well have understood, as Col. Jonathan Davis understood, that N. H. Davis was acting

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for them, and therefore appointed no *other person to supervise the sales. The suggestion that Messrs. Caldwell and Goodwyn were so appointed, is not warranted by the terms of the agreement. Their chief duty regarded the distribution of the funds to be received by them from the sheriffs. But there is another view of the subject: If this extraordinary sacrifice of property, at the May and July sales, resulted from a general impression that the object of the sale by the sheriff was only to give a clear title to one who had already purchased, or to others who might purchase, and that the funds of the real estate sale would be applied to the benefit of the judgment creditors, and this impression was created, or knowingly permitted, by Jon. Davis and N. H. Davis, under the circumstances of this case, the Court is of opinion that the sales cannot stand, or must accrue to the benefit of the creditors. There is no doubt whatever that such impression existed, and there is as little that this was the cause of the low price at which the lands were sold. So say all the witnesses, Cockrell, Kirkland, Ralph Jones, Edward G. Palmer and others. The language of Mr. Palmer is very strong. He was accidentally present at the May sales; was astonished to see the first tract knocked down to N. H. Davis at \$500, still more astonished when the second was knocked down to him at \$5; he turned round and expressed his surprise, that these gentlemen were said to be insolvent, and no creditors were present to bid up the property; the reply was, "they were selling the property to make titles." James Murphey said that, an evening or two after the May sales, Col. Davis told him of what had taken place—among other things, that he had bid off the Little River tract at \$500; and that he might have got the Little River tract for \$5, as well as for \$500; but that he had bid \$500 at first bid and no other bid was made.

But was this false impression (if it were false) created or permitted by Jonathan Da-

vis and N. H. Davis? On this point the testimony seems very distinct. Stanton says, that Colonel Davis frequently told him of the arrangement which had been made, and was urging him to consent to a credit sale. He told him the lands must be sold at sheriff's sales, in order to make good titles to the persons who purchased the lands, but he understood from him, very distinctly, that the price for which he (Col. Davis) could sell the lands was to be applied to "the creditors." But Dr. Thomas F. Furman says, that Col. Davis applied to him in March, 1846, to purchase the Owens tract belonging to J. B. Davis, saying, he was "authorized to act under some arrangement of large judgment creditors in Columbia—that the object was, to get as large a price as possible, by getting some one to make private sales on credit." The land was then under levy, and the contract was made so far as

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Col. Davis could make it: *when the witness arrived at the Court-house, in May, the land had been knocked down to N. H. Davis, at \$5; but the witness did not doubt that he was to have the land; that N. H. Davis had no interest, but had only bid to carry into effect the agreement between witness and Col. Davis, and he was neither mistaken nor disappointed. The title stated that N. H. Davis purchased for witness; the notes of witness were so made payable to Col. Davis, and the first was applied, as the Court understood, to the eldest unsatisfied judgment against James B. Davis; the second was deposited with the sheriff, to pay costs; and the third is in the Bank. After these sales, in May, N. H. Davis gave written instructions to the sheriffs, not only to make titles for the Owens tract to Dr. Thomas F. Furman, but that titles for the other tracts should be made by the sheriff to such persons as Col. Davis may direct. Mr. McCants said, that previous to the spring of 1846, he had several conversations with N. Davis and W. K. Davis, on the subject of the sales; N. H. Davis said, among other things, that "if Col. Davis could get the lands low, it would be for the benefit of him and the creditors both;" he cited the case of the sale to Dr. Furman, as an illustration of what his father (Col. Davis) would do; this was before he had bid off that tract, (the Owens tract.) Witness never heard Nathan Davis, or Col. Davis say, they intended to bid for their own benefit.

When Sheriff Cockrell objected to proceeding with the sale, not only on account of the season, but that he saw no bidders from that side of the district, he also objected because Dr. Furman was not present, who, he understood, had purchased one of the tracts. Nathan Davis replied, "it made no difference about Dr. Furman being present, that they only wanted a sale in order to make titles, and the sale which had been made previously

would stand." Witness's impression from Davis's conversation was, that this was the understanding in relation to all the lands sold by witness. N. H. Davis gave witness no notice that he was bidding for himself; he recollects none; and no such notice was given to any other person, so far as he knows.

All this testimony seems to the Court to warrant the conclusion that the public impression in regard to the character of these sales, in May and July, was created by, or derived from, the conduct and conversations of Col. Davis and N. H. Davis, and that this was the natural inference. No one who was examined supposed that N. H. Davis was bidding for himself, except, perhaps, Thomas Stanton; and this brings the Court to the consideration of his evidence. He was no party to these proceedings. It has been stated that, as executor of Owens, he had held a junior judgment against James B. Davis, but he had accounted fully for his

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transac*tions as executor of Owens, and, by a decree of this Court, had been finally discharged. He executed a release of all interest in the judgment, and tendered to Col. Davis a note which he had given as collateral security. This being declined, he destroyed the note, and, being sworn on his voir dire, he declared he had no interest. Stanton testified that, at the April sale's day, he had declined to give his consent to a sale on credit. The sale was postponed; that, either on that day, or afterwards, Col. Davis promised to pay his judgment. He attended at the sale day in May, expecting to have this promise fulfilled. An altercation then took place between Col. Davis and himself, which is fully proved by Mr. McCants on his examination in behalf of these defendants. Mr. McCants says Col. Davis urged Stanton to consent to a sale on credit; that Stanton evaded that, but insisted on the fulfilment of the promise; this was between nine and ten o'clock in the morning. Stanton still persisted in not waiving his consent to a credit sale, and the sheriff would not sell on credit without his consent. When the hour of sale arrived, the sheriff was unwilling to proceed with the sale for cash. According to the language of Stanton, the sheriff said to N. H. Davis, who was urging the sale, "it is a mighty bad time to sell land," to which N. H. Davis replied, "he did not care; he intended to buy the land himself—it was the second or third time he had been there, and it must be sold." "It was on hearing this, (continued the witness,) that I went out and had the conversation with Col. Davis." The conversation was, that he told Col. Davis if he did not do something for him, he would run up the land, and would make him pay as much to some one else as he would have to pay him. Col. Davis then told him, if he would not bid on the land, that he would pay Gladney, for him, \$400 the next week; or he

would sell Gladney a negro. Gladney was purchasing negroes at that time, and was straining on witness for a debt of \$400 which he owed him. Stanton says he would have bid but for this promise. In reply to a question of the defendants' counsel, the witness said, that he had brought this matter before the church, when Col. Davis afterwards omitted to pay Gladney, and that Col. Davis had been acquitted. Major Lyles was examined by the defendants, to prove that Stanton had given a different account of this conversation. His evidence has been already detailed, and appears to the Court rather to confirm Stanton's evidence, so far as the consistency of his declarations is involved. It may have been the purpose of Colonel Davis, at that time, to get the lands low, so as to enable him to make good titles, and, afterwards, sell them out at private sale, at fair prices, for the benefit of the creditors, and ultimately, therefore, for his own benefit. If that was his purpose, subsequent events

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*seem to have changed it. But, be that as it may, it is very clear that creditors are not bound by a sale of property effected under such circumstances. Nathan Davis bid off every tract that was sold, and directed the sheriff to make titles, according to the instructions of Col. Davis. The name of the Rev. J. C. Furman, the son-in-law of Col. Davis, was substituted as purchaser, except for the Owens tract, bid off for Dr. Thomas F. Furman: the Home tract sold to J. J. Welsh, and the White House tract, for which titles were made to N. H. Davis, who conveyed the same to J. C. Furman, as trustee. This latter tract was bid off at the July sales.

The Rev. J. C. Furman is a party defendant. In regard to the White House tract near Monticello, he says, "that the title was made by N. H. Davis to him as trustee for Mrs. Rebecca Davis, (the wife of Col. Davis) to be disposed of by her will, and in default of such disposition, to her two younger children, Mary G. Davis, and J. Bunyan Davis;" that the land "was sold by the sheriff of Fairfield district, and bought by N. H. Davis. The deed was made to defendant as trustee by N. H. Davis, in view of his leaving the country; this is the whole of the transaction as far as defendant knows. If there was anything fraudulent or illicit in it, he was not, and is not now informed." In regard to the other tracts, his answer says, that he holds titles in his own right on three of the tracts, and as trustee of Mrs. Davis, for the fourth; that, after he had the titles in his possession, he learned that there were complaints made respecting the sale and purchase of these lands, and that, in December, 1846, Simonton, one of the complainants, spoke to him, and alleged his misapprehension of N. H. Davis's design in bidding, as a reason why he did not himself bid for the

land. Defendant replied, that if that was really the case, he would not take advantage of the ignorance of other persons to gain a bargain, and that he would apply the proceeds of these lands to the benefit of Jonathan Davis's creditors. Defendant then proceeds to state what he afterwards did, and in what manner, or on what account, he was prevented from completing his purpose.

The Court is of the opinion, that all the purchases made by N. H. Davis at the sales of the sheriff of Fairfield district in May and July, 1846, except that of the Owens tract, and that of the Home tract, (belonging to W. K. Davis,) must be set aside and annulled, and that the notes of Dr. Thomas F. Furman (unpaid) must be applied to the payment of the creditors of Dr. J. B. Davis, according to their legal priorities; and that Nathan H. Davis must account to the creditors of W. K. Davis according to their legal priority for the notes of J. J. Welsh, or their value.

In October, 1846, Col. Davis made a gener-

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al assignment of *his estate to Benjamin D. Boyd, in trust for the payment of debts; the Court perceives no ground to invalidate that assignment, or the sales made under it. The assignee submits his readiness to account for his transactions (a statement of which is filed with his answer.) This is matter of reference; and so in regard to the judgment of Dr. Mendenhall. This, in the opinion of the Court, is not invalid, because taken to secure future advances made after the entry of junior judgments, and also as to the commissions charged by Dr. Mendenhall. As the amount due to him under this judgment will be matter of inquiry before the commissioner, such questions may be more fully determined on exceptions to his report.

There is nothing to impeach the debts of McMahon or of Kennedy, or to disturb the preference given to them in the assignment.

At the hearing, the complainants' solicitor abandoned (and properly) any claim to the slaves given by Col. Davis to N. H. Davis, and which were afterwards sold under a mortgage executed by him, N. H. Davis. Nor is the gift made to Mary G. Davis in 1831, or January, 1832, open to any objection. But the gift of Amelia was in 1843 or 1844, after the debt to Dr. Mendenhall was contracted: this slave must be considered subject to the provisions of the assignment, but the defendant, Mary G. Davis, is not responsible for hire, until after notice of this decree, nor to pay costs.

It is ordered and decreed, That the purchasers of the real estate made by N. H. Davis, at the sales of the sheriff of Fairfield district in May and July, 1846, (except of the tracts described as the Owens and W. K. Davis tracts) be set aside and annulled, and that the sheriff's deeds for the same be delivered up, to be cancelled; that

the said lands be sold by the commissioner of this Court, on the sales day in January next, on terms to be fixed by a future order; and that the defendants, N. H. Davis, J. C. Furman and Jonathan Davis, account for the rents and profits since the sale.

It is further ordered, That N. H. Davis account for the notes of J. J. Welsh, received by him in payment of the W. K. Davis tract of land, and the same are hereby declared liable, in his hands, to the demands of the creditors of W. K. Davis, as before stated; and the notes of Dr. Thomas F. Furman, yet unpaid, are declared liable, in the same manner, to the demand of the creditors of James B. Davis.

It is referred to the Commissioner to state an account under the foregoing orders, and also any special matter. It is also referred to him to take an account of the demand of Dr. Mendenhall, under the judgment recited in the pleadings, and also an account of the transactions of the defendant, B. D. Boyd, as assignee of Jonathan Davis, with liberty to the complainants to surcharge.

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*Finally, it is ordered. That the Commissioner publish a notice to the judgment and other lien creditors of W. K. Davis and J. B. Davis, to establish their demands before him on or before the 1st Monday of December next, and that the Commissioner report on the same, and their respective priorities. Parties to be at liberty to apply at the foot of this decree for any further and necessary order.

From so much of the decree as sets aside the purchase of the White House, the defendants, Jonathan Davis and N. H. Davis, appealed, and submitted that the reasons which supported the decree against the other sales did not apply to the purchase of this tract. That the letter of Mr. Taylor to the sheriff, dated 9th June, 1846, showed that the sale could not be averted. That Cockrell did not positively charge N. H. Davis with interfering in this matter, and he positively denied it; and this purchase was free from the charge of gross inadequacy.

2d. But at all events, if the purchase were set aside, the complainants were bound by their offer, distinctly made in the bill, to bid 10,000 dollars for the White House tract if re-sold, and the decree should not have ordered a re-sale without holding them to that condition.

3d. The defendants submitted by way of motion to the Court of Appeals, that the order directing an account should be enlarged, by authorizing the Commissioner to allow Nathan H. Davis, in his discharge, the purchase money actually paid to the sheriff; and to allow Jonathan Davis credit for

his judgment against W. K. Davis, according to its rank.

Boyce, Petigru & DeSaussure, for the motion.

contra.

Curia, per JOHNSTON, Ch. The Court is satisfied with the decree setting aside the sale of the White House tract, and it seems to us so obvious that the sale was entirely owing to the interference of Nathan H. Davis, that it is deemed unnecessary to add any thing to the observations of the Chancellor in his decree.

But the second ground of appeal insists that the sale should not have been set aside, and a re-sale ordered, without holding the plaintiffs, (as a condition of the re-sale) to the bid of \$10,000 made by them in the bill.

A sheriff's sale, as this was, must stand if fairly made, whatever the price obtained for the property. This sale was not set aside, and could not have been set aside, on the ground that the plaintiffs offered a better bid. The doctrine of opening bid-dings, has nothing to do with the case. The sale stands exclusively upon grounds of fairness or unfairness in bringing it about; and so the Chancellor has held.

If the plaintiffs did not and could not en-

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title themselves to a rescission of the purchase made by Nathan H. Davis, by making a higher bid; and were, on the other hand, entitled to set it aside, on the other grounds stated in the decree; it is difficult to perceive upon what grounds they should be held to the offer made in the bill. It was altogether nugatory and ineffectual in procuring the decree which was made. Why then should it be annexed to the decree as a condition of it?

The first question contained in the 3d ground of appeal, (i. e.) whether Nathan H. Davis should not be allowed, in his discharge, the purchase money actually paid to the sheriff, may be raised before the Master, in taking the accounts; and leave is given for that purpose, the Court reserving its judgment until the report comes in.

Upon the second question, in the same ground of appeal, the Court gives a like opinion. Mr. Jonathan Davis may bring his judgment before the Master, like the other creditors of William K. Davis, and will be entitled to its benefit, or not, according to the merits of his claim. The Court will not prejudice it either in his favor or against him.

With these explanations, it is ordered that the decree be affirmed and the appeal dismissed.

DUNKIN and DARGAN, CC., concurred.

Decree affirmed.

4 Strob. Eq. 149

THOMAS A. GLENN v. D. WALLACE et al.

(Columbia. May, 1850.)

[Executors and Administrators \hookrightarrow 531.]

It is well settled, that in cases involving the relative liabilities of sureties to several bonds for the same administration, they are all liable to the distributees of the estate. But, as between the sureties themselves, there is nothing to prevent the Court, when a surety applies for relief, to require a new security, which, as between themselves, shall be the primary one, leaving the former only collateral. Parol testimony is admissible in such cases to show the relative liabilities of the different sureties.

[Ed. Note.—Cited in *Bobo v. Vaiden*, 20 S. C. 278; *Hall v. Hall*, 45 S. C. 179, 22 S. E. 818.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2407; Dec. Dig. \hookrightarrow 531.]

[Witnesses \hookrightarrow 98.]

Where the question was as to the relative liabilities of the sureties to an original and a substituted administration bond, and the bill was filed by a surety who had been discharged by the Ordinary from the original bond, the Court rejected the testimony of a surety to both bonds, offered in behalf of his co-defendant, who was his co-surety only to the second bond, because it was evidently his interest either to make the first bondsmen, three in number, liable, rather than the second, who were two in number, or to make the bonds cumulative.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 344; Dec. Dig. \hookrightarrow 98.]

[Witnesses \hookrightarrow 86.]

In this Court a plaintiff may examine a defendant who is not interested, or on a matter in the cause in which he has no interest; and a defendant may examine a co-defendant in like manner. But a plaintiff cannot examine a co-plaintiff as a witness. If he would have his testimony, he must cause his name to be stricken out as a plaintiff, and make him a defendant. Nor can a defendant be allowed to examine a plaintiff; he must file a bill of

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discovery. And it is always proper that a statement in writing should be submitted as to the points to which it is proposed to examine the party, in order that the Court may distinctly perceive whether he is or is not interested.

[Ed. Note.—Cited in *Etheredge v. Partain*, 10 Rich. Eq. 214.

For other cases, see *Witnesses*, Cent. Dig. §§ 222-226; Dec. Dig. \hookrightarrow 86.]

Before Dunkin, Ch., at Union, June Sitings, 1849.

The following Circuit decree contains a full statement of the case:

Dunkin, Ch. On the 4th of December, 1837, P. M. Huson gave bond to John J. Pratt, Esq., Ordinary of Union district, conditioned for the discharge of his duties, as administrator of Wm. Brummett deceased. His sureties were Levi Rogers, T. A. Glenn, (the complainant) and H. D. Van Lew. In 1843, the complainant, becoming dissatisfied, applied to the Ordinary for relief, as provided by the Act of Assembly. J. J. Pratt, Esq., proved that the complainant had been speaking of proceeding to be released, and he applied to the witness, in his official capacity, to be released. P. M. Huson did not

wish to be formally cited, and came forward and gave a new bond. When Huson first proposed to give the defendant, R. M. Lewis, as surety on the new bond, he (the witness) at first hesitated, as Lewis was young, and was then at Columbia; but afterwards he concluded to take him, as he thought the parties to the new bond would be then sufficient. He at first spoke of requiring, another security, but he finally concluded these were good for the amount, and he thinks so still; accordingly, when the parties came, he took the new bond with Rogers and Lewis as sureties, and entered the order discharging Glenn.

The new bond is signed by P. M. Huson, R. N. Lewis, and Levi Rogers, and bears date 18th November, 1843. The penalty and condition are the same as in that of the 4th December, 1837. The order made by the Ordinary, is as follows, viz:

"18th November, 1843. P. M. Huson, administrator of Wm. Brummett, deceased, appeared by consent and substituted an administration bond with R. N. Lewis and Levi Rogers as his securities, in the sum of seven thousand dollars, in the place of Thomas A. Glenn, who is one of his securities on the original bond for his administration on the estate of the said deceased, and who is about to leave the State, and is desirous of being discharged from any future liability on account of said securityship. It is therefore ordered, that the said R. N. Lewis and Levi Rogers be taken in the place of the said T. A. Glenn, and that he be so far released as may be consistent with the interest of the parties concerned, and not contrary to the law, in such case made and provided."

(Signed) J. J. Pratt, Ordinary.

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*Suit had been instituted in the Court of Common Pleas, on the bond of December, 1837, by the defendant, Daniel Wallace, as administrator of McMeekin, who was a distributee of Brummett, and judgment entered against the complainant, as well as the other parties to the bond.

The bill insists that the judgment should be paid exclusively by the sureties to the bond of November, 1843. There is no reason to doubt the solvency of these sureties, and no question was discussed as to the ultimate responsibility of the complainant to the estate of Brummett. Indeed, after the judgment at law, it is not easy to conceive how such question could be made. The only inquiry, therefore, which the Court deems it necessary to institute and determine, is as to the relative rights of the complainant, and the sureties to the new bond. In *Field v. Pelot*, McMul. Eq. 387, Chancellor Harper said, "When it is the surety himself who becomes dissatisfied with his responsibility, and seeks to be relieved, the Court cannot substitute a new surety so as to discharge the former from his contract. But there is noth-

ing to forbid its requiring a new security, which as between the sureties themselves shall be the primary one, leaving the former only collateral, and such seems to be the nature of the new surety's undertaking." The Chancellor then shews an authority that parol testimony is admissible to shew the relative liabilities of the different sureties. "The testimony," says he, "of Mr. Grayson," (the Commissioner who took the bond,) "is express that the intention of the parties was, that John S. Field should be substituted in the place of Dr. Stoney, so as to discharge the latter." He concludes: "The sureties may arrange their liabilities and priorities as they will. For reasons before given, Dr. Stoney could not be discharged from all responsibility, but the surety might well assume the primary liability." I do not understand the soundness of these principles to be called in question by any member of the Court; on the contrary, Chancellor Johnston says, "the authority cited is sufficient to shew that in such cases, parol testimony is admissible to explain the intention of the parties, which intention must always govern." He afterwards says that when the application is made, a surety requesting that new security may be given, the cestui que trust having expressed no dissatisfaction with the existing security, a question might possibly be made, whether the old surety was not discharged; "but might it not be maintained," says he, "with more reason, that as between themselves, the new surety had assumed the primary responsibility in exoneration of the old?"

It is very difficult to affirm that in this case the intention of the parties is established only by parol proof. Mr. Pratt says that Huson, when he was called on by him, offered to put some notes, &c. in his hands as se-

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curity; witness declined to receive them, but directed him to deposit them with the sureties; and Rogers afterwards mentioned that he had these notes to the amount of about \$2200. But all the sureties may be said to be parties to the decree of the Ordinary of the 18th November, 1843. That decree recites that Levi Rogers and R. N. Lewis "was to be substituted in the place of Thomas A. Glenn, who is one of the sureties on the original bond, and who is about to leave the State, and desirous of being discharged," &c. "It was thereupon ordered, that said R. N. Lewis and Levi Rogers be taken in the place of the said T. A. Glenn," &c. If the bonds were merely cumulative, why did Levi Rogers become a party to and execute the new bond? The intention, then, being clear, that intention, as was said in *Field v. Pelot*, must "always govern."

But it was urged that, after the bond of November, 1843, was executed, Glenn, (the complainant) had expressed apprehensions as to his liability for Huson, and after the

judgment was recovered in 1845, had told the sheriff that he expected he would be obliged to shoulder half the debt, or something to that effect. That might well be. Mr. Pratt testified that he had always, heretofore, stated that there was no such order made as that of the 18th November, 1843, but that he had discovered the order on a recent examination of the records of his office; that so soon as he made the discovery, he communicated the fact to the solicitors of the several parties. It was proved that in one of the trials at law, in which the complainant was sued, Mr. Pratt had been sworn as a witness, and had testified on the stand, as he now states he said, to wit:—that he had made no such order. I think this was in the suit of McMeekin's children, for the complainant says he paid no attention to the suit by Wallace, for reasons which he states. But until he was able to produce the order of the 18th November, 1843, it was clearly the opinion of Judge O'Neill that he could make no case to sustain his defence, and such may have been the reluctant conclusion of the complainant himself.

The Court is of opinion that the defendants, Levi Rogers and Robert N. Lewis, are primarily liable for the defalcations of their co-defendant, P. M. Huson, as administrator of Wm. Brummett, deceased. It is ordered and decreed, that it be referred to the Commissioner to examine and report what payments have been made on the judgment mentioned in the pleadings, and by whom; and that he also report the amount, if any, that is now due on the said judgment; with leave to the Commissioner to report any special matter, preparatory to a final adjudication.

The defendant, R. N. Lewis, appealed,

1st. Because the Court rejected the testi-

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mony of the defendant, Levi Rogers, who was offered as a witness on the part of the defendant, R. N. Lewis, to shew that he was not liable. The witness was indifferent, or called to swear against his interest.

2d. Because the defendant, Lewis, was only liable on his bond for any future defalcation of P. M. Huson, the administrator of Brummett. The liability to commence from and after the date of the bond, if liable at all.

3d. Because the bond of Lewis was only cumulative at most.

4th. Because, from the evidence and answers, it was clear that the bond of Lewis was not to be effectual or binding without another surety.

5th. Because the defendant, Lewis, was in no event liable for more than one-half of Glenn's liability; and he was entitled to all the benefit of the funds received by the defendant, Rogers, from the principal, Huson.

6th. Because the bill alleged and charged that the defendant, Rogers, was only and ultimately liable; and the decree was, in other

respects, contrary to equity and the evidence.

Herndon, for the motion.
Dawkins, contra.

Curia, per DUNKIN, Ch. It may be now considered as well settled that, in cases of this character, whatever may be the rights of the classes of sureties inter se, they are all liable to the distributees of the estate. And this affords a very satisfactory answer to the argument, that the complainant, Glenn, is concluded by the judgment at law. The suit was preferred at the instance of the distributees. The administration of his principal, Huson, had never been revoked. The Ordinary had no authority to discharge his liability, and his decree cautiously avoids any such inference.

But, as between the sureties themselves, there is nothing to prevent the Court, as was said in *Field v. Pelot*, when the surety applies for relief, "to require a new security, which, as between the sureties themselves, shall be the primary one, leaving the former only collateral; and this (adds the Court) seems to be the nature of the new surety's undertaking."

It was proposed, however, to prove by Levi Rogers, one of the defendants, and who was a surety on both bonds, that there was a different understanding or agreement among the parties as to their respective liabilities. This witness was rejected by the Court as incompetent, and the ruling on this point constitutes the first ground of appeal. Although, at law, no party to the record is competent to testify, the rule in this Court has always been different; and for obvious reasons. "A suit in Equity often contains many issues,

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and *the general rule compels all who are interested in any way to be made parties, either plaintiffs or defendants; it often happens that a person, who could furnish material evidence respecting one point in dispute, is precluded from doing so by being made a party in consequence of some interest in another point."

To obviate this inconvenience, leave is frequently given, according to the English practice, for a party to be examined on motion, or on a petition filed, suggesting that he is not interested. "The interest spoken of in the motion, is interest in the matter to be examined to, not interest generally in the cause." The order is accordingly made, saving all just exceptions, which means, reserving all objections except the single one that he is a party to the cause. In this way, a plaintiff may examine a defendant who is not interested, or on a matter in which he has

no interest; and a defendant may examine a co-defendant in like manner. But a plaintiff cannot examine a co-plaintiff as a witness. If he would have his testimony, he must cause his name to be struck out as a plaintiff, and make him a defendant. Nor can a defendant be allowed to examine the plaintiff, but must file a bill of discovery. Such is the well established doctrine and practice of Westminster Hall, and our own does not differ from it, except that it has not been usual to obtain any special order, or to file a petition for leave to examine a party to the record as a witness. But it is always proper that a statement in writing should be submitted as to the points to which it is proposed to examine the party, in order that the Court may distinctly perceive whether he is or is not interested.¹

In this case, the Court have no difficulty. It was explicitly announced that the purpose was to prove that the parties to the second bond were not to be primarily liable, or were only to be liable in proportion with the parties to the first bond. Rogers was surety on both bonds. But in the first bond, there were two sureties besides himself. In the second bond, Lewis alone was his co-surety. The interest of Rogers was to have as many as he could to share the burthen with him—in other words, to make the first bondsman liable where there were three sureties, or to make the bonds cumulative, when there would be four sureties to divide the loss. It is impossible, therefore, to say that he had no interest in the matter touching which it was proposed to examine him. His interest was to multiply the number of sureties, to throw the burthen on both bonds rather than on either, and on the first bond rather than the second. It is no answer to say, that VanLew, one of the sureties on the first bond, was not in a pecuniary condition to aid in the discharge of the obligation. Who can affirm

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that he would never be in a condition *to contribute his proportion? The Court is of opinion that the witness was properly rejected.

The other grounds of appeal have been already sufficiently discussed. It is ordered that the decree be affirmed, and the appeal dismissed.

JOHNSTON and DARGAN, CC., concurred.

Appeal dismissed.

¹ Gressl, Evid. 242. *Paris v. Hughes*, 15 Eng. C. C. R. 1; *Miller v. McCaw*, 7 Paige, 458. *Brown v. Chester*, Jac. 577, (4 Eng. C. C. R.) 1 *Prince Wms.* 595.

4 Strob. Eq. 155

WILLIAM THROWER v. THOMAS K.
CURETON.

(Columbia. May, 1850.)

[Execution ⇐256.]

The bill charged that, at a sheriff's sale, the defendant, who controlled the executions under which the plaintiff's land was sold, fraudulently stifled competition, by certain public declarations which he then and there made to the bystanders. The sale took place in February, 1842, and the bill to set it aside was filed on the 26th day of June, 1848. Defendant relied on the statute of limitations. The bill was dismissed on the ground of the statute, as well as on the merits.

[Ed. Note.—Cited in *Cox v. Cox*, 6 Rich. Eq. 283; *Barrett v. Bath Paper Co.*, 13 S. C. 158.

For other cases, see *Execution*, Cent. Dig. § 728; Dec. Dig. ⇐256.]

[Limitation of Actions ⇐179.]

Where the bill avers that the facts constituting the alleged fraud came to the plaintiff's knowledge within four years before the filing of the bill, such an allegation is substantially an averment that the plaintiff was ignorant of them until that time; and I am of opinion, that such an averment throws the burden upon the defendant of proving that the plaintiff was acquainted with the facts for four years or upwards, before the bill was filed; otherwise, he is not entitled to the benefit of his plea of the statute—*ob. dict. per Johnston, Chancellor.*

[Ed. Note.—Cited in *Shannon v. White*, 6 Rich. Eq. 101, 60 Am. Dec. 115.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 668, 669; Dec. Dig. ⇐179.]

Before Dunkin, Ch., at Lancaster, June Sittings, 1849.

Circuit Decree.

Dunkin, Ch. In February, 1842, the complainant's property, land and negroes, was under levy, by virtue of several executions in the sheriff's office; a considerable portion of the amount due, was due to the defendant, and other executions were under his control. The negroes were first disposed of, and afterwards the lands. Two of the tracts of land were purchased by the defendant, one of two hundred and seventy-five acres, for eleven dollars, the other of fifty acres, for twelve and a half cents. The bill alleges that the former tract was worth two thousand dollars, and the latter was worth twenty dollars per acre, (being bottom land,) or one thousand dollars. The answer seems to admit that the two hundred and seventy-five acre tract was worth one dollar and a half per acre, but fixes no specific value on the latter. B. S. Massey said he was present at the sheriff's sales in February, 1842; that he wanted the larger tract for his son, Leonidas, and made a bid; defend-

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ant bid, and some conversation took place; defendant said he was bidding to save himself, and the land must bring its value; witness, upon that, withdrew; the impression left upon his mind was, that defendant would

purchase and then settle with complainant according to his indebtedness, allowing him a fair price for the land; witness had thought or intended to bid two hundred dollars for the tract. The conversation between himself and the defendant was in the common tone of voice; others might have heard it. There was other testimony to the same effect, nor does it appear to the Court that there is any material discrepancy between the statements of the witnesses and the admissions of the defendant's answer. Nor does the answer deny that, in one of the executions under the control of the defendant, he gave notice that specie would be demanded. Here, then, is the fact that a tract of land was knocked down to the defendant for one-fiftieth part of its value, and for one-twentieth part of what another man, desirous of availing himself of the chances of the sale was willing to pay, and was only prevented from bidding, by statements which left the impression on his mind, that in so doing, he would prejudice the unfortunate debtor. I do not think the particular language used is very important. The enquiry is, was it the intention of the party to deter competition? Was that the natural effect of his language and deportment? And was the intended effect produced? The case of *Fuller v. Abrams*, 3 Brod. & Bing. 116, is very similar to that before the Court, but I am prevented from pursuing further the examination of the evidence, and the consequences resulting from it, by the necessity of considering the plea in bar, which the defendant has interposed at the close of his answer. The sale took place in February, 1842, and this bill to set it aside was filed the 26th of June, 1848. The defendant relies on the statute of limitations. It has been repeatedly determined that, although this statute does not, in terms, apply to the proceedings of the Court of Equity, yet these courts are affected by analogy. If the party be guilty of such laches in prosecuting his equitable title as would bar him if his title were purely legal, he shall be barred in Equity. See *Bond v. Hopkins*, 1 Sch. & Lef. 428. Where the object is to obtain relief against a secret fraud, the analogy only applies from the discovery of the fraud. But in this case, the object is to set aside a sale on grounds of public policy. There was no secrecy whatever, in the transactions, or in the conduct of the defendant. At the time of the sale, or in ten minutes afterwards, the complainant might have had all the information which he possessed when the bill was filed.—As is properly said in *Prescott v. Hubbell*, 1 Hill Eq. R. 217, it is necessary to distinguish between a knowledge of the fraud and the discovery of the evidence by which it may be substantiated. But if the

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complainant *in this case had not the evi-

dence of the facts on which he relies, it was surely to his own laches he is indebted for his ignorance.

It is ordered and decreed that the bill be dismissed, but without costs.

The plaintiff moved to reverse the decree of the Chancellor,

1. Because the knowledge of the fraud charged in the bill against defendant, was from the disclosure of Mr. Anderson, and made to plaintiff only about one month before filing the bill, and, therefore, plea in bar in analogy to the statute of limitations, should not have availed the defendant.

2. Because the discovery of the testimony of Mr. Anderson was the first knowledge of actual fraud in defendant at the sales—which was within four years before filing the bill, and, therefore, the statute could not avail the defendant.

3. Because the Chancellor, from the pleadings made, and the evidence, should have set aside the sheriff's sale complained of.

Clinton & Hanna, for the motion.

Witherspoon, contra.

Curia, per DUNKIN, Ch. The Chancellor, having determined that the defendant's plea in bar should be sustained, has not detailed the whole of the testimony, but expressly waives a further examination of it, or the consequences resulting from it. But, judging from the facts reported, this Court is of opinion that they afford no ground for invalidating the purchases made by the defendant.

We are all of opinion that the plea was properly sustained. The ground of complaint is that, at a sheriff's sale, the defendant fraudulently stifled competition, by certain public declarations which he then and there made to the bystanders. Whatever he said or did might have been heard or observed by any man in the crowd, and so the evidence establishes. If it can be believed that this was not known to the complainant until six years afterwards, it is his own fault. But this should not take from the defendant the shield which the statute affords to any discussion of long by-gone transactions.

The decree is affirmed and the appeal dismissed.

MARGAN, Ch., concurred.

Per JOHNSTON, Ch. I deem it worth while in this case to express my opinion, separately; although I come to the same result with the Chancellor, and, therefore, concur in affirming his decree.

I do not think the facts stated in the decree are any evidence of fraud on the part

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of the defendant; and, therefore, *am of opinion the bill was properly dismissed, independently of the statute of limitations.

On the subject of the statute, if the case were necessarily to be put on that, I should have more difficulty.

The bill avers that the facts constituting the alleged fraud, came to the plaintiff's knowledge within four years before the filing of the bill. Such an allegation is substantially an averment that the plaintiff was ignorant of them until that time; and I am of opinion that such an averment throws the burden upon the defendant of proving that the plaintiff was acquainted with the facts for four years or upwards before the bill was filed; otherwise, he is not entitled to the benefit of his plea of the statute.

I avail myself of this occasion to throw out this opinion, with some of the reasons upon which it is founded, because I believe there is some misapprehension among some portion of the profession, upon the subject.

The general doctrine is, that the statute will not be applied, in equity, as a bar to relief against fraud until the facts constituting the fraud are discovered. Cases upon this subject present the question, whether the plaintiff, in averring his ignorance of the fraud of which he complains, is to be regarded as offering a reason why the statute should not run against him, or whether his negative averment is not rather to be regarded as the statement of a case which is *prima facie* true; and thereby furnishing the defendant a fair opportunity to deny the fact, and entitle him to the benefit of the statute, by proving notice or knowledge on the part of the plaintiff.¹

If the plaintiff is obliged to prove his ignorance prior to the time when he admits in his bill that he received information, this is a negative which, in its nature, does not admit of proof; and it follows, that the bar of the statute must be applied by this Court from the date of the fraudulent transaction—contrary to its own maxim, that the statute, in cases of fraud, runs only from the discovery.

"Ignorance," says Johnson, J. in the case of *Hopkins v. Mazyck*, 1 Hill Eq. 251, "cannot be proved. Who can enter into the heart of man, and ascertain what knowledge dwells there?"

It comes to this, then; that if the burden of proof lies on the plaintiff—if he can relieve himself from the currency of the statute only by proving his ignorance, the protection afforded him by the maxim of this Court is a mockery; and the Court might as well permit the statute to run from the perpetration of the fraud.

It is a general rule that negatives need not be proved; and the cases in which exceptions are allowed, will be found to be cases in which the nature of the matters in-

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involved ad*mits the possibility of proof. But

¹ 3 Pr. Wms. 143, 144; vide 2 Scho. & Lef. 635; 1 Ball & Beatty, 166, 167.

ignorance, in its very nature, admits of no evidence.²

The analogy is strictly to cases where a party pleads or avers a want of notice; of which *Eyre v. Dolphin*, 2 B. & B. 303, cited *Gresley's Eq. Ev.* 289, may serve as an example. The answer stated a purchase for valuable consideration, without notice, and, upon going into evidence, the plaintiff had to prove the notice.

Undoubtedly it is the English practice, that if plaintiff charges fraud, and that it was not discovered till within the statutory period, the statute is not a good plea, unless the defendant denies the fraud, or avers that the fraud, if any, was discovered beyond the time limited by the statute. Now, if the defendant contents himself with denying the fraud, and it is found against him, the plaintiff must be relieved. If, however, the defendant would avail himself of the statute, he must aver that the fraud was discovered more than six years (with us 4 years) before bill filed.

1. He must swear to the discovery.

2. As he avers an affirmative proposition, I think he must prove it.

The English practice requires him to plead it, averring the discovery in the plea, and supporting the plea by answer.

The averment must be made and proved, in order to bring defendant's case within the statute:—so I infer.³

It is true that, in *Booth v. Warrington*, and in *Wamburzee v. Kennedy*, 4 Des. R. 479, some proof was attempted of the time of discovery; but, as might be expected, it amounted to nothing, as such proof always will; and in the latter case, the Chancellor says—"they state in the bill, that they were not informed until within one year of filing their bill; and there is no proof, on the other side, to induce a belief that they had any earlier knowledge."

Says Chancellor Harper, in *White v. Pous-sin*, Bail. Eq. 459, "the rule is notorious, that time will not run to protect a fraud, until the fraud has been discovered;" (which, by the way, is very much the way in which the doctrine is laid down in *So. Sea Co. v. Wymondel*, 3 Pr. Wms. 144. "It is true," continues Chancellor Harper, "that the party seeking relief in such a case, must allege that the fraud was discovered within the statutory period before the filing of the bill. The allegation is not strictly susceptible of proof; but it is material to put the defendant upon proof of discovery." To the same effect, see his observations in *Thayer v. Davidson*, Bail. Eq. 420.

These observations I have thought proper to make, with a view to future cases, as well as because unless I was satisfied, here,

² Vide *Gresley's Eq. Ev.* 288-9.

³ See *Beame's Pleas in Eq.* 29, 168, 209, and *Willis's Pleadings*, 248, note; *Law Lib.* vol. 35. 1 Br. P. C. 455.

that there was proof of knowledge in the plaintiff prior to the time stated in his bill, I could not concur in the application of the statute.

But it appears that the plaintiff was at the

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sale, and had *opportunities to know all the facts upon which he now relies. I, therefore, think the bill was well dismissed on the ground of the statute as well as on the merits.

Decree affirmed.

4 Strob. Eq. 160

WM. McKENNA et al. (Official Sureties of Secrest, Sheriff.) v. LEROY SECREST et al.

(Columbia. May, 1850.)

[*Principal and Surety* ⇐147.]

A sheriff had contracted with one of his sureties for the purchase of a house and lot, and had subsequently paid the money. The surety had given a bond for titles, but the sheriff proving insolvent, he refused to convey. The sheriff, with some of his private creditors, filed a bill against him for a conveyance in conformity to the contract, and these creditors desired that the premises should be sold to satisfy their demands. The surety concurred in the application for a sale, but resisted the payment of the proceeds to the private creditors, on the ground that the title was yet in him, and that he had an equity to be protected out of the proceeds of the sale, against the liability he had incurred as one of the sureties of the sheriff. The premises were sold in accordance with the application, and the surety became the purchaser. The Court ordered the proceeds of the sale of the house and lot to be charged to the surety, on behalf of the sheriff's official creditors, in addition to his liability as surety of the sheriff for an aliquot proportion of his official bond.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 402-412; Dec. Dig. ⇐147.]

[*Principal and Surety* ⇐169.]

Complainants, sureties of an insolvent sheriff, filed their bill calling in his official creditors, and seeking to be discharged upon payment of their aliquot shares of the bond towards the demands of the creditors; but they did not, upon filing the bill, apply for leave to pay their respective proportions of the bond into Court, nor did either of them pay in his proportion. Held, that the sureties were not entitled, in ascertaining the amount for which they were respectively liable on the bond, to a credit for any payments which had been applied in extinguishment of interest or costs which accrued after the filing of their bill.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 489; Dec. Dig. ⇐169.]

[*Execution* ⇐322.]

A party assigned his notes and accounts and also his executions then in the sheriff's office. Against the same party there were also unsatisfied executions in the hands of the sheriff. Upon the assigned executions, the sheriff, both prior and subsequent to the assignment, had collected money which he had not applied to the executions against the assignor. Held, that the assignment of the executions, before an actual and formal application of the money previously collected on them, to the executions

against the assignor, transferred the right to the money to the assignees, and prevented its application to the executions against the assignor; that it also gave the assignees a good right to all money afterwards collected on the executions previously lodged, as well as to the money afterwards collected on executions on the notes and accounts subsequently obtained and lodged.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 951; Dec. Dig. ¶322.]

Appeal from a decree made by Johnston, Ch., at Lancaster, June Sittings, 1848.

The plaintiffs, McKenna, McIlwain, Johnson, Ingraham and Twitty, were the sureties

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on the official bond of the defendant, Secrest, as sheriff of Lancaster, and filed their bill the 23d of January, 1843, calling in his official creditors; and seeking to be discharged upon payment of their aliquot shares of the bond towards the demands of the creditors. The share of each surety to the bond was \$2400. The creditors were enjoined from proceeding at law, and called in to establish their demands in this Court. Secrest, the principal to the bond, as sheriff, as well as all his sureties, except McKenna and McIlwain, were insolvent; and therefore the creditors were to be paid out of the aliquot shares of the bond for which McKenna and McIlwain were liable under the statute, so far as these would extend; which was only to a part of the demands, leaving a considerable balance unsatisfied.

The plaintiffs did not, upon filing their bill, apply for leave to pay their respective shares of the bond into Court; nor did either of them pay in his share.

Upon taking the account of the demands of the creditors, and the sums which McKenna and McIlwain, the solvent parties to the bond, had paid towards them, and in discharge of the \$2400 for which each of them was bound, it was ascertained that

McIlwain had paid.....	\$2412 80	
Of which there was applied to interest accrued on the creditors's demands, after bill filed	\$345 93	
And on account of costs.....	98 57	444 50
Leaving applied to demands, as they stood at the filing of the bill, and exclusive of costs and interest, afterwards accrued, the sum of.....	\$1968 30	
And that McKenna had paid.....	\$2167 28	
Of which there was applied to interest accrued on creditors's demands, after bill filed, the sum of.....	\$312 36	
And for costs.....	84 62	397 58
Leaving applied to creditors's demands, as they stood at the filing of the bill, the sum of	\$1769 70	

The Commissioner, in his report upon the accounts, allowed McIlwain and McKenna credit upon their aliquot shares of the penalty of the bond, for the entire sums thus paid by them; and allowed them credit for the whole amount paid.

The creditors, by way of exception to the

report, contended that they were not entitled to credit for so much of the payments as were applied to costs incurred in resisting the creditors, and to the interest accrued on the creditors's demands after bill filed; and the Chancellor sustained the exception, observing:

"The Court is of opinion that the sureties are not entitled, in ascertaining the amount for which they are respectively liable on the bond, to a credit for any payments which have been applied in extinguishment of interest or costs, which have accrued since the

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filing of the bill. The costs were *incurred in resisting claims for which they, as sureties, were personally liable, and should not be thrown upon the security fund: which would be equivalent to making the creditors liable for them. As to the interest, it is a rule that parties to a penal bond are not liable beyond the penalty; and these sureties are not liable beyond their aliquot share of the penalty. But they should have paid in their share on the filing of their bill; and, by retaining it, must be regarded as liable for the interest which accrued while improperly retained in their hands."

Another point brought before the Chancellor arose as follows:

In 1833, Secrest, the sheriff, had contracted with McKenna, one of his sureties, and one of the plaintiffs in this case, for the purchase of a house and lot in the town of Lancaster, at the price of \$3930, to be paid in three annual instalments; and Secrest paid the money in 1841-2. McKenna had given a bond for titles. Secrest, with some of his private creditors, filed a bill against McKenna for a conveyance of the house and lot, in conformity to the contract, and the private creditors desired that the premises be sold to satisfy their demands. McKenna concurred in the application for a sale, but resisted the payment of the proceeds of the sale to the private creditors, upon the ground that the title was yet in him, and that he had an equity to be protected out of the proceeds of the sale, against the liability he had incurred as one of Secrest's sureties as sheriff.

The Court ordered the premises to be sold, reserving all questions in the case until the Commissioner should report in this case, (the one now under consideration,) "in which," says the order, "is involved an inquiry as to the extent of McKenna's liability for Leroy Secrest, as surety to his official bond."

The house and lot were sold accordingly, and were purchased by McKenna, at the nett price of \$1020; who subsequently procured an order on circuit, in that case, (Secrest et al. v. McKenna,) that the purchase money be paid over or retained by him.

In taking the accounts in the case now under consideration, (McKenna et al. v. Secrest, sheriff, et al.) it became a question whether this sum of one thousand and twenty dollars, thus received by McKenna, the pro-

ceeds of the house and lot, should not be charged to McKenna, on behalf of Secrest's official creditors, in addition to his liability as surety of Secrest, for an aliquot proportion of his official bond; and the Chancellor ruled that he should be so charged.

A third point in the cause arose out of the following circumstances:

There were several executions in the office

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of Secrest, as *sheriff, against one William Clarke. The oldest of these executions were those of Pitman & Day, and of Hall & Co., exceeding \$2400. Junior to these two executions was another execution of Parish, Wiley & Co. v. William Clarke, Caleb Clarke, Sr., and Caleb Clarke, Jr., for \$2000. On this latter execution William Clarke was bound as principal, and his said co-defendants were his sureties; and they were also his sureties on a note in Bank for about \$720.

William Clarke had certain executions in sheriff Secrest's hands. At Fall Term, 1839, a rule was taken out by Pitman & Day and Hall & Co. against him, (Secrest,) and made absolute unless he made the money due on their execution, out of William Clarke, by the 1st of December, 1839.

On the executions in favor of William Clarke, the sheriff collected, prior to the assignment hereinafter spoken of, the sum of \$497.79; but did not apply it to the executions against him.

On the 12th of March, 1840, William Clarke assigned to Caleb Clarke, Sr. and Caleb Clarke, Jr., (who, it will be remembered, were his sureties on his note in Bank, and also on the execution of Parish, Wiley & Co. against him,) his notes and accounts, and also his executions then in the sheriff's office.

After this assignment the sheriff collected the further sum of \$340.76 on the executions of William Clarke, which had been lodged in his office before the assignment was made, and the sum of \$206.30, on executions obtained on the accounts and notes which had been assigned, making together the sum of \$547.06, collected after the assignment.

Subsequently, the sheriff, Secrest, satisfied the attachment issued against him.

Upon the accounting in this case, Caleb Clarke, Sr. and Caleb Clarke, Jr., the assignees of William Clarke, claimed not only the \$497.79, collected before the assignment, but the \$340.76 collected after it, upon executions which had been lodged before it was made; and the \$206.30 collected upon executions lodged after the assignment.

On the other hand, the sureties of Secrest insisted they should not be charged with these sums; contending that Secrest had a right to detain them, having satisfied the older executions of Pitman & Day and Hall & Co. against William Clarke, to which they were applicable.

The Commissioner decided that he was

entitled to retain the \$497.79 and the \$340.76; the former sum being collected before the assignment and the latter being collected upon executions lodged before the assignment; but that he was not so entitled in respect to the \$206.30, which was collected after that event, and upon executions not lodged at that time.

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*To this decision these two assignees put in an exception: which was overruled by the Chancellor.

Upon all these points an appeal was taken from the Chancellor's judgment, and argued, by

Clinton, for Secrest's sureties;

Boyce, for C. & C. Clarke, the assignees; and

Hanna, contra.

The Court delivered its opinion as follows:

JOHNSTON, Ch. Taking up the appeal of C. & C. Clarke, in the first instance, I have to observe: That according to the practice of the Law Court, while I was at the bar, and according to the older cases, such as *Summers v. Caldwell* and others, [2 Nott. & McC. 341] reported in our books, the money collected on the executions of William Clarke, prior to his assignment of them, would have been applied to the executions against him in the sheriff's hands; and of course the assignee, taking subject to all equities and incumbrances existing at the time of the assignment, would have no claim to such money. It appears, however, that later decisions by the Law Courts, (which are binding on us,) have varied this doctrine; and that the rule now is, that an assignment, before an actual and formal application of the money to the executions against the party for whom the money is collected, transfers the right to the money to the assignee, and prevents its application according to the older cases. To these decisions I must yield, whether I perceive their correctness or not; and they are sufficient to sustain the claim of C. & C. Clarke to the money collected before the assignment made to them.

If this be so, a fortiori, the assignment gives them a good right to all money afterwards collected on the executions previously lodged; and, with still stronger reason, establishes their right to money afterwards collected on executions afterwards obtained and lodged.

I turn now to the appeal taken by McKenna and McIlwain.

One of the grounds taken is, that the Chancellor's decision in relation to interest is erroneous.

It is a general rule that interest will not be allowed upon a bond beyond its penalty, any more in equity than at law. But where parties to an obligation come into this Court,

asking its active interposition on their behalf, they must do what equity and justice demand, as a condition of the Court's interference.

These plaintiffs, by the very act of filing their bill, admitted that the official creditors of Secrest, their principal, were entitled to be paid out of their aliquot share of the bond to which they had made themselves parties. When they called in those creditors to present and establish their demands here, and enjoined them from proceeding at law,

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they were bound to pay their share of the penalty into Court, and to throw no unnecessary obstruction in the way, to procrastinate their recovery of what was due them.

Instead of paying the money into Court, however, these plaintiffs withheld it, while interest was accumulating on the demands to which it should have been applied. Lord Eldon, in the case of *Pulteney v. Warren*, 9 Ves. 79, cited in *Grant v. Grant*, 5 Cond. E. Ch. 155, speaking of *Duval v. Terry*, says—"The decree for principal and interest beyond the penalty of the bond, was affirmed upon the very ground that the party was prevented from going on at law while the demand was under the penalty." "That is the way" says the Vice Chancellor in *Grant v. Grant*, 5 Cond. Eng. Ch. 155, "in which Lord Eldon represents the case; and it is in substance a true representation of it; and he applied the principle of that case to the circumstances of the case of *Pulteney v. Warren*, which arose on the ground of the conduct adopted by Warren, one of the lessees on the *Pulteney* estate; and he gave an account, which was continued far beyond the time it would have been continued to, but for the conduct of Warren. The same principle seems to have been adopted in *Clarke v. Lord Abington*, 17 Ves. 106, and the other cases which were mentioned at the bar; all of which go to support the principle, which is merely founded on this, that if a party chooses, by improper proceedings, to prevent a creditor from having payment as soon as the creditor ought, these proceedings shall not operate to the prejudice of the creditor; but he shall be considered as entitled to receive what is really due to him; and notwithstanding there is a form of penalty in the bond, that shall not be the limitation of what shall be recovered by him."

See, also, on this subject the case of *Smedes v. Hooghtaling*, 3 Caine's Cases, 48, and the note appended to it.

When the creditors were called in and enjoined from proceeding at law, this was equivalent to saying they were entitled to what a Law Court would, at that time, have given them judgment for; and in the case of the *State v. Wylie*, 2 Strob. Rep. 113, it was held that the interest accruing after judgment is to be allowed beyond the penal-

ty; and Withers, J. says, "I held, that they" (the sureties of Wylie, who was sheriff of Fairfield) "were not entitled to any credit for costs which accrued in the litigation of other creditors against them, for I could not conceive how the creditors of the sheriff should receive, among them, what the law allowed, to wit: the whole penalty, if costs arising from the default of the sureties and their principal, paid, (as they were) to various officers of Court, should be deducted from the creditors's fund; and, for the like reason, I excluded the item of interest from the calculation, arising, as that did, from the peculiar default of the defendants. If the sureties" he adds, "had gone into a

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Court of Equity, I believe that jurisdiction would have required them to pay into Court the whole penalty of the bond, which would have been invested, and the creditors might have had interest on the penalty."

The last ground relates to the \$1020 received by McKenna from the sale of Secrest's house and lot.

It is true that in the case of *Secrest v. McKenna*, [1 Strob. Eq. 356,] it was intimated that as between Secrest and his private creditors on the one hand, and McKenna on the other, McKenna was entitled to hold this money to indemnify him for what losses he might sustain as surety on Secrest's official bond. But the difference between those creditors and these is this, that McKenna was no surety and in no manner bound for the debts which Secrest owed the former. Their demands had no lien on the house and lot, and therefore, their claim to be paid out of the proceeds of the premises was merely an equity, and McKenna had an equal equity, to which was superadded the further circumstance, that the title to the house and lot, though paid for by Secrest, was still in McKenna, the vendor. But in the present case, it is to be considered that McKenna is surety for the very debts to which Secrest, the equitable owner of the property, whose proceeds McKenna has received, should have applied the money. We are to regard the case, therefore, as if Secrest had placed the \$1020 in McKenna's hands. "A creditor" says a respectable elementary writer, well supported by authority, "is entitled to the benefit of all the securities which the principal debtor has given to his surety, as well as those which were given to the creditor by the principal."¹

To the same effect is a passage in *Pitman on Principal and Surety*, page 88, 40 Law Lib. citing 1 Eq. Ca. Abr. 93, and 11 Ves. 12.

On the whole, I do not perceive any error in the decree against the sureties; and, as to them, it is ordered that the decree be affirmed and the appeal dismissed.

¹ Burge on Suretyship, 324, citing 9 East. 35, and 10 B. & C. 93.

But as to C. & C. Clarke, it appears the decree was erroneous. Their exception should have been sustained, and it is so adjudged.

It is ordered, that the cause be remanded to the Circuit Court, and the account recommitted to the Commissioner for correction, according to this opinion.

DUNKIN and DARGAN, CC., concurred.
Decree modified.

4 Strob. Eq. *167

*JOHN WOODWARD et al. v. CALEB CLARKE, Sen., et al.
(Columbia, May, 1850.)

[*Infants* ⚡72; *Limitation of Actions* ⚡72.]

Where the minority of one of the complainants alone prevented the bar of the statute to the recovery of the freehold, the Court ordered that, as to the interests of the minor, the account of rents and profits should be extended to the period when her right accrued, but that her disability affording no advantage to her co-plaintiffs, in the claim for rents and profits, as to them the account should not be extended beyond the filing of the bill.

[Ed. Note.—Cited in *Scaife v. Thomson*, 15 S. C. 368; *Johnson v. Pelot*, 24 S. C. 262, 263, 58 Am. Rep. 253.

For other cases, see *Infants*, Cent. Dig. § 185; Dec. Dig. ⚡72; *Limitation of Actions*, Cent. Dig. § 391; Dec. Dig. ⚡72.]

[*Tenancy in Common* ⚡37.]

[Cited in *Scaife v. Thomson*, 15 S. C. 367, to the point that the giving of an account for rent depends on general principles of equity.]

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 106; Dec. Dig. ⚡37.]

Before Dunkin, Chancellor, at Chester, July Sittings, 1849.

Circuit Decree.

Dunkin, Ch.—It is proposed only to advert to some of the leading facts in this case.

The complainants are, some of them, children of Patsy Woodward, deceased, and others, children of Caleb Clarke, sen., but all of them are grandchildren of Charlotte McMullan, deceased. Mrs. McMullan died on the 3d day of March, 1831; she had been four times married; Patsy Woodward was the only child of the first marriage. Richard Harrison and Julia B. Clarke, formerly the wife of Caleb Clarke, sen., were the issue of the second marriage; all these children died before their mother, Charlotte McMullan; she was survived by her husband, Hugh McMullan, and two sons, Joseph J. and James C. McMullan, who, with the complainants, were entitled to any estate she might have left. Hugh McMullan died in 1841, and Joseph J. McMullan in 1845. The defendants, C. Clarke, sr., and J. Cathcart, are now the administrators of Hugh McMullan, deceased.

The first claim which will be considered is

that which relates to the estate of Richard Harrison, the brother of Mrs. Clarke; Richard Harrison died in 1812, prior to the intermarriage of Caleb Clarke, sr., with his wife, Julia B. Harrison. His estate consisted of some lands, and five or six negroes. His distributees were his mother, Mrs. McMullan, his sister (afterwards Mrs. Clarke,) in equal moieties. Mr. Clarke says he does not know whether a division of the negroes had or had not been made before his marriage: but the real estate was certainly divided afterwards, and his wife received her share.

The complainants interpose no claim to any part of the real estate. Hugh McMullan and those claiming under him, have been in quiet possession of such of the Harrison negroes as they held (some five in number), from 1812 until the 7th May, 1846. Anything will be presumed to quiet their title, and, when it is remembered that, during about twenty years of that time, the conflicting claimant was one eminently qualified to understand and to maintain his rights, it may

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*well be presumed that any claim had been previously satisfied, or was abandoned.

The next demand of the complainants is couched in the following terms: "that Hugh McMullan, without administrating on the estate of his wife, received of money, belonging to her estate, the sum of three thousand one hundred and eighty-four dollars, and has never accounted to the complainants for their distributive share thereof." To explain and to establish this charge, the complainants relied on two receipts, given by the defendant, Caleb Clarke, esq., to the Commissioner in Equity, on the 6th January, 1838, and also on testimony of Mr. Clarke, who was examined as a witness. The receipts purport to have been taken in the case of Hugh McMullan, administrator of Wm. M. McDonald, deceased, v. John Dunovant and others. The second is in these words "Received, of Samuel McAlilly, Commissioner in Equity, two thousand eight hundred and ninety dollars, money received by him of John Brown, one of the defendants in the above case, January 6, 1838. Signed, Caleb Clarke." Mr. Clarke says that this was the closing scene of a litigation, relating to the McDonald estate, which had embraced a period of more than twenty years. Mrs. McMullan was the sole distributee of W. M. McDonald, of whom Hugh McMullan became administrator. The litigation extended to suits in Union, Fairfield, Chester and Lancaster districts, and both in law and equity. According to Mr. Clarke's statement, the suits were managed with various success, during the intermediate periods; and gave, both to Hugh McMullan and his solicitor, the witness, great trouble and no little expense. Hugh McMullan collected something (how much does not very clearly appear, nor

is it important.) in the lifetime of his wife. But the sum now claimed never came to his hands at all, nor any part of it, so far as the Court can gather: it was detained by Mr. Clarke, for his long and laborious professional services. He says he gave Hugh McMullan credit for the amount collected; that the amount was received and adjusted after Mrs. McMullan's death. This is the evidence of the complainants. If it proves the receipt of the money by Hugh McMullan, as Administrator of McDonald, it proves also that he rightfully disbursed it, for highly important and valuable services rendered to the estate which he represented. The complainants make no charge of collusion between McMullan and his solicitor, to whom this apparently large allowance was made; and the defendant, C. Clarke, might well complain (as he did.) that any objection was urged, or rather inquiry instituted, as to the reasonableness of his remuneration, without any specific charge on that subject. But the proof, on the part of the complainants, is, that Hugh McMullan, in fact, received nothing

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of McDonald's estate after the *death of his wife. When the charge assumes a more definite form, and shall seek to make his estate responsible for the money which Mr. Clarke collected, his representatives may be able to shape their defence to meet the charge. But this is a specific demand, for a specific sum, as received, by the intestate, which is not sustained by the proof.

Mrs. Charlotte McMullan was, at the time of her death, in 1831, entitled to one moiety of the Leonard tract of land, and to the forty-acre tract mentioned in the pleadings, and also to a tract of land in Lancaster district, said to be in the possession of the defendants, Daniel Bush and James R. Massey. At the time of Mrs. McMullan's death, her husband became entitled to one-third of her estate, one-sixth descended to the children of Patsy Woodward, one-sixth to the children of Mrs. Clarke, and two-sixths, or one-third, to the sons of Hugh McMullan. These latter transferred their right to their father, who was thus seized in fee of two-thirds of the said real estate. Some five or six years after his wife's death, Hugh McMullan agreed to sell the Lancaster tract to Dr. Bush, for four thousand dollars, and, on the 25th November, 1836, executed a bond in the penal sum of \$8,000, conditioned to make warranty titles on payment of the purchase money. About three-fourths of the purchase money has been paid, when, on the 7th May, 1846, these proceedings were instituted, claiming partition, and that two-sixths, or one-third, of the several tracts above mentioned, should be set off to the complainants. The defendant, Dr. Bush, relies on the possession of his grantee and himself for about fifteen years. But it was proved that the youngest of the complainants (a daughter of Caleb Clarke,

esq.,) was now but eighteen years of age. Under the decision of *Lahiffe v. Smart*, 1 Bail. R. 192, this protects the rights of her co-tenants. Partition must accordingly be ordered; but it appears to the Court that, under the circumstances, the account for rents and profits should be restricted to the time of filing the bill.

It is ordered and decreed, that, as to the claim for an account of the personal estate of Richard Harrison, deceased, and also for the sum of \$3,184, the bill be dismissed. It is further ordered, that a writ or writs of partition issue to divide the real estate of Charlotte McMullan, deceased, described in the pleadings, among the parties interested therein, and that an account be taken of the rents and profits since the 7th May, 1846, and that the Commissioner report thereon. It is further ordered and decreed, that the Commissioner state an account between the defendant, Daniel P. Bush, and the administrators of Hugh McMullan, deceased; and that, for any balance due to the said Daniel P. Bush, he have leave to stand as a bond creditor of the said intestate.

Each party to these proceedings to pay their own costs.

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*The complainants appealed on several grounds, of which the following only was urged.

Because his Honor should have decreed complainants entitled to the rents and profits of the lands of Mrs. Charlotte McMullan, from the time of her death, in March, 1831, up to the present time.

Dawkins & Rutland, for the motion.
Gregg & McAlilly, contra.

Curia, per DUNKIN, Ch.—The first ground of appeal was abandoned, and the third ground was not urged. The second ground of appeal is, that the Court should have directed an account of the rents and profits, from the death of Mrs. Charlotte McMullan, in March, 1831.

It is stated in Bailey's Eq. Rep. 63, as well as in several other cases, that the practice of the Court, in giving an account of rents and profits of real estate, depends on general principles of equity. The account will be given from the accrual of the right, or will be restricted to four years, or to the time of the demand, according to the circumstances of each case. And in *Rowland v. Best*, 2 McC. Eq. R. 320, the Court say, "It is not an uncommon case for a party who lies by and permits another to occupy and enjoy property as his own, under an apparent good title, which he might and ought to have brought into discussion much earlier, to be restricted in his demand, for an account of rents and profits, to the filing of the bill, or four years before." The Circuit Chancellor there restricted the account to five years, and the Court of Appeals, in reviewing the

judgment, declared that "they would have been better satisfied if it had been allowed only from the time of demand."

In this case, the complainants's right accrued in March, 1831. For ten years the property has been in the possession of a bona fide purchaser, for a full and valuable consideration. More than fifteen years after the accrual of their right, the complainants first moved in the matter, and brought into discussion the defendant's title, several years after the death of his vendor, and when his estate had become probably insolvent. The minority of one of the complainants alone prevents the bar of the statute to the recovery of the free-hold. But this disability of a co-plaintiff can afford them no advantage in the claim for rents and profits. It is ordered and decreed that, as to the interests of the minor, Julia Clarke, the account of rents and profits be extended to the period when her right accrued, and that the decretal order be so modified. In all other respects, the decree of the Circuit Court is affirmed, and the appeal dismissed.

JOHNSTON and DARGAN, CC., concurred.

Decree modified.

4 Strob. Eq. *171

*THOMAS BALLARD, Admin'r of INGRAM, et al. v. FRANCIS K. BRUMMITT and SIMON BECKHAM.

(Columbia, May, 1850.)

[*Guardian and Ward* ⇨174.]

The surety of a guardian held not to be liable for money received by the guardian through mistake, as a part of the estate of his wards, and which he was afterwards unable to refund to the parties entitled to it.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 590; Dec. Dig. ⇨174.]

[*Principal and Surety* ⇨66.]

A surety shall not be charged beyond the terms of his covenant.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 108–110, 112; Dec. Dig. ⇨66.]

Before Dunkin, Ch., at Lancaster, June Sittings, 1849.

Circuit Decree.

Dunkin, Ch. The facts of this case are, for the most part, very fully set forth in the report of the Commissioner, filed 13th June, 1848, in the case of David Clanton and others v. F. K. Brummitt and Simon Beckham. That was a suit by the children of John P. Clanton, deceased, to recover from their guardian, Brummitt, and his surety, Beckham, four hundred and twenty-six dollars and fifty-one cents, which it was charged had been received by their guardian from the Commissioner, in 1838 and 1839, on account of the proceeds of the real estate of their grandmother, Margaret Ingram, deceased. It ap-

peared in evidence, that although Brummitt had so received the money at the time, yet, that in a subsequent proceeding instituted by the present complainants against Brummitt as assignee of Alexander Ingram, and guardian of the Clanton children, it appeared that the payment was an improper payment, as the ancestor of the Clanton children had, in his lifetime received more than his share of Margaret Ingram's estate, and a decree was accordingly had in favor of the other distributees, the complainants, against Brummitt for the sum thus irregularly received by him, which decree the complainants had enforced against him by a sale of his property as far it would extend, and he had subsequently taken the benefit of the insolvent debtors Act. On proof of these facts, the claim of the Clanton children against their guardian and his surety was dismissed.

The decree in favor of the complainants against Brummitt was had in 1843, and, not having succeeded in realizing their money from him, they instituted these proceedings against him and his security on the guardianship bond.

They have already a decree against Brummitt, and the only point necessary to discuss is, their right to recover against the surety on the bond given for the discharge of his duty as guardian of the Clanton children. The principle has been often stated that a surety shall not be charged beyond the terms of his covenant. This doctrine was declared and enforced by Sir William Grant in a very hard case, *Sumner v. Powell*, 2 Mer. 30. He there held, that where there was no antecedent liability—where it is the bond that first

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creates the liability—*when the "obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. See same case on appeal, 11 Eng. C. C. R. 230, where Lord Eldon said that a Court of Equity gives no more relief in such cases than a Court of Law does. Then what is the covenant of the defendant Beckham, and what is the extent of his legal liability? On the 12th December, 1838, he entered into bond with his co-defendant, to the Commissioner in Equity, in the penal sum of two thousand dollars. The bond recited that Brummitt had been appointed guardian of the minor children of Clanton, deceased, and the condition was that he should bring up and educate his wards, and "when they should come of age, he should pay over and deliver to them all the estate and effects of the above named infants, or that they may be entitled to receive, and in case of the death of the infants, to such person or persons as may by law be entitled to the estate of the above named infants." The obvious purpose of the bond is to protect the interest of the infants. At law the Commissioner could recover against the defendant, only by proving that his principal

had received funds to which his wards were entitled, and which he had failed to pay over. His fidelity to his wards was that alone for which the defendant was responsible. The strength of the complainants's case is, that Brummitt colore officii, but with the consent and acquiescence of the complainants themselves, received funds to which his wards were not entitled, and for which they have in vain attempted to prove, that he, as their guardian, was liable to account to them. The complainants concede that they have no claim against the surety on the bond in the Court of Law, but they insist on the doctrine of subrogation. The essence of this principle is, that the party to whose rights they claim to be subrogated, must themselves have rights. If Brummitt colore officii, had obtained possession of a negro as the property of his wards, which negro had afterwards been recovered from him, on proof that his wards had no right to the negro, it would seem clear enough that the wards could have no claim on the guardianship bond. The negro was no part of the ward's estate, and to that only is the bond a security. Does it make any difference that Brummitt had run off, or otherwise converted the negro, and the verdict of the rightful owners against him proved unfruitful?

It was supposed that the decree of 1843 was important, which declared that Brummitt, as assignee and guardian, should refund. Neither the minors nor the surety were parties to that decree. It is the province of judicial tribunals to declare, not to create, liabilities. In more than one case, and particularly in the case of the Ordinary v. Hanscome, Charleston, 1839, Ct. Appeals, this is affirmed; the Court had ordered a sale of real estate, and directed expressly that the proceeds should be paid to A B,

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*as the administrator of the intestate; it was held that the sureties on the administration bond were not responsible. They are liable for nothing but the faithful administration of the personal estate of the intestate, and neither the decree of the Court nor the language of the decree could change or extend their liability. But, in partition suits, the action of the Court is merely ministerial. So far as persons sui juris are concerned, the decree is the act of the parties. The complainants transferred to Brummitt funds in which his wards had no interest, both he and the complainants supposing that they (the wards) had an interest. Assuming now, that the wards had no interest in the fund (and this is the only assumption on which the complainants hold their decree of 1843 against Brummitt,) how has the condition of the defendant (Beckham's) bond been violated? If Brummitt had in fact received funds belonging to his wards, to the amount of two thousand dollars (the penalty of the bond) and the complainants were now insisting that this claim should be acknowledged, and that

there should be an abatement in proportion, the proposal would not be more untenable, although its invalidity would be more apparent.

It is ordered and decreed, that the bill be dismissed.

The complainants appealed, on the following grounds:

1st. Because Brummitt, as guardian of the Clanton children, received the fund in dispute under such a state of facts as rendered the defendant, Beckham, his surety on the guardianship bond, responsible, and the decree therefore should have been for complainants.

2d. Because Beckham was indemnified by Brummitt, and complainants should have recovered at least to the extent of the indemnity.

Hammond & Boyce, for the motion.
Clinton, contra.

Curia, per DARGAN, Ch. Mrs. Margaret Ingram died intestate. Her heirs at law and distributees were her grandchildren, namely, the children of her deceased son, — Ingram, and the children of her deceased daughter, Sarah Clanton. In July, 1831, a bill was filed by the Ingrams against the children of Sarah Clanton, for a partition of the estate of their grandmother, Mrs. Margaret Ingram. Wm. K. Brummitt became the guardian of the infant children of Sarah Clanton, and Beckham was his surety. Brummitt received at different times payments as it was supposed on account of the distributive shares of his wards, amounting in the whole to \$426.51. On further investigation, it appeared that Mrs. Clanton or her husband in her lifetime had received, in the way of advancements, more than her due

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share of the *estate of the intestate, and consequently that her children were entitled to nothing more. The sum of \$426.51 was therefore inadvertently and improperly paid to their guardian, by the mutual mistake of all the parties. On ascertaining these facts, the Ingrams filed their bill against Brummitt, the guardian, claiming a restitution of that sum, as money paid by mistake. On the final hearing of this bill, they obtained a decree against Brummitt for the amount thus paid him by mistake, issued their fi. fa., levied on his property, and sold out his entire estate, without obtaining enough to satisfy their decree against him; and he is now insolvent. Subsequent to the decree against Brummitt in favor of the Ingrams, his own wards filed a bill against him and his surety, Beckham, for an account. And they were held not to be entitled to recover against Brummitt and his surety the amount which had been recovered by the Ingrams against the guardian, as for money paid him by mistake, and to which his wards had no right.

Brummitt having proved to be insolvent, and the Ingrams having failed to collect by

the sales of his property the amount of their decree against him for the money which had improperly gone into his hands as guardian, have filed their present bill against Brummitt, and his surety Beckham, in which they seek to recover from the surety the balance of their decree against Brummitt.

I think I may safely assume, that there is no legal or equitable obligation resting upon the surety, farther than he may be considered as bound by his contract. He stands in no fiduciary relation to these parties, or any of them, and he was in no ways instrumental in this fund coming improperly into the hands of Brummitt. He is entitled to stand upon the terms of his bond; and if these do not bind him to pay this claim, he is not bound at all. And what are his liabilities on his bond, and for what ends and purposes did he become bound? Not, certainly, that the guardian should faithfully administer funds that should come into his hands, to which his wards were not entitled, and for which they could not compel him to account. Beckham was the surety of Ingram. For the performance of what duties on the part of Brummitt, did he bind himself? This Court, in considering the liabilities of the surety, cannot travel out of the terms of the bond, which alone creates the privity between him and the wards of his principal. The surety bound himself that his principal should bring up and educate his wards, &c., "and when they should come of age, he should pay over and deliver to them all the estate and effects of the above named infants, or that they may be entitled to receive; and in case of the death of the infants, to such person or persons as may, by law, be entitled to the estate of the above named in-

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fants." These are *the whole of the obligations which Beckham has assumed. Has his principal failed in any of these particulars? Or if he has, does that constitute a just ground of complaint for any but the wards themselves? The complainants in this case seek to make the surety liable, not for the mal-administration of the wards's estate, but for not paying a debt which he owed them. There is a privity between the surety and the wards through the operation and terms of the bond. But there is no privity between the surety and these complainants.

If the guardian had, in behalf of his wards, recovered a negro in an action against B, and thus acquired the possession; and afterwards, A had recovered the same negro by a better title, in an action against the guardian, it would hardly be supposed that the surety would be bound, upon such a contract as I have above quoted, to make good the verdict. If a sheriff receive money on a judgment, before an execution is lodged, his surety would not be bound, because though he receives it *colore officii*, he is not entitled to receive it, and does not receive it in his

official capacity. If an administrator receives, on account of his intestate's estate, the rents of lands, his surety is not bound for his faithful disbursement of funds so received, because he only bound himself for the administration of the personal estate. And much less would he be bound to third persons, who were strangers in interest to the estate which he represented, for any liability or damages he might incur for intermeddling with property which he supposed to belong to his intestate's estate, and which should turn out to be a mistake.

I am at a loss to perceive any ground upon which this bill can be maintained. The decree is affirmed, and the appeal dismissed.

DUNKIN, C., concurred.

Decree affirmed.

4 Strob. Eq. 175

J. M. GADBERRY et al. v. JOHN McCURE et al.

(Columbia. May, 1850.)

[Execution \hookrightarrow 268.]

The levy and sale of mortgaged lands under executions senior to the mortgage, carries the fee to the purchaser, freed from the encumbrance of the mortgage.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 763; Dec. Dig. \hookrightarrow 268.]

[Appeal and Error \hookrightarrow 173.]

A ground of appeal which contends that it should have been referred to the Commissioner to receive evidence of the existence of personal property sufficient to satisfy executions in exoneration of mortgaged real estate, is answered by the fact that the plaintiff had ample opportunity to take such evidence before the Commissioner before the hearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1089, 1091–1093, 1095–1098, 1101–1120; Dec. Dig. \hookrightarrow 173.]

[Marshaling Assets and Securities \hookrightarrow 2, 4, 11; Mortgages \hookrightarrow 151.]

It is competent for a mortgagee of real estate, before its sale under senior executions, to file his bill to compel the execution creditors to

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take satisfaction out *of the mortgagor's personal property, or any other property he has, pointing it out in his bill, and proving its existence; and asking that the mortgaged premises be exonerated until the other property be exhausted. It may be competent for him also, after the sale, to come into this Court for a distribution of the moneys collected, in such manner as to leave the proceeds of the mortgaged real estate to him until the proceeds of the other property are all exhausted by applying them to the executions; but should he fail to proceed in either of these ways, he will, after four years, be barred by the statute of limitations.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. §§ 1, 4, 14; Dec. Dig. \hookrightarrow 2, 4, 11; Mortgages, Cent. Dig. § 322; Dec. Dig. \hookrightarrow 151.]

[Limitation of Actions \hookrightarrow 21.]

A plaintiff will be barred by the statute of limitations of his remedy for the fraudulent breach of an agreement to postpone a sheriff's

sale, whereby he was damnified, if he fail to file his bill within four years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 90-99; Dec. Dig. § 21.]

Before Dunkin, Ch., at Union, June Sitings, 1849.

Circuit Decree.

Dunkin, Ch. On and before the 10th of January, 1842, there were executions in the sheriff's office in favor of the complainant, J. M. Gadberry, and of Kitchens and Gowing, against the defendant, Willard; on which executions a balance was then due of \$88.63. In the forenoon of that day (10th January, '42,) Willard confessed a judgment to McLure and Wilson, amounting, with interest and costs to \$124.41; and to C. Gowing a judgment, amounting to \$83.15, or, in the aggregate, \$207.56; on both which judgments executions were lodged in the sheriff's office before dinner. About dusk in the evening of the same day Willard executed a mortgage of two tracts of land to the complainants, to secure a debt of \$28.50 to R. J. Gage, and \$112 to J. M. Gadberry, and to indemnify R. J. Gage and Gad Clark as sureties on a recognizance. The mortgage was recorded next day. On the 11th January, 1842, sheriff Johnson levied on one of these tracts, containing 110 acres, by virtue of executions in his office, and on the 14th February, 1842, he levied on the other tract of eighty acres. He sold the land at sale day in December, 1842. The defendant, John McLure, purchased both tracts—the former for \$250, and the latter for \$85. He settled with the sheriff 18th August, 1843, by signing a receipt for the amount of the execution of McLure and Wilson, and paying the balance in cash. McLure afterwards sold the land to his co-defendants, Spencer and Sketlan, at enhanced prices.

On the 27th April, 1847, this bill was filed, alleging, among other things, that the complainant, Gadberry, was surprised in regard to the time of the sale of the land, and also that the defendant, Willard, had personal property which should have been subjected to the satisfaction of the executions. It is also insisted that only the equity of redemption was sold by the sheriff.

In respect to the surprise, no evidence was offered. As to *the personal property, the sheriff testified that about a week after the sale of the land he received from the defendant, Willard, corn and fodder to the amount of sixty-two dollars.

On the reasoning and authority of ex parte Stagg, 1 N. & McC. R. 405, the Court is of opinion that the executions of the 10th January, 1842, have priority to the complainant's mortgage. The sheriff's sale of the 5th December, 1842, seems to have been fair and bona fide in every respect, and there is no ground to question the title of the purchaser, or of his subsequent vendees. It seems, too,

that the sale of neither tract was, in itself, sufficient to discharge the existing executions. Again, the sheriff having in his office existing executions amounting altogether to about \$296, and having sold real estate for \$335, subsequently received from the defendant in the execution corn and fodder to the amount of \$62. He then pays over to the execution creditors the amount of their several demands. If the sheriff were now a party defendant, and the mortgagee had not a plain and adequate remedy at law, there might be ground for giving relief to the mortgagee against the sheriff. But in August, 1843, the defendant, McLure, received from the sheriff only the money to which he was entitled, and the Court can perceive no principle upon which he can be called to account or to refund.

It is ordered and decreed that the bill be dismissed.

The complainants appealed, and moved the Court of Appeals to reverse or modify the decree of the Chancellor, on the following grounds, viz.:

1st. Because there was error in the decree of the Chancellor, on the circuit, in giving a preference to the judgments and executions against Thomas E. Willard, of the 10th January, 1842, which were of the same date of the complainants' mortgage against Thomas E. Willard, as in equity the complainant, James M. Gadberry, the mortgagee, though his mortgage was executed at a later hour of the day, on the 10th January, 1842, still the mortgagee was entitled to be paid before the judgment creditors of that date, or at least to his just and equitable share of the real value of the lands mortgaged.

2d. Because, from the proofs in the cause, it was apparent that there was personal property of the defendant, Thomas E. Willard, amply sufficient to pay all the judgments against the said T. E. Willard, of a date prior to the 10th January, 1842, and thereby to leave at least one of the tracts mortgaged to the payment of the complainants' mortgaged debt.

3d. Because the defendants, McLure and Wilson, took an unconscientious advantage of the complainant, Jas. M. Gadberry, in using his executions against Thos. E. Willard et al. to his prejudice, and pressing the sale of the mortgaged premises, in the absence of the mortgagee, when it had been

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agreed *to postpone the sale of the said lands, as was charged in the bill, and not denied in the answer.

4th. Because, under the circumstances of the case, the sheriff could not, and in fact did not, sell anything but the equity of redemption of Thos. E. Willard, in the mortgaged premises, as appears from the prices at which John McLure, one of the execution creditors, bought and sold the same.

5th. Because the defendants should not

have been permitted to go into evidence to fix the hours of the day, of 10th January, 1842, at which judgments and mortgage against Thos. E. Willard were severally created, as fractions of a day in such case, in law and equity, are not to be regarded.

6th. Because the matters of account should have been referred to the Commissioner, where the complainant, Jas. M. Gadberry, can clearly show there was personal property of Thos. E. Willard, to have secured the lands to the mortgagee.

7th. Because the decree should have required the defendants, John McLure and Clinton Wilson, to contribute, or the lands should have been ordered to be sold to foreclose the mortgage.

A. W. Thomson, for the motion.
Dawkins, contra.

Curia, per JOHNSTON, Ch. No doubt the levy and sale of the lands, under the executions senior to the mortgage, carried the fee to the purchaser, freed from the incumbrance of the mortgage.

It was competent for the mortgagees to have filed their bill before the sale, to compel the execution creditors to take satisfaction out of Willard's personal property, or any other property he had, pointing it out in the bill, and proving its existence (as to which there is no evidence, however): and asking that the mortgaged premises be exonerated until the other property was exhausted.

It may have been competent for them, also, after the sale, to come into this Court for a distribution of the proceeds of the moneys collected, in such manner as to leave the proceeds of the mortgaged lands to the mortgagees, until the proceeds of the other property were all exhausted by applying them to the executions.

But they failed to proceed in either of these ways until barred by the statute of limitations—which is pleaded in the answer.

There is no proof of the fraud charged in one of the grounds of appeal—wherein it is stated that there was an agreement to postpone the sale, which is alleged to have been violated by bringing it on in Gadberry's absence; and if such fraud had been proved, the plaintiffs were barred of their remedy for it, by not filing their bill within four years.

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*The ground which contends that it should have been referred to the Commissioner to receive evidence of the existence of personal property sufficient to satisfy the executions, is answered by this:—that the plaintiffs had ample opportunity to take such evidence before the Commissioner before the hearing. The plaintiffs were bound to make out a case to be sent to the Commissioner, but failed to do so. It would have been singular to

send the case to the Commissioner to take the accounts, and allow the case to be made out there. The case should have been made out in the first instance, and the account taken afterwards.

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN and DARGAN, CC., concurred.

Decree affirmed.

4 Strob. Eq. 179

CHRISTIANA HATCHER v. DOUGLAS ROBERTSON, Executor.

(Columbia, May, 1850.)

[Wills \hookrightarrow 775.]

The testator "willed and bequeathed," to six persons, (named,) certain slaves, "to be equally divided between them and their heirs forever," and three of the said legatees, (the fact being unknown to the testator up to the period of his death,) had died before the execution of the will. *Held*, that the bequests, to the three deceased legatees, lapsed, and passed to the residuary legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1998; Dec. Dig. \hookrightarrow 775.]

[Husband and Wife \hookrightarrow 29.]

An antenuptial agreement, founded on the consideration of marriage, though resting in parol merely, provided it be clearly and satisfactorily established by proof, will be set up and enforced by the Court.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 158; Dec. Dig. \hookrightarrow 29.]

Before Dargan, Ch., at Edgefield, June sittings, 1849.

Circuit Decree.

Dargan, Ch.—William Robertson's will is dated the 17th September, 1840. He died soon after its execution; and Douglas Robertson and James Robertson, nominated as executors therein, duly qualified, and took upon themselves the burthen of its execution. By the sixth clause of his will, the testator provides as follows: "In compliance with a promise made to my late wife, I will and bequeath unto Christiana Hatcher, Josey Parker, Benjamin Parker, William Parker, Hezekiah Barns and Frances Barns, now the wife of one Tally, the following negroes, to wit, old Andrew, Mary, Harriet, Chester, Jesse, Charlse, John, Quincy, Jim, Phil, George, Peggy, young Mary, and Oden, to be equally divided between them, and their heirs forever."

The eighth clause of the will is as follows: "I give and bequeath my Cedar Creek tract

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of land, with a field of twenty *acres of land, bought by me of M. Mims, to the persons named in the sixth clause of my will, to be equally divided between them, and their heirs forever."

In the tenth clause, after directing the negroes to be sold at private sale, with the

privilege of selecting their masters, at an appraised valuation, the testator directs that "in the said appraisement and sale herein directed, my executors are required to keep distinct the negroes mentioned in the sixth clause from the negroes mentioned in the seventh of this will, and account with the respective legatees mentioned in those clauses for the sale of the negroes therein mentioned."

The executors caused the negroes to be appraised and sold according to the provisions of the will; and have paid over to the complainant the one-sixth part of the proceeds of the sale of those negroes enumerated and disposed of in the sixth clause of the will. At the time of the death of Elizabeth Robertson, the wife of the testator, all the persons named in that clause, as legatees, were alive; but, after the death of Elizabeth Robertson, and before the execution of William Robertson's will, three of the said legatees had died, namely, Josey Parker, without issue, and Benjamin Parker and William Parker, each leaving children now surviving. And it is a conceded fact, and it is charged in the bill, that William Robertson, at the execution of the will, was ignorant that three of the persons named as legatees, in the sixth clause, were then dead. And it would further appear that he was not informed of the death of his said legatees to the day of his own death. James Robertson, one of the executors, has recently departed this life, and the administration of the estate under the will has survived to the defendant.

The complainant admits that she has been paid by the executors one-sixth of the proceeds of the sales of the negroes described in the sixth clause; but she contends that, by the death of Josey, Benjamin and William Parker, in the lifetime of the testator, and before the execution of his will, she is entitled, not to one-sixth only, but to the one-third of the proceeds of the sales of those negroes, on the ground that the bequests to the three deceased legatees did not lapse and pass to the residuary legatees, but that the same vested in the living legatees, under that clause, by the right of survivorship.

If the legacy given to the six persons named in the sixth clause had created a joint-tenancy, and Josey, Benjamin and William Parker had died after the execution of the will, and in the lifetime of the testator, a case would have been presented precisely similar to that of *Herbemont v. Thomas*, Cheves Eq. 21, the decision of which has been approved in *Ball v. Deas*, 2 Strob. Eq. 24, [49 Am. Dec. 651.] But, between those cases and this, there is no parallel, for, in this case, the sixth clause of the will creates a

clause were such as would have created a joint tenancy, the legatees, whose interest is alleged to have passed over by virtue of *jus accrescendi* to the survivor, being dead at the time of the execution of the will, there was nothing upon which this doctrine could operate. The deceased legatees never had been an inchoate right, under the will, which could, by any possibility, become the subject of the *jus accrescendi*.

It cannot, however, be doubted but that the legatees who took under the sixth and eighth clauses, took as tenants in common. There was a sufficient designation of their several interests, or shares, in the property bequeathed, to constitute them such. If a legacy to a tenant in common would lapse where the legatee died before the testator, and after the execution of his will, it seems clear that the same result would happen where the intended recipient of the testator's bounty was actually dead at the execution of the will: it might, perhaps, more properly be called an ineffectual than a lapsed legacy. There were no such persons in existence at the date of the will, and nothing passed, or could pass, to them, or be transmitted through them. And it seems to be a necessary consequence, that the subject matter of such a legacy would become either intestate property, or would fall under the residuary clause of the will.

It was urged in the argument that the legacy in the sixth clause, and the devise in the eighth, were given to a class, and that, in such a case, there could not be a lapse, and the survivors, or those who could bring themselves under the description, at the death of the testator, would be entitled to take. The principle contended for is undeniably true, but the application is unfounded: the gift here is not to a class, but to persons individually, and by name. It was also contended, that there will be no lapse where the testator did not intend it, and provided a substitute. This legal proposition is perfectly correct; but it must not only appear that the testator did intend that the legacy should not lapse, but it must appear equally clear that he has provided a substitute to take in the event of the failure of the primary object of his beneficence. In this case, however, I appeal in vain to the terms, of the will for any such indication of intention on the part of the testator. The words "to them and their heirs forever," occurring after the words "equally to be divided between them," are not substitutional, but are simply words of limitation, indicating the quantity of the estate intended to be created. For though, in regard to personalty, words of limitation are entirely unnecessary, and have ever been so regarded, to carry the absolute interest,

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tenancy in *common, and not a joint tenancy. And I cannot perceive upon what possible ground the right of survivorship can be said to exist. And, again, if the words of the

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this circumstance alone *has been considered altogether insufficient to denote an intention, on the part of the testator, to make the ex-

ecutor or administrator independent and substitutional legatees; and, where the devisee or legatee is dead at the execution of the will, the words of limitation are equally inoperative to let in the representatives of the deceased person. The same reason, and the same remarks, apply, in all their force, to a case where the words of limitation are to them and their heirs forever.¹

There was another question made in the pleadings and the evidence, and insisted on in the argument. It was contended that there was a parol ante-nuptial marriage contract between William Robertson and his wife, Elizabeth, wherein it was stipulated that the property of each of them should be enjoyed by them in common, as husband and wife, during their joint lives; and, upon the death of either, the survivor should have and enjoy the whole during life; and, in the event that Elizabeth Robertson, the wife, died first, then, after the termination of the husband's life estate in the property, which she brought him upon their marriage, it was to be disposed of as follows: a negro boy, John, to Benedict Barns; a girl, Judy, to Susan Barns; and the residue of her estate and property was to be given to six legatees, by name, to wit, to the complainant, who was her sister, her three brothers, Josey, William and Benjamin Parker, and two relatives of her former husband, Hezekiah Barns and Frances Barns. This is the substance of the parol marriage contract, alleged and set forth in the bill.

In support of this allegation, and by way of proof, the complainant relies on the recital in the sixth clause of the will, wherein the testator declares the inducement which moved him in bestowing the legacy; she also adduced and relied on two letters addressed by the testator to Josey Parker, one of the deceased persons designated in that clause as a legatee. I should not hesitate to set up and enforce an ante-nuptial agreement, founded on the consideration of marriage, though resting in parol merely, provided it was clearly and satisfactorily established by the proof. I should experience no difficulty, either in the way of principle or authority, in setting up and enforcing such a marriage contract, not only against the husband, his heirs at law, devisees, legatees, distributees, or any other person claiming from or through him by voluntary conveyance, but even against a purchaser for valuable consideration, provided he had notice of the wife's equity; and this equity would be enforced, not only in favor of the wife herself, while living, but of those who, by the terms of the stipulation, were to succeed her in the enjoyment of the estate.

The complainant, however, has not made out any such case for relief; the recital in

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the sixth clause is in these words: "In

compliance with a promise made to my late wife, I will and bequeath," &c. There is no acknowledgment here of any legal or equitable obligation. It is evident that the testator, in the probity of a virtuous heart, and his affectionate remembrance of his deceased wife, was disposed, honestly and religiously, to fulfil a promise made to her in her life; but, whether the promise was made before and in consideration of marriage, or after the solemnization of the nuptials, and therefore without consideration, and void, does not appear from any internal evidence afforded by the will.

When I turn to the two letters of the testator, which have been adduced in evidence, I see nothing in them sufficient to sustain the complainant's claim, or to justify the conclusions which she adduces from them. But from the tenor of those letters, I am rather led to the opposite conclusion, namely, that the mutual promises which are spoken of as having been made between the testator and his wife, were post nuptial, and therefore voluntary and void. By the first letter, dated 20th February, 1831, the testator seems to have labored under an erroneous impression in regard to his rights in his wife's property, and to have supposed that he on her death had no interest in it whatever. He believed, that on her decease it passed by law immediately to her brothers and sisters, independently of any contract on the subject between her and himself; under this impression, he asks them to let it remain with him during his life, and as an inducement for them to consent to this desired arrangement, he states what had occurred between himself and his wife, in regard to the property, and her wishes in regard to its disposition. He proceeds to say, that she desired him to have it during his life, and after his death that it should go to her own relations, the persons to whom he was making the appeal for the fulfilment of her wishes. He also says, that "when we first married I made my will. I gave her the whole of my estate, real and personal, if she was the longest liver, during her natural life. She likewise gave me the whole of her estate, real and personal, if I was the longest liver, (by what form is not stated) and after my death, for her estate to be divided as follows: one negro boy named John, to be given to Benedict Barns, a nephew of her first husband, also a negro girl named Judy, to Susan Barns, a niece of her former husband. They are fatherless and motherless orphans; the balance of her estate be divided into six parts, that is to say four parts to her sister and three brothers, and the two other parts to her former husband's relations. But her will and desire is not good in law, according to the laws of our State," &c. It will be at once perceived, that there is not the slightest admission or intimation that there was any

¹ Maybank v. Brooks, 1 Bro. C. C. 81.

contract or understanding between them, antecedent to the marriage. From the last sen-

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tence of the *passage quoted, it is manifest that the testator did not suppose that there was any subsisting legal or equitable obligation arising from any contract between himself and his wife, that was binding upon him or her heirs, except in conscience. And he proceeds to address an appeal to her relations (his correspondent being one of them) to carry out and fulfil the understanding, which he supposed to be inoperative and void in law. This letter proves no ante-nuptial agreement. The terms of the second letter leads to the same conclusion, and perhaps falls "short of the mark" in a more eminent degree. Before this letter (dated the 8th of June, 1831) was written, the testator had discovered that his impression in relation to the claims of his wife's relations upon her property, was erroneous. He informs Mr. Josey Parker (his brother-in-law) that he had been advised that his marital rights had attached, and that it was "in his power, and that it would be lawful for him to dispose of her estate as he saw proper." But notwithstanding his perfect legal title to the property, he informs Mr. Josey Parker of his disposition and intention to dispose of the property according to the mutual agreement between himself and his wife. He then reiterates the terms of the agreement between them, by which, if he survived her, he was to dispose of her property after his death. These declarations do not indicate the existence of any binding ante-nuptial agreement. But there is a remarkable passage which fixes the date of the agreement; he says that "on her death bed she desired for Benedict Barns to have a negro boy named John, and his sister, Susan Barns, to have a certain negro girl named Judy, and the balance of her estate to be equally divided into six parts, that is to say, Christiana Hatcher," &c., "as the law gives her estate to me," he proceeds to say "I have made my will and willed her estate as she desired me;" thus referring to her wishes as expressed on her death bed, as a guide by which he was governed in the disposition of the estate which he had acquired by her.

I cannot, therefore, sustain this as a valid agreement, and if I could, I do not perceive that it would confer much benefit on the complainant. If the agreement were valid and to be enforced, and if it created a joint tenancy, the *jus accrescendi* would not exist; whereas, in the case supposed, the estate vested in the life of the deceased joint tenant. Our Act of 1791 abolishes the right of survivorship, where any person shall be seized or possessed at the time of his death, of any estate in joint tenancy, and makes such estate distributable, as estates in common. But the terms of the agreement, according to the letters, created, not a joint tenancy, but

a tenancy in common. The balance of her estate was to be equally divided into six parts, of which each of the persons named was to have one. And Benjamin and Wil-

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liam Par*ker having both died, leaving children, the complainant could have no interest in their shares which would pass to their respective legal representatives, for the benefit of their own lineal descendants. Josey Parker having died without issue, the complainant would be entitled to only one-third, and it would be necessary that her claim to that much should be asserted by an administrator, which has not been done. It would also be necessary that there should be administration granted on the estates of Benjamin and William Parker, and their administrators and children should be made parties to the bill, so that in the view of the case presented by the complainant, I should be under the necessity of dismissing the bill for the want of the proper parties.

In my view, the only possible aspect of the case in which the complainant's bill could be sustained, is, that under the will of the testator, and not under the marriage contract of himself and wife, the complainant and her brothers took, or would have taken, an estate in joint tenancy, the deceased brothers, to whose shares she sets up a claim by survivorship, being alive at the execution of the will, and dead at the death of the testator. There has been a most signal failure in all the conditions upon which she would be entitled to recover.

There has been no question made in the pleadings in regard to the land which was the subject of devise in the eighth clause.

The complainant having already received all which she is entitled to receive under the will of William Robertson, it is ordered and decreed that her bill be dismissed.

The complainant appealed, and moved the Court of Appeals to reverse the decree, on the following grounds:

1st. Because the legatees under the sixth clause, who were alive and competent to take at the date of the will, took all the property in that clause mentioned; and being associated with the names of others, not then in esse, did not alter the case, inasmuch as aliquot portions of the property were not bequeathed to the legatees severally, but the whole was given to them collectively.

2d. That the direction in the latter part of the said sixth clause, that the property "be equally divided between them and their heirs forever," did not, nor was intended to have the effect to increase or diminish the share of a legatee; inasmuch as an equal division among those who could take, and also an absolute estate in the legacies taken, would have been the legal effect of the bequest, if those words had been altogether omitted.

3d. Because, by the tenth clause of the will, the executors were directed to keep

separate the proceeds of the property mentioned in the sixth and seventh clauses sev-

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erally, and to *account with the respective legatees in those clauses mentioned. From which it was inferred and submitted by the complainant, that the legatees under the seventh clause (being also the residuary legatees) could not take the shares of the legatees who were dead at the date of the will.

4th. Because the will and the letters of testator furnished sufficient evidence of a contract between him and his wife to authorize the Court to decree a specific performance in such manner as to prevent any portion of the property mentioned in said sixth clause from passing to his relations.

5th. Because it was manifest, from the whole will, that it was not the intention of the testator that the legatees named in the seventh clause, should take any portion of the property bequeathed by the sixth clause of his will; and, if they do receive it as residuary legatees, it will be in opposition to a clearly and strongly expressed intention to the contrary.

Bauskett, for the motion.

Griffin, contra.

PER CURIAM. We concur in the Chancellor's decree; and it is ordered, that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, and DARGAN, CC.

Decree affirmed.

4 Strob. Eq. 186

R. W. SMITH v. ELLY and ASA
GODBOLD.

(Columbia. May, 1850.)

[Execution ⇨238.]

Where a judgment at law had been enjoined perpetually, and the plaintiff in the judgment had been ordered to account for and pay over to the defendant the money which he had received by virtue of sales made by the sheriff, under execution, the plaintiff cannot exonerate himself from doing so, on the ground that, although he had bid on the property of the defendant in execution, sold by the sheriff, no title had been executed, or receipt given by the sheriff for the purchase money; for, where the plaintiff in execution bids off the property of the defendant at a sheriff's sale, and the money due upon the bid is to be paid to the party who bids, the bid itself (if the forms and requirements of the law have been pursued in the sale) is payment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 662; Dec. Dig. ⇨238.]

[Interest ⇨12.]

In this Court, where money has been received by a party, which ex æquo et bono he ought to refund or pay, interest follows as a matter of course; and this whether it has or has not been prayed for in the bill, or ordered by the decree.

[Ed. Note.—Cited in Barr v. Haseldon, 10 Rich. Eq. 62.

For other cases, see Interest, Cent. Dig. § 23; Dec. Dig. ⇨12.]

Before Dargan, Ch., at Marion, February Sittings, 1849.

Circuit Decree.

Dargan, Ch. The former decree does not vacate or declare void the judgment of Asa

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Godbold v. the complainant, *but enjoins it perpetually, and orders the plaintiff in the said judgment at law to account for and pay to the complainant in this bill the moneys which he has received by virtue of sales made by the sheriff under the execution. And this matter of account was referred to the Commissioner, who, at this term of the Court, has submitted his report; to which the defendant, Asa Godbold, has filed exceptions.

The Commissioner reports that the defendant received \$20 in cash from the sale of a horse, by sheriff Carmichael. The defendant does not, at this stage of the proceeding, object to the payment of this sum of \$20, but excepts to the report on account of the interest, on this and the other item, which the Commissioner in his account has reported against him.

The question of interest I will consider in the sequel.

It also appears that the sheriff sold, under the defendant's execution against the complainant, a tract of land containing two hundred and forty-six acres, which was bid off by the defendant, for the sum of \$200.

He contends that he is not liable for his bid, because no title has ever been executed, or receipt given by the sheriff for the purchase money; and that, under these circumstances, this cannot be considered a payment to him; and, therefore, does not come within the provisions of the decree, which orders all payments to be refunded by him. This position is not tenable. Where the plaintiff in execution bids off the property of the defendant at a sheriff's sale, the bid itself (if the forms and requirements of the law have been pursued in the sale) is payment. I mean, of course, a case where the money due upon the bid is to be paid to the party who bids. In such case, the money is already in the pocket of him to whom it belongs. The sheriff would have no right to demand it of him; for no such vain and empty formality would be considered necessary as that the bidder should pay the money into the hands of the sheriff, for the purpose of being immediately paid back to the rightful owner. Asa Godbold, by the very fact of the land being knocked off to him, was a purchaser who had paid the purchase money, and the execution was satisfied, pro tanto.

He was eo instanti possessed of an equitable title, and it is his own fault if he has not obtained a deed of conveyance from the sheriff. I think, therefore, that this sum of \$200 comes strictly within the character of a pay-

ment to the plaintiff in the execution, which the decree orders him to refund.

But the defendant, Asa Godbold, further contends, that if he is liable for this bid of \$200, and the other payment of \$20, he is not liable for interest, and this constitutes the ground of his first exception to the Commissioner's report. His objection to the payment

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of interest is three-fold: first, *because interest ought not to be allowed at all; secondly, because the bill contains no prayer for an account with interest; and thirdly, because the decree does not in express terms allow it. In regard to the first objection, it will suffice to say, that in this Court at least, where money has been received by a party, which *ex æquo et bono* he ought to refund or pay, interest follows as a matter of course. The second and third objections are not without support from English authorities. It would seem, from the cases cited in Daniels's Practice, pages 439 and 1507, (some of which I have consulted) that the Court will not decree interest, unless under very peculiar circumstances, where it is not prayed for in the bill; and further, that in general no interest could be allowed where it was not ordered, or the question of interest reserved by the decree, unless upon a re-hearing. The practice of our Court, as far as my experience and observation extend, has been different. In bills for account, it is not usual with us to pray for an account with interest. This is implied. And so in regard to the decrees or decretal orders for an account, or where matters of account are referred to the Commissioner; there is not one case in a hundred, which have fallen under my observation, where there was any express order or direction that the account should be stated with a computation of interest. It is too late to alter the practice of our Courts in this respect, for the purpose of conforming to a rule of English practice, with no very strong or imperative reason to support it.

It is ordered and decreed, that the report of the Commissioner be confirmed.

Extract of Chancellor Caldwell's Decretal Order.

It is therefore ordered and decreed, That the judgment and execution of Asa Godbold, as against Redding W. Smith, be perpetually enjoined, and that it is referred to the Commissioner to ascertain and report how much money was collected and received by the said Asa Godbold, out of the sale of Redding W. Smith's property, and applied to the judgment and execution, subsequently to the award and rescision of the said contract; and it is further ordered and decreed, that the said Asa Godbold do account for the amount he received to the plaintiff, and pay the costs of this case.

James J. Caldwell.

The defendant moved to modify the decree of his Honor, Chancellor Dargan, on the following grounds:

1st. Because his Honor erred in holding the defendant liable to account for two hundred dollars, the price bid for defendant's land, when no titles had ever been executed

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for the *same, and when the said sum was not applied or credited upon defendant's execution as a payment.

2. Because his Honor erred in charging the defendant with interest, the same not being prayed for in the bill, not ordered to be accounted for by Chancellor Caldwell's decree, and ought not *ex æquo et bono*, to be charged against the defendant.

W. W. Harlee, for the motion.

—, contra.

PER CURIAM. This Court is satisfied with the decree of the Chancellor; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, and DARGAN, CC.

Decree affirmed.

4 Strob. Ea 189

SAMUEL BROCKINGTON and Wife v. WM. CAMLIN et al.

(Columbia, May, 1850.)

[Limitation of Actions \hookrightarrow 45.]

Where, on the appraisement and division of the estate of her former husband among his children, the wife of defendant retained and claimed certain slaves as her own, under a deed from her father, and the claim was acquiesced in by all parties, and the distributees gave receipts to the administrator for their several proportions of the estate, and the defendant and his wife retained undisputed possession of the slaves up to the period of her death, twelve years after the division, and the defendant himself continued in possession for three years longer—the Court sustained the plea of the statute of limitations interposed by the defendant to the claim of the distributees of his wife's former husband, to have these slaves subjected to division among them.

[Ed. Note.—Cited in Pettus v. Clawson, 4 Rich. Eq. 101.

For other cases, see Limitation of Actions, Cent. Dig. § 234; Dec. Dig. \hookrightarrow 45.]

[Equity \hookrightarrow 71.]

Where the parties who are entitled to the fund or estate, have received it informally, and without an administration, and the same parties afterwards administer, or one for the rest, and set up a claim in their character as administrators for the fund or estate which they have already received, their claim will meet with no countenance or aid in this Court. And if, in a settlement based upon their equitable rights, they, supposing themselves not to need the instrumentality of a representative of the legal estate, have omitted something which ought or might have been included in the settlement, there is no reason why the statute of limitations should not run in favor of the party

intended to be discharged, from the time of the settlement, as in the case of any other settlement with trustees.

[Ed. Note.—Cited in *Long v. Cason*, 4 Rich. Eq. 63; *Sollee v. Croft*, 7 Rich. Eq. 42; *Presley v. Davis*, Id. 110, 62 Am. Dec. 396; *Colburn v. Holland*, 14 Rich. Eq. 241; *Mason v. Johnson*, 13 S. C. 24; *Fricks v. Lewis*, 26 S. C. 239, 1 S. E. 884; *Ariail v. Ariail*, 29 S. C. 93, 7 S. E. 35; *Hayes v. Walker*, 70 S. C. 52, 48 S. E. 989.

For other cases, see *Equity*, Cent. Dig. § 208; Dec. Dig. 671.]

Before Dargan, Ch., at Chambers, Williamsburg, May, 1849.

Circuit Decree.

Dargan, Ch. On the 4th day of April, 1793, Straud Conyers, of North Carolina, executed

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a deed, bearing that *date, by which, in consideration of love, good will and affection, he conveyed to his two daughters, Elizabeth and Mary Conyers, a negro wench, named Clarinda, "to have and to hold the said negro wench, and her increase, unto their heirs, and lawful issue of their bodies, as their proper use, without any manner of condition." Indorsed upon the deed, is an acknowledgment, that Straud Conyers had delivered the negro to Joseph Thomas, for his daughters. This memorandum is subscribed by Conyers, and bears the same date with the deed. On the 3d of January, 1804, Elizabeth Conyers intermarried with John Arnett. They had born to them the following children:—Mary Jane Arnett, born 18th November, 1804; she died 14th November, 1811. James C. Arnett, born 4th July, 1806; he died 29th Oct. 1811. John A. Arnett, born 11th October, 1808. Sarah M. Arnett, born 13th October, 1810. Eliza Elmira Arnett, born 23d of March, 1813. James Jaroe Arnett, born 7th October, 1815; he died 2d September, 1828. Eliza has intermarried with Samuel Brockington, the complainant, and Sarah with David Nesmitte, one of the defendants.

In the year 1816, John Arnett died, leaving his widow, and his children, John, Sarah, James and Eliza, surviving him. Elizabeth Arnett, the widow, administered on his estate, and the negroes, Clarinda and her issue, (the subject matter of this controversy) were included in the appraisement, and were returned as part of John Arnett's estate. In the year 1817 she intermarried with William Camlin, one of the defendants, who thus became administrator jure mariti.

But on the 8th May, 1824, he gave, with his wife, an administration bond to the Ordinary, subscribed by himself and wife as administrator and administratrix, and by Abner Brown and Asa Brown as sureties. Camlin and wife kept possession of the estate of John Arnett (including Clarinda and her issue) until the 4th February, 1834. At that time there was a division, which was made by Wm. G. Flagler, D. R. McClary and J. J. Tisdale. There is no complaint that there

was any part of the estate of John Arnett omitted in that division, except Clarinda and her issue. The persons who made the partition, preface their written statement of it, by the declaration that "agreeable to the request of the parties concerned, we have proceeded to appraise and divide the following negroes, &c. belonging to the estate of John Arnett, deceased." Then follows a statement and appraisement of four negroes, and a few other articles of personal property, of but little value. The negroes, Clarinda and her issue, constituting, if they belonged to John Arnett's estate, a very large proportion of its value, are not included or alluded to. The total valuation in this division is \$1460.50. One-third of which (\$486.83) is assigned to Mrs. Camlin, and one-third of the

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remainder (\$324.55) is assigned to each *of the surviving children of John Arnett. The share of James Jaroe Arnett is not represented or noticed, and the partition is made as if he had died before the testator, and never had any rights in the estate. This mode of proceeding varied the results somewhat from the legal rights of the parties, as his mother, in the division, got one-third instead of one-fourth of his share. It is not, however, of this that the complainants make complaint.

The division having been made, as above stated, each of the distributees, that is to say, David Nesmitte, in right of his wife, Sarah, Samuel Brockington, in right of his wife, Eliza, and Alexander Arnett, in his own right, executed to William Camlin a receipt, in the following words, to wit:—"I do hereby acknowledge the receipt of the within named property of Mr. Wm. Camlin, mentioned in lot No. 2d. as being my full share of said property, certified by me, this 4th February, 1834." The receipts were written upon the sheet that contained a statement of the appraisement and partition, and followed it; and were all of the same form, except in regard to the number of the several lots.

After the division, Wm. Camlin and his wife continued in possession of the negroes, Clarinda and her issue, to the period of the death of Mrs. Camlin, which occurred on the 16th September, 1846. After her death Camlin still held possession of the negroes up to the present time.

The defendant, Camlin, now claims these negroes in his own right, and the complainants, Samuel Brockington and wife, have filed their bill for a partition of said negroes, as a part of the estate of John Arnett, deceased. They make Wm. Camlin a party defendant, on account of his administration of the estate of John Arnett, and of his being a party in interest; they make the other distributees of John Arnett, parties, to wit:—Alexander Arnett, and David Nesmitte and wife. They also make Wm. G. Flagler, Ordi-

nary of Williamsburg district, a party defendant, charging him as being, ex officio, the legal representative of James Jaroe Arnett.

Alexander Arnett has entered a formal disclaimer to any portion of or right in the negroes, sought to be recovered, and releases whatever right, title or interest he may have, to William Camlin.

David Nesmitte and wife have filed a joint answer, in which they adopt the statements of the complainants, made in their bill, and insist upon their right to a partition of the said negroes.

The defendant, William Camlin, by a special plea, filed 31st. January, 1848, sets up the statute of limitations, in bar of the complainant's claim. And having been required by an order to answer, passed at March Term, 1848, the said William Camlin, on 20th

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April, 1848, filed his answer; for *the statements of which, I refer to a copy of the answer. Wm. G. Flagler has also filed his answer, in which he admits himself to be the Ordinary of Williamsburg district, but denies that the complainants have any right to make him a party to their bill, as administrator of the estate of James Jaroe Arnett, in consequence simply of his being Ordinary of the district in which the said James Jaroe Arnett lived and died.

It would, perhaps, be as well for me at once to dispose of the question, which is made on the construction of the Act of 1843, as to the right of the complainants to make the Ordinary a party, under circumstances like the present. I have heretofore adjudged that the Ordinary is not, under that Act, the legal representative of a derelict estate. It is unnecessary for me here to iterate my reasons for such a construction; as my judgment, before alluded to, is now before the Court of Appeals. My opinion is, that Wm. G. Flagler, Ordinary of Williamsburg district, is not properly a party defendant to the complainant's bill. It is, therefore, ordered and decreed, that the said bill, as to him, be dismissed, with costs. I will remark, in this connection, that David Nesmitte, subsequently to the filing of the complainant's bill, has administered on the estates of James Jaroe Arnett and of Elizabeth Camlin, the deceased wife of the defendant, Wm. Camlin, and claims that representative character in his answer. He is not charged, however, and made a party as such, in the complainant's bill; he having administered on both estates subsequently to the filing of the bill.

Having now made a preliminary statement of those matters necessary to the proper elucidation of the discussion which is to follow, I proceed to consider the questions which have been made in the pleadings and evidence. In the first place, did the negroes, Clarinda and her issue, belong to John

Arnett at the time of his death? Had his marital rights attached upon the said negroes? I do not think this question entirely free from difficulty. It will be remembered that Straud Conyers, by his deed, gave Clarinda to his two daughters, jointly. Were their interests ever separated formally? If so, at what time? Is Mary Conyers yet living? Did she ever marry? If she be dead, did she leave husband and children, or either? Did she leave collateral kindred besides Elizabeth Camlin? When did she go to the west? Was she ever heard from afterwards? If so, when was she last heard from? How long before the death of John Arnett? When did Joseph Thomas deliver the negro, which Straud Conyers had delivered to him, "in care for his said daughters, to them or either of them?" A cloud of impenetrable darkness rests upon all these matters of fact.

All that I know is, that, at the death of

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John Arnett, these *negroes were in his possession. And this I know, from the appraisal which his wife returned, as his administrator, to the office of the Ordinary. All that I know of Mary Conyers is from the deed of her father, Straud Conyers, in which he gives to herself, and her sister Elizabeth, a negro, jointly, and from the declarations of that sister, made at the division in 1834, (forty years afterwards.) The declarations of Mrs. Camlin, made in 1834, were, that her sister Mary had gone to the west, and she did not know what had become of her. When she went, to what part of the west, and under what circumstances, did not transpire. That Mary Conyers's interest in the slaves had not been acquired by partition or purchase, we are well warranted in presuming. For, upon the occasion of the partition of the estate of John Arnett, when her own and absent sister's rights to Clarinda's issue were directly under discussion, she set up no such claim. The deed was produced, by which it was manifest that her absent sister (then living, so far as she knew,) was entitled to one-half of the negroes. It would have been most natural and reasonable, that she should then have advanced a claim to Mary Conyers's share, by purchase, if such had been the fact. So far, there is nothing to induce the conclusion that there was any actual severance of the joint interests of the sisters, by partition or purchase. There are no circumstances under which, by presumption of law, Mary would be considered as dead, at the death of John Arnett. It does not appear how long before that time she had left the country; whether she had been absent long enough to raise the presumption of her death, or whether, if absent long enough, she had not been heard from within the period in which such a presumption arises. If Mary Conyers was still living, and entitled, at the death of John Arnett, to her moiety in the negroes, then, under the decision of

the Court of Errors, in *Verdier v. Hyrne*, 4 Strob. 463, Arnett's marital rights had not attached, and Mrs. Camlin's interest in her undivided estate survived to her. And though presumptions of law, arising from absence and non-claim, were not strong enough in Arnett's life to give his wife a perfect title, these presumptions might be sufficiently strong and conclusive to give her such a title, as the wife of Wm. Camlin, in 1846, when she died, and when thirty additional years had given strength and weight to the presumptions.

Twenty years exclusive possession by one joint tenant, or tenant in common, without any recognition of the right of the co-tenant, would, I suppose, give the tenant in possession a perfect and several right, on the presumption of a purchase or a partition. And if it had been shown that Elizabeth Arnett had been in the actual possession of the negroes from 1794 (the date of the deed) to the

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time of her husband's death, in 1816, and that Mary Conyers was, during all that time, *sui juris*, then the last mentioned presumption would have arisen in favor of Arnett's title. But it does not appear when Joseph Thomas delivered possession of the negro or negroes; when Elizabeth's possession commenced; whether Mary was not an infant, and whether Mary was not, in fact, in possession herself, for a great portion of the time during which such presumptions could arise.

For these reasons, and from the circumstances commented on in the preceding observations, I should have come to the conclusion that there had been, at the death of Arnett, no severance of the estates of the sisters in these negroes, and no circumstances from which such a presumption could arise. I should have concluded, therefore, that his marital rights could not have attached, and that these negroes constituted no part of his estate, but for one fact, which amidst the doubts and shadows which rest upon the subject, is to my mind conclusive. The fact to which I now allude is, that in the appraisalment which Mrs. Arnett, as administratrix, returned to the office of the Ordinary, she returned the negroes as the property of her intestate. I do not, of course, mean to say that such a fact would be conclusive under any and all circumstances, but simply that it is *prima facie* conclusive; and in the total absence of all other proof on the subject, it must prevail.

In returning the negroes as the property of her deceased husband, she made an unequivocal admission against her own rights. Being at that time *sui juris*, and acquainted, as it may be supposed, with all the circumstances, she did this unequivocal act without reservation or qualification; and she thus admitted that the marital rights of her deceased husband, John Arnett, had attached

upon the property. And her subsequent husband, the present claimant, now adduces no evidence to rebut the force and effect of this admission, and to show that the marital rights of John Arnett had not attached. I have thus arrived at the conclusion, that the negroes, to a partition of which the complainants set up a claim in their bill, as a part of the estate of John Arnett, not heretofore divided, were, in fact, property of the said John Arnett, and, as such, subject to a partition among his distributees.

Considering the negroes in question as a part of the estate of John Arnett, I come next to consider the effect of the statute of limitations, which the defendant, William Camlin, sets up in bar of the complainants' claim, and, as we have seen, of their legal rights. In considering this question, it will be necessary to look further into the testimony. The receipts of Brockington and Nesmitte are not releases, or receipts in full, but are simply acknowledgments of having received their full shares of the property em-

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braced in the valuation and partition then made. But it is undeniably true that the partition then made embraced all the property at that time, or since, admitted by Camlin and his wife to appertain to the estate of John Arnett. Whatever may be thought of her pretensions, Mrs. Camlin at that time denied that the negroes, who were the offspring of Clarinda, were the property of the estate of John Arnett, and asserted an independent claim to the said negroes in her own personal right. In this opinion as to her rights, she did not appear on that occasion to have been singular. D. R. McClary, who produced the deed of Straud Conyers, entertained the same opinion. He advised that she should not give up the negroes. The appraisers seem to have had similar views, as did also the distributees of John Arnett; for Alexander Arnett and Brockington and Nesmitte, and the wives of the two latter, were all present at the division. It appeared to have been the concurrent and honest opinion of all present, including the parties and their friends and advisers, upon an inspection of the deed, that Clarinda and issue were the property of Mrs. Camlin, independent of any right she might derive from the estate of John Arnett. For though it was known that Clarinda and her children were then present upon the plantation, none contended (so far as it appears) that they should be included in the partition. The persons who performed the friendly office of making the division were John J. Tisdale, Wm. G. Flagler and David R. McClary. The first named, examined on the part of the complainant, says, "Mrs. Camlin claimed the increase of a family of negroes, Clarinda and her increase, and would not let them be divided." He states that a deed from her father, Straud Conyers, was produced, giv-

ing the negroes to Mrs. Camlin and her sister Mary, who was not present; that Mrs. Camlin could not tell whether her sister was then alive, but she said that her sister had removed to the west; that David R. McClary produced the deed, and thought she ought not to give up the property to be divided; that Mrs. Camlin claimed the property under this deed, and thought that they had no right to divide these negroes until after her death; that the parties now claiming were present at this discussion, and that the negroes were not divided. He further says that the negroes have been in possession of Camlin from the division to the present time. H. D. Shaw said, "that the Clarinda negroes have been in the possession of Mr. Camlin ever since his marriage, and have never been out of his possession."

Wm. G. Flagler, one of the appraisers who divided the estate, was examined, and said "some negroes were excluded from the division that had been in John Arnett's possession. Some instrument of writing was produced, which prevented the division of those negroes." He recognized the original deed of Straud Conyers as the instrument pro-

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duced upon the *occasion of the division, and said, "in consequence of the production of that deed, a portion of the property was set apart as the property of Mrs. Camlin." He did not recollect whether Mrs. Camlin objected or not, but he said that it was "in consequence of the production of the deed that only three or four negroes were divided. Mrs. Camlin was present. The impression of the appraisers was, that it was Mrs. Camlin's property under the deed."

After the division there was a general impression prevailing that these negroes belonged to Mrs. Camlin, and not to her husband, Wm. Camlin. And in the belief that this was the fact, several sheriffs, with executions against Camlin, forebore to levy upon the negroes; and his creditors were unwilling to incur the risk of indemnifying. From 1834 to 1839 Camlin returned the negroes to the tax collectors as his wife's property. From 1840, inclusive, to the present time, he has returned the negroes as his own.

Samuel Brockington was born in 1816; David Nesmitte was of age at the time of the division. The bill was filed the 21st December, 1847. These are the material facts of the case, under which I am to decide upon the bar of the statute of limitations raised in the pleadings.

In a Court of law, the statute of limitations, when pleaded, and in a case to which it is applicable, is of peremptory obligation. In this Court it is not a bar, *juris* and *de jure*. Its obligation here is self-imposed. Its provisions do not extend to suits in equity. But though the statute does not absolutely bind Courts of Equity, yet those Courts, following the law, have adopted it as a rule, to

guide them in the exercise of their discretion, and apply what is termed the equity of the statute in certain cases. If there be a strong equity against the rule prescribed in the statute, it is disallowed in this Court. It is allowed to prevail in all cases of constructive trusts, but is disallowed in those trusts that, in contra-distinction to such as are implied, are termed technical trusts. But if, in the case of a trust of the latter character, the trustee does an act which imports to be a termination of the trust; if he has a settlement which is intended to be in full; if he settles as to part, and claims the residue in his own right; if he denies the trust in the presence of the *cestui que trust*, these acts, or any of them, will so far disturb and dissolve the strictly fiduciary relations between the trustee and his *cestui que trust*, as that the statute of limitations will commence to run from the date of such acts.¹ In *Moore v. Porcher*, [Bail. Eq. 195,] Judge Nott says, "The statute will not bar a trust; but when the trust is executed the relation of trustee and *cestui que trust* is at an end. The confidence, which is said to be the essence of the trust, is determined; and every principle on which the statute of limitations is enforced by Courts of Equity, applies."

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In *Ho*venden v. Lord Annesly*, 2 Sch. & Lef. 693, Lord Redesdale had remarked, "if a trustee is in possession and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title. Judge Nott, in the case already cited, commenting on this passage, observes, "but if he does perform his trust, or does an act which purports and is understood to be a final performance, can it be said thenceforth that his possession is according to his title?"

We will proceed to apply these clearly settled principles to the case under judgment. The relations between the defendant, Camlin, and the complainants, were, in the inception of the trust, of the strictest fiduciary character. They so continued up to the period of the settlement in 1834. It is conclusively shown that in the settlement every article of property was intended to be included which was admitted to be of the estate of John Arnett. The complainants do not charge in their bill that any thing was omitted but the Clarinda negroes. That these negroes belonged to the estate of John Arnett, was denied by Camlin and his wife, and an independent claim to them was asserted in behalf of Mrs. Camlin, in her own personal right, under the deed of her father, Straud Conyers. In this claim there was an universal acquiescence. Can it be doubted that

¹ *Starke v. Starke*, Carolina Law Journal, 509; *Moore v. Porcher*, Bail. Eq. R. 198; *Glover v. Lott*, 1 Strob. Eq. 79.

it was understood and believed by all the parties interested, that the trust in relation to the estate of John Arnett was then executed and terminated?

What was the reasoning on which the parties and their friends and advisers came to the conclusion that Clarinda and her offspring did not belong to the estate of John Arnett, but was the independent property of Mrs. Arnett, does not appear. To my mind it is far from being clearly shown that the marital rights of John Arnett had attached upon this property; for it was not satisfactorily proved that at his death the joint estate of his widow and Mary Conyers did not still subsist. And if this was so, under the decision in *Verdier v. Hyrne*, his marital rights would not have attached, even upon his wife's undivided moiety. I hardly suppose that these parties and their advisers discussed in their conclave the grave and vexed question upon which the opinions of the highest appellate tribunals in South Carolina have oscillated for upwards of thirty years past. But according to the most recently promulgated doctrine in relation to the vesting of the marital rights under circumstances like those that (so far as the proof goes,) existed at the death of John Arnett, the decision upon the claim set up by Mrs. Camlin at the division was not far from being correct. And in that conclusion, as I have already intimated, I should have coincided, had not Mrs. Camlin returned Clarinda and her children to the Ordinary

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*as the property of John Arnett. But even if it had been the clearest matter imaginable that these negroes did in fact belong to the estate of John Arnett, the claim set up to them by Mrs. Camlin, in her own right, and adversely to any right on the part of the intestate, and the settlement of every other portion of the estate, constitutes a case where the plea of the statute will be sustained. There is no countervailing equity, such as is recognized by this Court, to prevent the operation of the statute. It is true, as was argued, that when a trustee in the settlement practices a fraud, the statute will not protect him or run in his favor, except from the discovery of the fraud. But in this case there was no fraud, misrepresentation or concealment. There was no suppression of the truth or suggestion of a false state of facts. The complainants were possessed of all the information which Camlin and his wife possessed. The negroes were known to be present. The deed was produced, the sole title on which Mrs. Camlin's claim was made to rest. All the parties reasoned upon the same facts and came to the same conclusion. It is impossible to conceive of a more bona fide or honest error, if it was one. The complainants not only had an opportunity of exercising their own judgment, but of obtaining professional advice as to their rights.

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And this brings me in a natural connection to consider another argument urged in behalf of the complainants. It was contended that the omission to include these negroes in the division was a mistake of law, and that this Court will relieve against mistakes of law, though it will not against errors resulting from ignorance of the law.

There are cases recognizing such a distinction. I will say, en passant, that this distinction is exceedingly subtle and artificial. It is also vague and difficult of application in practice, without making each case to be governed by its own circumstances. I have never been satisfied with the reasoning upon which the distinction has been established. But to this case the distinction, such as it is, does not apply. If it does, there are but few cases of settlements where errors have been committed which cannot be opened on the ground of alleged errors of law.²

But suppose that this distinction did apply, with all its force, to the case under judgment; suppose that the complainants did have a right to open the settlement, on the ground that, by mistake of law, Clarinda and her issue were not included in the division, would that prevent the currency of the statute of limitations? Would a mistake of law, committed in a settlement, where the party aggrieved had all the facts laid before him, and that those facts were sufficient to lead him to a correct and just conclusion as to his rights; or supposing him incompe-

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tent to reason correctly, where he had *the fullest opportunity to have sought illumination from the highest professional sources—would a mistake of law like this present such an equity as would induce this Court to refuse to enforce the statute? If so, then how long will the party aggrieved, who is possessed of all the necessary information as to the facts, be allowed to make the science of law his study, so that he may be enabled to reason justly as to his rights? Or being thus possessed of all the necessary data for a correct opinion, how long will he be allowed to lay those data before learned counsel, and to obtain the proper legal advice? I am of opinion that such a mistake as was committed in this case, if it was a mistake, and be it a mistake of law or of fact, and whether the complainants would have been, in consequence of it, entitled, in a proper time afterwards, to have opened the settlement or not, does not prevent the running of the statute in favor of the defendant.

Having arrived at this conclusion, the question occurs, are the complainants bound by the time that has elapsed before the filing of their bill? At the time of the division, which occurred 4th February, 1834, the complainant's wife wanted a little less than

² *Lowndes v. Chisolm*, 2 McCord's Eq. R. 455 [16 Am. Dec. 667]; *Lawrence v. Beaubein*, 2 Bail. L. 623, [23 Am. Dec. 155]; *Hopkins v. Mazyek*, 1 Hill Eq. Rep. 212.

two months of being 21 years old, she having been born the 23d March, 1813. But her age is unimportant, as her legal rights were at that time merged, as to this property, in those of her husband, Samuel Brockington. He was born, according to the testimony, in 1816, but the day and month were not proved. At the time of the settlement in 1834, when he executed the receipt, he was eighteen years old, or thereabouts. In 1837, three years after the settlement, he attained his majority. In 1841 the statutory bar was complete. The complainants filed their bill on the 21st December, 1847, so that more than thrice the period necessary for the discharge of the defendant, by operation of the statute, had run out before they instituted their suit. Sarah Nesmitte was born the 13th of October, 1810. She was, consequently, between 23 and 24 years old at the date of the settlement. The age of her husband, David Nesmitte, was not shown. But there was no pretence that he was not of full age when he executed his receipt.

Before I conclude, it will be proper for me to notice another view, urged in favor of the complainants. Among other matters testified to by John J. Tisdale, he said that Mrs. Camlin "thought they had no right to divide the negroes until after her death." It is not said that she expressed herself in these words; but this, it is contended, is the implication. And hence, after implying that she used these words, it is inferred either that these negroes constituted a separate estate in her, or that it was an admission that, after her death, the negroes were to be divided, as a portion of the estate of John Arnett. There does appear to have existed

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a vague notion that she had an independent estate in the negroes. This was the general impression, and her husband seems to have participated in this illusion, when, from 1834 to 1839, he returned the negroes as her property: but, in fact, there was no foundation for such a belief. There is not a tittle of proof that there ever was a separate estate. At the same time, this erroneous impression serves to explain why she supposed that the property, after her death, might be divided as her estate. Nor do I perceive any ground for inferring that the expression of Mrs. Camlin, which has been cited, was an admission that, after her death, and after she had enjoyed a life estate in them, the negroes were to be divided, as a portion of the estate of John Arnett. There was just as much reason for her claiming them in fee, as for life. And the evidence is full and conclusive that she claimed the negroes in her own independent right, and adversely to the title of her deceased husband.

It is ordered and decreed, that the plea of the statute of limitations, filed by the defendant, Camlin, be sustained, and that the bill be dismissed with costs.

The complainants appealed from the decree of his Honor, Chancellor Dargan, dismissing the bill in this cause, on the following grounds:

1. Because it sufficiently appeared, from the pleadings and evidence in the cause, that Clarinda and her issue, forming a large portion of the estate of John Arnett at the time of his death, were not included in the partial division made in 1834, and have never been accounted for by defendant, Camlin, who remained in possession of them, as administrator; and, therefore, complainants are now entitled to have an account of the said property against him, and to have their share delivered to them.

2. Because the complainants, being both infants at the time of the division, in 1834, and not entitled to receive their share of Arnett's estate from the administrator, could give no receipt or release, nor do any act which would terminate the fiduciary relation, or bar or prejudice their rights in the premises.

3. Because, whether the said property was omitted from mistake of law or fact, fraud or misrepresentation, in neither case can the defendant, Camlin, be allowed to take advantage of such error; nor can the statute of limitations have any application, but from the time that it appears that the mistake, fraud or misrepresentation was discovered by the complainants.

4. Because the division made in 1834, was confined to certain specified property; and the relation of trustee and cestui que trust, continuing as to the residue of Arnett's estate, the statute can have no application.

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*5. Because the defendant, Camlin, having retained possession, with the understanding that the same was to be divided upon her death, his possession during her life could give him no title beyond such claim.

6. Because the estate of James Jaroe Arnett having never been previously represented, or the interest in the estate of his father accounted for by the defendant, Camlin, (the administrator of the estate,) and complainants being entitled to a distributive share of such estate, an account should have been ordered between the defendant, Camlin, and his co-defendant, Nesmitte, the administrator of James Jaroe Arnett, and the share of complainants in such estate ascertained and decreed to them.

7. Because it is, upon the whole case, inequitable to allow the defendant, Camlin, to retain the property of those whose interests he was bound by law to protect, in consequence of a transaction which was either fraudulent in the beginning, or which has been converted into an instrument of fraud by his subsequent conduct.

Mitchell, Complainants's Solicitor.

The defendants, Nesmitte and wife, also appeal from the decree of his Honor, Chan-

cellor Dargan, relying on all the grounds (except the 2d) taken on behalf of complainants, and submit that an account should have been decreed against their co-defendant, Camlin, either to this defendant, Nesmitte, or his co-defendant, Flagler, the Ordinary of the district.

Moses, Solicitor.

Curia, per Dargan, Ch.—The general reasoning of the decree, and its conclusions as to the rights of the parties, have met the approbation of this Court. I do not deem it necessary to enter into any further disquisition as to the questions of law and of fact, which I discussed in the circuit decree. There is one point, however, which, though made in the argument, and considered and adjudged by the Circuit Court, has not been discussed in that decree. It is to this point alone that I will address the observations which I now have to submit.

James Jaroe Arnett was one of the children of John Arnett. He was born on the 7th October, 1815, and he died on the 2d of September, 1828. He died before he had quite attained his thirteenth year, and after the decease of his father. He was, consequently, one of the infant distributees of John Arnett's estate. He died about six years before the settlement among the surviving distributees, which occurred on the 4th of February, 1834. There was no administration on his estate until after the filing of the complainant's bill. It is contended that he was not a party to the settlement,

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*having died before it was made; that his legal representative is not bound by the settlement; that his estate was not then represented, inasmuch, as administration of his estate was granted afterwards; and that, therefore, the principles of law upon which the rights of the living distributees who were parties to the settlement were made to turn in the decree, were not applicable to the claim set up in behalf of the estate of James Jaroe Arnett.

In reference to this branch of the case, it would be sufficient to say, that administration was granted to David Nesmitte, after the commencement of this suit. And, although the complainants have made him a party defendant, as entitled, in right of his wife, to one of the distributive shares of the estate of John Arnett, they have not charged him in his representative character, as the administrator of James Jaroe Arnett. Nor has he, in his character as the legal representative of James Jaroe Arnett, filed any bill, or served any process, against Wm. Camlin, who is at present in possession of the negroes, claiming them in his own right. This objection is fatal to any claim in that behalf, arising on these pleadings.

But this Court is of the opinion that the administrator of James Jaroe Arnett would not be entitled to recover upon the merits.

The time that has elapsed from the date of his death to the trial was eighteen years. This is not sufficient to bar the claim on a presumption arising upon the lapse of time. The doctrine is, where the party who sets up the presumption, in support of his title, relies solely upon the lapse of time, nothing short of twenty years will be sufficient to raise such presumption. But a shorter period than twenty years has often been considered sufficient, where there were auxiliary and corroborative circumstances. I will not undertake to say that such circumstances exist in this case. But there is one fact that is manifest. In the division of the estate of John Arnett, which occurred on 4th February, 1834, the distributees of that estate, the defendant, David Nesmitte, who is the administrator of James Jaroe Arnett, being one of them, proceeded to divide the whole estate of John Arnett, then admitted to be such, including the shares of James Jaroe Arnett and other deceased distributees, and not deeming an administration necessary. They represented, though irregularly, the interests of James Jaroe Arnett in that settlement, and, disregarding the forms of law, divided his share of what was admitted to be the estate of John Arnett among them. They thus became executors in their own wrong. And now, for the purpose of obviating the effects of the settlement and partition, which was full and complete, so far as the defendant, Camlin, then or since has admitted, the parties to it have put forward

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one of their number to administer on the estate of James Jaroe Arnett. The statute of limitations, it is true, does not run until after administration has been granted. This is the rule. But, where the parties, who are entitled to the fund or estate, have received it informally, and without an administration, and the same parties afterwards administer, or one for the rest, and set up a claim in their character as administrators for the fund or estate which they have already received, their claim would meet with no countenance or aid in this Court. And if, in a settlement based upon their equitable rights, they, supposing themselves not to need the instrumentality of a representative of the legal estate, have omitted something which ought or might have been included in the settlement, I do not perceive any reason why the statute should not run in favor of the party intended to be discharged, from the time of the settlement, as in the case of any other settlement with trustees. The only difference is that, in the one case, the settlement is made with a party seized of the legal estate in trust for others, and, in the second case, the settlement is made with the equitable and real owners themselves. I think the principle is equitable alike in both cases.

It is the opinion of this Court, that the ad-

ministrator of James Jaroe Arnett stands in the same category with the other distributees of John Arnett, in regard to the claim which they set up in their bill, and that the bill was properly dismissed.

It is ordered and decreed that the circuit decree be affirmed, and the appeal be dismissed.

JOHNSTON and DUNKIN, CC., concurred.

Decree affirmed.

4 Strob. Eq. 203

JOSIAH LANHAM & Wife v. JAMES MEACHAM et al.

(Columbia. May, 1850.)

[*Slaves* ⇐22.]

Testator, in his will, first expressed a wish to exempt from sale, or division, certain negroes, then further says, "It is my will and desire that my brother, J. M., take the above named negroes under his charge, and act as their guardian, and do all things in relation to them as he may think best." He then devised and bequeathed his whole estate, both real and personal, to be divided equally between this brother and his two sisters. *Held*, that the said J. M. took no title to the negroes under the first clause of the will; that, to carry out the intention of the testator, would be an infraction of the Statute Law of South Carolina, prohibiting the emancipation of slaves; that the provisions of the will were sufficiently comprehensive to embrace the whole of testator's estate; and, therefore, that the negroes in question should be distributed accordingly.

[*Ed. Note.*—Cited in *Crossby v. Smith*, 3 Rich. Eq. 256.

For other cases, see *Slaves*, Cent. Dig. § 94; Dec. Dig. ⇐22.]

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*Before Dargan, Ch., at Edgefield, June Sittings, 1849.

The following circuit decree states the facts of the case:

Dargan, Ch.—This is a bill filed by the complainants for an account against James Meacham, the executor of Joshua Meacham, and for a partition of the estate of the testator. The only question presented for the Court, at the present term, arises under the following circumstances. The testator, in his life, was possessed of a family of slaves, Bid- dy and her children, Jesse, Henry and Lizzy. The children of Bid- dy, and perhaps herself, are mulattoes. In regard to this family of negroes, the testator, in his will, makes the following disposition: "In the first place, I wish to exempt from sale, or division, the following family of negroes, namely, Bid- dy, about forty years of age; Henry, about twenty-five years of age; Jesse, about twenty-seven years of age; and Lizzy, about twenty-two years of age. And, further, it is my will and desire, that my brother, James Meacham, take the above named negroes under his charge, and act as their guardian, and to do all things in relation to them as he may think best." He then gives one-third

part of his estate, both real and personal, to his brother, James Meacham; one third part to his sister, Margaret Jones, for her separate use for life, remainder over to the heirs of James Meacham and Martha Lan- ham; and one third part to his sister, Mar- tha Lanham, wife of Josiah Lanham (Josiah Lanham and wife are the complainants). He nominated, as his executor, Jas. Meacham, who was qualified and has taken possession. James Meacham sets up a claim to Bid- dy and her children as his own property, under the provisions of the will. And the only question submitted to me, at the present hearing, is, whether James Meacham is en- titled to Bid- dy and her children in his own right, and whether the provisions of the will, in regard to this family, be not a violation of the Statute Law of South Carolina, in re- gard to the emancipation of slaves. In the first place, I am of the opinion that there is not any bequest of Bid- dy and her children to any person, nor do I think that a bequest was intended. The direction of the testator, that they should be exempt from sale or di- vision, is certainly nugatory, unless he had made some valid disposition of them. The most decided expression of a will by a testa- tor, that his estate should not go to, or be taken by his heirs at law or distributees, will not prevent the heirs at law and distributees from taking under the act of distribution, unless there be also some effectual devise or bequest to other persons. Their title is under the statute. He has a right to deprive them capriciously of his estate, but he must name his devisee and legatee. But, if he does not,

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the law of the *land, as in cases of intestacy, will prevail. In such a case, who but the heir at law and distributee would be entitled to take? If they would not be entitled, the estate would be without a proprietor. Joshua Meacham, as I have said, has not given these negroes to his brother, James Meacham. He is directed to take charge of them, but how, and in what character? Not as owner, but as a guardian. The whole clause repels the conclusion that he intended to give a legacy, or any right or title as owner of Bid- dy and her children. The testator gives a third of his estate, real and personal, to Martha Lanham, one-third he gives to Mrs. Jones, and the remaining third to James Meacham. It is my opinion that he did not mean to die intestate as to any part of his estate, and that the provisions of the will are sufficiently comprehensive to embrace the whole of his estate, Bid- dy and her chil- dren included. But, if Bid- dy and her fam- ily are not included in the bequests of the will, they constitute intestate property, and, in this point of view, the complainants are entitled to one-third under the statute of dis- tributions.

I will now turn my attention to another

aspect of the case, which has been presented in behalf of the defendant, James Meacham. It is supposed that the terms of the will give to him a legacy of Biddy and her children. I have already said that the will does not properly admit of any such construction. But, if it did, how stands the question? If they were given to him, and a title passed under the will, they were not given to him for his own use. It is perfectly clear to my mind that, if the first clause gave to James Meacham a title to these negroes, it was intended as an evasion of the Statute Law of South Carolina against the emancipation of slaves. No personal benefit was intended to be bestowed upon him. He was to take charge of them, not as property, but as a guardian. Who ever heard (when a personal benefit was intended,) of a legacy being given in this form of words? Slaves do not have guardians, but masters. But free persons of color, who are males, are required by law to have guardians. It is evidently in conformity to this requirement of law, that the provisions of this clause were framed. If, then, James Meacham, as a legatee, took a title to these negroes, under the first clause of the will, he was intended by the testator to take, coupled with a trust that he should hold them in nominal servitude, and that, while they purported to be his slaves, they should be actually free. It is, in this point of view, a clear infraction of the Act of 1841. If he took a title to them with this trust, the trust is void, and he holds them for the legatees or distributees; for such persons, in fact, as would be entitled if the first clause of the will were stricken out, or had never been inserted. The doctrine asserted in *Morris v.*

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the Bishop of Durham, which *has been frequently recognized by our Courts, applies—that, when an estate is given by will to one in trust, for objects and purposes that are illegal, or which must fail from the indefinite nature of the trust, the trustee holds for the heirs at law, or for such persons as would be entitled to take, but for the illegal and ineffectual trust.

It is ordered and decreed, that the slaves, Biddy and her children, Jesse, Henry and Lizzy, named in the bill, are subject to distribution under the will of Joshua Meacham, and that the complainants are entitled to one third part thereof, Mrs. Jones to one third part thereof, and James Meacham to the remaining third. It is also ordered that the complainants, or either of the defendants, have leave to apply, at the foot of this decree, for a writ of partition, and a reference as to the hire and profits.

The defendant, James Meacham, appealed, and moved the Court of Appeals to reverse or modify the Chancellor's decree, on the grounds—

1. That the Chancellor erred in supposing

there was any evidence, even by hearsay, that the slaves, Biddy and her children, are mulattoes, and that said children are the progeny of the testator, Joshua Meacham.

2. That the said slaves were given by the will of said testator to the defendant, James Meacham, in absolute property, in addition to his equal share with the other legatees, and without any trust, secret or express, or manifested by proof.

3. That no intention of the testator, in the bequest to defendant, contrary to the purposes of the Act of 1841, or the policy of the law, was deducible by just construction from said will, or established by evidence.

4. That the validity of said bequest was improperly brought into question in this suit, which was against an executor for account and partition.

Wardlaw, for the motion.

Carroll, contra.

PER CURIAM.—We concur in the decree of the Chancellor; and it is ordered that the same be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, CC.

Decree affirmed.

4 Strob. Eq. *207

*WADE HOPKINS and G. W. HOPKINS v.
SUSAN E. HOPKINS, Administratrix of
J. A. Hopkins.

(Columbia. May, 1850.)

[*Limitation of Actions* 53.]

If there be a general or continuing agency, the statute will not commence to run until the termination of the agency; but if the agency be special, and relate to isolated transactions, in regard to which the agent received special authority from his principal to act for him in those particular matters, then the statute of limitations will commence to run from each of those several transactions, each of which will be barred or not, according to the time which has elapsed from their respective dates to the filing of the bill.

[Ed. Note.—Cited in *Parris v. Cobb*, 5 Rich. Eq. 470.

For other cases, see *Limitation of Actions*, Cent. Dig. § 291; Dec. Dig. 53.]

[*Assignments* 127.]

Where there has been an assignment (for valuable consideration, or for the consideration of love from a parent to a child,) of legal choses that are unassignable at law, this Court will entertain a bill in the name of the assignee for the enforcement of such claims; provided the assignor be made a party either as a complainant or defendant, and provided also there be bona fides in the transaction of the assignment. If the object be to obtain an unconscientious advantage over the party to be brought to the reckoning, the Court will not lend itself to the enforcement of the inequitable arrangement.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 194; Dec. Dig. 127.]

[*Assignments* 65.]

Where the bill is filed for the enforcement of his claims, by the assignee of legal choses,

unassignable at law, the assignor is not a competent witness for the assignee, but must be a party to the suit, either as complainant or defendant.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 126; Dec. Dig. ⚡65.]

[Pleading ⚡258.]

Where a party has submitted his case, upon a final hearing, to the judgment of the Court, he has no right to the privilege of being allowed to amend. He should have done that at an earlier stage of the proceedings; more particularly, where he has been notified by the plea of the adverse party.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 777; Dec. Dig. ⚡258.]

Before Dunkin, Ch., at Chester, July Sittings, 1849.

Circuit Decree.

Dunkin, Ch. Ferdinand Hopkins departed this life in January, 1843. By his will, dated in October, 1825, he devised and bequeathed to his widow, Sarah Hopkins, his whole estate, so long as she remained his widow. Sarah Hopkins was appointed executrix, and two other persons executors; but she alone proved the will, and qualified thereon. The testator left four children, to wit: the complainants, Wade and G. W. Hopkins, a daughter, Mary, and John A. Hopkins, the intestate of the defendant, who departed this life in June, 1846.

This bill was filed on the 19th May, 1847. It states, among other things, that the intestate of the defendant was indebted to Sarah Hopkins in a large sum of money for the proceeds of the cotton crops of the estate of Ferdinand Hopkins, deceased, from 1834 to 1845, inclusive, (except 1841,) which proceeds the intestate had received as the agent of Sarah Hopkins, and also for the sales of certain mules, &c., made in 1841, and for hire of slaves in the same year; and also for cash advanced to and money paid for said intestate by Sarah Hopkins, at various times between the fall of 1834 and March,

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*1846—that this account and demand had been assigned by Sarah Hopkins to the complainants, on the 17th February, 1847, for valuable consideration. The bill prays a discovery of the cotton, &c. sold; of the mules, &c. and the price; and that an account may be taken of what is due to complainants on said assigned demands, and payment decreed, &c. The defendant demurred, generally. The cause was heard, on the demurrer, by Chancellor Caldwell, and his decree, overruling the demurrer, was filed 19th July, 1847. The decree stated that “although assignments of choses in action are valid in equity, yet they will not generally be carried into effect in favor of mere volunteers, but only in favor of persons claiming for a valuable consideration.” “But here,” (proceeds the decree) “the plaintiffs allege that the account has been assigned by Sarah Hopkins for value received,” &c. This is, therefore, a

different case from a mere voluntary assignment, &c.

The answer of the defendant was filed on the 6th April, 1848. She disclaims any personal knowledge whatever of the principal facts alleged in the bill; she was, at the time, young, unmarried, lived in a different district, and had no connection with the parties; she has heard that her husband, before his marriage, resided with his mother, and afforded her his aid in the management of her affairs—that, although illiterate, she was very particular, and did not place implicit confidence even in her own children, and that she kept her own money; that her husband may have sometimes received, for his mother, the sales of her cotton, but she does not doubt that he accounted to her, and she is impressed the more particularly with this conviction, from the fact that, very soon after her husband's death, Sarah Hopkins came to the house, and desired to see the account sales of cotton for the preceding year, amounting to \$180, stating that her son had not settled for that, but she made no claim for any previous bills—that this bill was thereupon given or shown; that she, or one of the complainants, G. W. Hopkins, as her agent, had free access to all her husband's papers, of which they availed themselves as far as they desired—that Wade Hopkins, the other complainant, was then in Mississippi—that he was indebted to his deceased brother, the intestate of the defendant, on a note for \$1720, on which note the defendant has been obliged to institute a suit. In respect to the alleged assignment, the defendant “denies that any valuable consideration was paid; she believes, and hopes to be able to establish by proof, that the assignment was the result of a combination and confederacy between the said Sarah Hopkins and her two sons, the complainants, to make the said Sarah a witness, to establish the said account by her testimony, contrary to the rules of the common law, and without precedent

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in this Court.” *The defendant also relies for her defence on the statute of limitations, and insists that Sarah Hopkins should be a party to the proceedings, more especially as she, the defendant, would hope to establish a balance against her in relation to the estate of Ferdinand Hopkins, deceased.

Upon this state of the pleadings, the Commissioner, on the 21st June, 1849, ordered a reference upon the accounts, “reserving all the equities of the case.” This seems altogether irregular, while a plea in bar is on record. The Commissioner has no authority to overrule the plea. He might, with equal propriety, have made a similar order before the Chancellor overruled the demurrer. The Act of the Legislature was intended to give the power to the Commissioner only in cases where the party submitted to account, and

the order is therefore made as of course to expedite the cause. But it was said that the provision reserving the equities secured to the defendant all her rights. The Act authorizes the Commissioner to make no such qualification. It is a high power, to be exercised by the Court alone, and under special circumstances. A principal object of determining on the plea in bar is defeated, if all the expense and delay of litigation is to be first encountered in the Commissioner's office; of which a more lively and instructive illustration cannot well be presented than in the history of the case before the Court.

As was anticipated by the answer, Sarah Hopkins was the principal if not the only material witness to sustain the account against the estate of the intestate. The result of her testimony and of the other evidence is, that during several of the years mentioned her deceased son received for her the amount sales of the cotton sent to market, and did other occasional acts for her which were befitting their relative situation; she had an opportunity every year and any day in the year to know what he had done for her, and the manner in which he had done it. The utmost that can be made of the evidence is, that the intestate was the special agent of the witness, Sarah Hopkins; and the doctrine upon this subject, maintained by the Court in *Van Rhyn v. Vincent*, 1 McC. Eq. R. 310, is too salutary not to be adhered to. "The defendant's testator," say the Court, "was merely the receiver of so much money to the use of the complainants, and if the amount had been known, she might have brought her action at law for money had and received, to which action the statute of limitations would have been a protection to the defendant. The trust, then, is not the foundation of the jurisdiction of the Court of Equity in this case, but the want of a discovery—and where a party has a mere legal demand, and the Court of Equity has a concurrent jurisdiction, for the purpose of discovery, the defendant is as well entitled to the benefit of the statute of limitations in a Court of Equity as at law."

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When the loose *and informal manner in which such things are usually done is considered, and that receipts are more frequently omitted than taken on such occasions; and moreover, as in *Rowland v. Martindale*, Bail. Eq. R. 226, that the memoranda kept by the agent in a book are not evidence for him, even after his death, the Court more readily interposes the shield which the law has provided against stale, and it may be, unfounded demands. There is no part of the account assigned for which Sarah Hopkins would have had any right to ask a discovery against her deceased son, which is not effectually barred by the statute of limitations. The items within the statute are for moneys loaned to the intestate, or moneys

paid for him, which are clearly merely legal demands, and to be substantiated like any other demand of that character.

And this brings the Court to the inquiry, whether the mere assignment of a debt will give the assignee a right to sue in Equity, when the assignor could only pursue his remedy at law. In the very well considered case of *Hammond v. Massinger*, 9 Sim. 327, the Vice Chancellor ruled that the assignee of a debt, not in itself negotiable, is not entitled to sue the debtor for it in equity, unless some circumstances intervene which shew that his remedy at law is, or may be, obstructed by the assignor. The Court is of opinion that this principle is well sustained by the authorities in this country, as well as in England, and that it would be fatal at least to so much of the plaintiff's claim to a status in this Court as is not barred by the statute of limitations.

But there is another view of this case which the Court is not permitted to pass by. The evidence is entirely satisfactory, even from the testimony of Sarah Hopkins, that the assignment to her sons, the complainants, was wholly voluntary, or without valuable consideration. It is scarcely less clear, that the object of assigning the debt was, to have the benefit of her testimony to establish the demand. The incalculable mischief which would result from giving any countenance to a transaction of this character, and influenced by such motives, are so obvious, that the Court would be justified in establishing a precedent, if not in creating a rule, to discourage and repress them. But there is no absence of authority. Champerty and maintenance are forbidden by the common law, as offensive to justice, and leading to oppression. Courts of Equity go farther, and discountenance all proceedings which, in the language of Lord Northington, "savour of maintenance." "Courts of Equity," says Mr. Justice Story, "are ever solicitous to enforce all the principles of law respecting champerty and maintenance; and they will not, in any case, uphold an assignment which involves any such offensive ingredients."¹ Maintenance has been variously defined. In *Harrington v. Long*, 2 Myl. and Keene, 590,

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the Master *of the Rolls said, "maintenance is where there is an agreement, by which one party gives to a stranger the benefit of a suit, upon condition that he prosecute it." "Maintenance," continues he, "is properly discouraged, because it promotes litigation, and leads to oppression." But, as he afterwards says, the mere assignment of a chose in action is not maintenance. It is necessary to inquire into the motive or object of the party. Both in that case and in *Burke v. Greene*, 2 Ball & Beatty, 517, it was shewn that an assignment of this kind may be made

¹ Story Eq. Juris. S. 1048 and 1049, and note.

under circumstances which render it illegal—that the object with which the assignment was made, tainted it with maintenance. In the latter case, Lord Manners said, if the assignee had a private purpose to answer, by getting the suit into his hands, “that is neither more nor less than dealing for a suit in Chancery, which the Court will not allow—a purchase made for such a purpose is, according to all the authorities, maintenance.” In the case before the Court, the complainants had no interest whatever in the alleged demand of Sarah Hopkins against the estate of the intestate. They procured the assignment to themselves for the purpose of enabling them to institute a litigation in this Court in their own name, and thereby secure the testimony of the assignor to substantiate a merely legal demand, which testimony would be inadmissible in the ordinary forum. By obtaining a voluntary transfer of the rights of Sarah Hopkins, they proposed and intended to conduct a successful litigation against the defendant, which Sarah Hopkins could not successfully conduct for herself. Looking at all the circumstances of the transaction, the language of Sir Launcelot Shadwell may well be applied to it:—“If,” says he, “bills of this kind were allowable, it is obvious that they would be pretty frequent, but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances.” Jeremy Bentham, and some other theorists of that class, have suggested, as an improvement in the administration of justice, that each party should be permitted to tell his own story, and be sworn as a witness in his own case. But the suggestion has found no favor with those who are familiar with courts of justice. Experience justifies the conviction that such innovation in the practice would have no tendency to elicit truth; and that it is due to the infirmity of human nature, that it should be protected from this strong temptation to perjury. But it has never yet been supposed that the cause of justice would be advanced by hearing only one side, or by permitting one party to tell his tale, while the lips of his adversary were closed, whether in death or by the rules of law. So scrupulous is the law, that, even in cases of usury, which constitute an exception in relation to the rules of evidence, the exception is only permitted

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to prevail *while both parties are alive. But what would be the security to property, if a man might fabricate a demand, assign it to his son, or his friend, and then establish it by his own oath? It might be, as in this instance, that the assignment was voluntary, and expressly without recourse, and, therefore, the assignor had, technically, no interest in the issue. But it is against morality to hold out this temptation to fraud and perjury. It is against public justice and public policy to permit or encourage this species of

traffic; “this officious intermeddling in the materials of litigation, in which a person has no interest,” or to allow suits in this Court to be thus manufactured and thus sustained.²

On all the points which have been considered, the Court is of opinion that the bill should be dismissed, and it is accordingly so ordered and decreed, and that the complainants pay the costs of the proceedings.

The complainants appealed, on the following grounds, viz:

1. Because the Chancellor erred in deciding that the demand of the complainants was a mere legal demand, and their only remedy was in a court of law, where they must sue in the name of Sarah Hopkins, when, from the evidence, it appears John Hopkins was the general agent of Sarah Hopkins; for many years transacted all her business (she being illiterate and could not write); sold all the crops made on her plantation; superintended her hands, and his own, which they worked together in copartnership for several years; and the matters of account between them were such, that a court of law could not afford adequate relief.

2. Because the statute of limitations was not applicable to the case, and if it was, the evidence takes the case out of it.

3. Because love and affection is a good consideration, and sufficient to support the assignment to complainants, and the complainants were not strangers.

4. Because the Court erred in deciding that the complainants were guilty of champerty and maintenance, in taking the assignment from Sarah Hopkins; and, therefore, the bill could not be sustained.

5. Because Sarah Hopkins was a competent witness for complainants.

6. The decree is, in other respects, contrary to law and the evidence.

7. Because the Commissioner's report, modified by the complainants's exceptions, ought to have been sustained.

Herndon, for the motion.

Gregg, McAlilly and Dawkins, contra.

Curia, per DARGAN, Ch. In the argument of this appeal, many questions have been

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presented, and earnestly urged *upon the attention of the Court. From the disposition which the Court has thought proper to make of the case, it will not be necessary for me to notice and discuss in this opinion, all the questions that have been made.

The complainants are the sons of Mrs. Sarah Hopkins. The defendant's intestate, and late husband, John A. Hopkins, was also her son, and lived with her, while the complainants lived in the west. The bill charges that John A. Hopkins was the agent

² Note.—As to the competency of the witness, see *Bell v. Smith*, 11 E. C. L. Rep. 198.

of his mother, Mrs. Sarah Hopkins, and sold her cotton and some other property, and that, by virtue of this agency, he sold her cotton, and received the proceeds of the same, from the year 1834 to the year 1845, inclusive, with the exception of the year 1841; for which he has never accounted, and is still indebted to a large amount. It is also stated in the bill, and is proved, that Mrs. Hopkins has executed an assignment to the complainants, of her account against the estate of the intestate; the items of which consist of the proceeds of the sales of the cotton, charged to have been received by him in the years before mentioned, of some money lent, and the proceeds of the sales of some mules. The assignment purports to have been executed for valuable consideration, but it is admitted that the consideration was love and affection. The answer of the defendant denies all knowledge of the transactions stated in the bill, which she alleges relate to a period of time before her intermarriage with the intestate, while she lived in another district, and was a stranger to the relations that subsisted between the different members of this family. These are the simple facts of the case, upon which I am to announce the judgment of this Court.

The first point to which I will direct my attention will be the plea of the statute of limitations, which the presiding Chancellor held to have barred the claim, with the exception of such portion of it as arose within four years before the filing of the bill. There is not the slightest difference of opinion between the members of this Court as to the principles of law which bear upon this question. If there was a general or continuing agency, the statute would not commence to run until the termination of the agency. Assuming that there was a general and continuing agency, the statute would not bar the account; as the agency (if such an one existed) continued to the day of the intestate's death, and the bill was filed within one year afterwards. If the agency was special, and related to isolated transactions, in regard to which the intestate received special authority from his mother to act for her in those particular matters, then the statute would commence to run from each of those several transactions; and each of which would be barred or not, according to the time that had elapsed

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from their respective dates to the filing of the bill. From the fragments of the evidence that have been printed in the brief, it would seem that there was a general agency. But the Chancellor who tried the cause is of the opinion that if all the evidence had been presented, the conclusion to be deduced from the whole would be, that the agency was special. The brief in this case was very imperfectly prepared. And this has been the case with a great many of

the briefs furnished during this term, which has occasioned much difficulty and embarrassment to the Court. I will take the occasion to say, that this affords just ground of complaint; and further to remark, that if error and misconception arise from this cause, there cannot be a doubt as to where the responsibility should fall. From the view which the Court has taken of this case, the plea of the statute of limitations becomes unimportant. And I should not have felt it necessary to remark upon it, but for the purpose of preventing misapprehension.

The assignment of an open account, or a chose in action not negotiable by mercantile law, or assignable by legislative enactments, vests no legal title or interest in the assignee; who, for this reason, can maintain no legal action on the same in his own name. But it is different in this Court, where the assignee may enforce, by a suit in his own name, choses of this character, which have been assigned to him for a valuable consideration; subject, of course, to the equities that subsisted between the original parties. Nor can it be doubted that an assignment from a parent to a child, of choses in action, not assignable at law, and of mere equities, may be supported in this Court, on the consideration of love and affection. The Court can and has enforced such claims, in suits brought in the name of the assignees. But in either case, whether the assignment be made for valuable consideration, or for the consideration of love and affection between parent and child, the bona fides of the assignment may become the subject of inquiry in this Court, and if, on investigation, that be found wanting, the Court will refuse its aid. It does not follow, unless there be fraud, that the Court will affect to set aside the assignment. But if an unconscientious advantage is sought to be taken, the Court will withhold its assistance, and leave the party to struggle with his difficulties in the best way he can. In such an event, he would have no other remedy than to prosecute his action at law in the name of the original creditor.

This Court is of the opinion that where the assignee of an open account, or of such choses as are the subject matter of this suit, files his bill in Equity against the debtor, to enforce the demand or demands which have been assigned to him, the assignor should be made a party, either complainant or defendant. This, perhaps, may not be

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necessary, when the assignor has parted with his whole estate in the chose, both legal and equitable. But the demands in this account that have been assigned to the complainants, are all legal choses; that is to say, they are choses upon which an action may be maintained at law by the party to whom they were originally due. The as-

signee has a mere equitable interest, while the legal estate remains in the assignor. The assignor should be made a party, therefore, on the general rule, that all persons having an interest, legal or equitable, should be made parties to the proceeding. There is something more than form in the enforcement of this rule in cases like the present. It serves to meet and carry out the substantial justice of the case. When a creditor, either by himself or his assignee, files his bill against the defendant for an account, the claim is subject to all equitable discounts which the defendant may succeed in establishing against it. If on stating the accounts, there is a balance found in favor of the defendant, he is entitled to a decree for such balance. A party praying an account is entitled to it only on the condition that if, on a settlement, he should be found to be the debtor, a decree should go against him for the balance. This is pure equity. And the converse of it would be highly inequitable, and would lead to circuity of actions and multiplicity of suits. But this wholesome rule of justice could not be enforced, and this responsibility would be evaded, if the assignee were permitted to file a bill for an account, without making the assignor a party. The assignee would not be liable for any balance in which the assignor should be found indebted to the defendant. He should, therefore, bring in the assignor as a party, who would be liable for a decree for such balance, and thus prevent the vexation, expense and delay of another suit, on the part of the defendant; and save the Court the trouble of trying two causes, where one would answer every purpose. This Court is therefore of the opinion that Mrs. Hopkins, the assignor, should have been a party to the bill, either as a complainant or defendant. And further, the Court is of the opinion that, being a party, and an interested party, she could not be a competent witness. The assignee would be entitled to any balance that would be found due by the defendant; but it is obvious that the accounting of the defendant would be with the assignor, who would go into the examination, subject to the liability of a decree against her if a balance should be found due to the defendant. It would be to the interest of the assignor to swell the amount of her claims against the defendant, and to reduce his against herself. She would, for this reason, be incompetent.

The complainant's solicitor has asked the Court, in the event of Mrs. Hopkins being a necessary party, that he be allowed, by an order of this Court, to amend his bill, so as

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to *make her a party. This, of course, is equivalent to asking for another trial. It is to be remarked that the defendant has insisted upon the objection as to the want of a necessary party, during the whole progress

of this cause. She first filed a general demurrer, which embraced the objection as to the want of parties, where, as in this case, the omission of a proper party appears upon the face of the bill. The demurrer being overruled, she urged the same objection in her answer. She urged it upon the hearing on the Circuit, and again on the hearing before this Court. During all these successive stages of the litigation, the complainants have persisted in their course, and have not moved to amend for the purpose of making a new party. But, after the final hearing on appeal, they ask, not by motion, but by parol, in the event the Court should be of the opinion that Mrs. Sarah Hopkins is a necessary party, that they be allowed to amend. The competency of the Court, in the exercise of its discretion to do this, and on its own motion, is not doubted. It would be done on a proper occasion. It was done in *Neely v. Anderson*, [2 Strob. Eq. 262,] where the question was not made in the pleadings, nor discussed in the Circuit Court. But it was discovered that the case involved the rights of infants, who were not parties. The decision would of course not be binding upon them, nor terminate the litigation. Under these circumstances, this Court, in the exercise of its undoubted discretion, and on its own motion, ordered the bill to be amended, and the infants to be made parties. When a party has submitted his case, upon a final hearing, to the judgment of the Court, he has no right to the privilege of being allowed to amend. He should have done that at an earlier stage of the proceedings; more particularly, where he has been notified by the plea of the adverse party.

But I will now discuss the ground upon which I am more particularly instructed by the Court to place its judgment. I have already stated that where there has been an assignment (for valuable consideration, or for the consideration of love from a parent to a child,) of legal choses that are unassignable at law, this Court will entertain a bill, in the name of the assignee, for the enforcement of such claims; provided, that the assignor be made a party either as a complainant or defendant; and provided also, there be bona fides in the transaction of the assignment. If the object be to obtain an unconscientious advantage over the party to be brought to the reckoning, the Court will not lend itself to the enforcement of the inequitable arrangement. It seems to the Court that the purpose of the parties to this assignment was not in good faith to the defendant. The object was to obtain an undue advantage, by enabling Mrs. Sarah Hopkins to become a witness in establishing her

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account against the estate of her *deceased son. From the relations between the assignor and the assignees, it did not matter much to her whether she or they got the benefit

of this claim. If she wished to make a donation of this amount to her sons, why did she not sue for it in her own name, and, after recovery, give it to them? It cannot be doubted that the assignment was a mere contrivance to recover, by means of her own testimony, a claim which she could not otherwise recover. The arrangement was in their understanding to have the effect of opening her mouth as a witness, while the lips of the defendant were to remain hermetically sealed. Death had stamped his cold signet upon the lips of the other party to the contract. He could not speak from the grave. If he were living, he would not have been allowed to speak as a witness; but he would know in what manner best to make his defence. If his wife were allowed to speak as a witness, although she was necessarily ignorant of many of the alleged facts, she might have testified to what she stated in her answer, that, shortly after her husband's death, Mrs. Hopkins came to her house, and desired to see the account of sales of the preceding year, amounting to \$180, stating that her son had not settled for that, but making no claim for the sales of the preceding years. I allude to this for the purpose of illustrating how little it tends to the development of truth, and the attainment of justice, to receive in evidence the statements of one party to a legal contro-

versy, without receiving those of the other. Just such a state of things has the contrivance of the complainants and their co-laborer produced. Mrs. Hopkins, according to her own statements, had demands against her deceased son. They were demands that were properly cognizable at law, and if she had resorted to that Court, she would have occupied her natural and proper position of a plaintiff, and would be bound to prove her case by disinterested testimony. Knowing or fearing that she would not be able to succeed in a Court of Law, the contrivance of the assignment was resorted to, for the purpose of enabling the case to be brought into this Court, where it was supposed she might be a witness. The mala fides in the transaction of the assignment, according to the principles which I have before stated, is a sufficient ground for the Court to refuse to entertain the complainant's case; more especially, where the claim at best wears a somewhat equivocal character, and it seems that substantial justice has already been done by the decree of the Circuit Court.

It is ordered and decreed that the decree of the Circuit Court be affirmed, and that the appeal be dismissed.

DUNKIN, Ch., concurred.

Decree affirmed.

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